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Remote Killing and the Fourth Amendment: Updating Constitutional Law to Address Expanded Police Lethality in the Robotic Age

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ABSTRACT

In the early morning hours of July 8, 2016, a loud boom echoed between the buildings in downtown Dallas, signaling both the end to a bloody massacre that took the lives of five Dallas-area police officers and the dawn of a new age in American law enforcement. Police officers had killed an armed suspect by affixing a bomb to a remotely controlled vehicle, driving it up to him from a position of relative safety, and detonating it. For the first time in American law enforcement history, police killed by remote control.

In the aftermath of the incident, much has been written on the evolving field of robotics and the moral, legal, and technological safeguards needed as autonomous, independent-decisionmaking robots are armed and begin patrolling American streets. While this scholarship is important for a future that is undoubtedly coming, the device used in Dallas was not such a robot; it was a remotely controlled vehicle, capable of nothing more than what its human operator commanded. In this Comment, I regard the remotely controlled vehicle as an extension of the officer controlling it and focus on the Fourth Amendment implications of the remote use of lethal force. I examine the current constitutional standard for analyzing the reasonableness of the use of force under *Graham v. Connor*, and I discuss why it falls short in situations in which the officer has time to consider her options, as any officer engaging an individual via remotely controlled vehicle undoubtedly does.

To address the shortfalls in current constitutional jurisprudence, I propose the Dallas test, an addendum to the *Graham* standard, that, while born of the analysis of the remote use of force, should be applied any time an officer has time to think and employs force. I argue that the deference courts give to the decisionmaking of officers on the scene must be tempered in circumstances in which an officer has time to consider her options and when alternative, less-lethal means of seizing the individual are available. In such circumstances, an officer's considered decision to forgo nonlethal alternatives and employ deadly force must be scrutinized more strictly than the *Graham* standard currently prescribes. Finally, I examine the actions of Dallas police under the new standard I propose. Although I ultimately conclude their actions were reasonable and therefore constitutional, this Comment exposes the gaps in the current standard and proposes a new form that a reasonableness analysis should take when police use of force is not a split-second decision. It makes clear that remote policing is coming and that the current constitutional jurisprudence is ill-equipped to meet it.

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INTRODUCTION

In the early morning hours of July 8, 2016, Dallas police killed Micah Xavier Johnson with a remotely detonated bomb strapped to a remotely controlled vehicle.[1] Johnson had opened fire earlier that evening during a peaceful citizens' protest, killing five officers and wounding a dozen more people, most of them officers. Police soon cornered him in the back hallway of a community college building, but in a position advantageous to Johnson that police could not reach without exposing themselves to his field of fire.[2] After hours of fruitless negotiations, exchanges of gunfire, and threats of continued violence, police improvised a bomb from C-4 plastic explosive, rigged it to detonate remotely, attached it to a remotely controlled vehicle designed for bomb disposal, drove it down the hallway to within a few feet of Johnson, and detonated it, killing him instantly.[3] In doing so, they forever changed the landscape of the use of force by law enforcement.

For the better part of the first hundred years of this nation's existence, police carried no guns,[4] and therefore "[d]eadly force could be inflicted almost solely in a hand-to-hand struggle."[5] The common law ruled that if an officer killed a felon as a last resort to prevent escape, that killing was justified.[6] Someone resisting an officer, or fleeing from within the officer's killing radius, was, by definition due to their physical proximity, a threat to the officer's safety. After they began arming themselves with guns, however, police could kill at distances much greater than an arm's length, so long as they had a line of sight on their target. A century after guns became commonplace for police, *Tennessee v. Garner* updated the constitutional

1. *See* Avi Selk et al., *Eight Hours of Terror: How a Peaceful Protest Turned Into the Dallas Police's Deadliest Day*, DALL. MORNING NEWS (July 8, 2016), http://interactives.dallasnews.com/2016/dallas-police-ambush-timeline [https://perma.cc/FHK7-BC6W].
2. Robert Wilonsky, *How and Why Dallas Police Decided to Use a Bomb to End the Standoff With Lone Gunman*, DALL. NEWS (July 9, 2016), http://www.dallasnews.com/news/news/2016/07/09/dallas-policedecided-use-bomb-end-standoff-lone-gunman [https://perma.cc/FL26-YTCV].
3. *See* Sara Sidner & Mallory Simon, *How Robot, Explosives Took Out Dallas Sniper in Unprecedented Way*, CNN (July 12, 2016, 8:50 AM), http://www.cnn.com/2016/07/12/us/dallas-police-robot-c4-explosives/index.html [https://perma.cc/H4WE-725X].
4. LEE KENNETT & JAMES LAVERNE ANDERSON, THE GUN IN AMERICA: THE ORIGINS OF A NATIONAL DILEMMA 150 (1975).
5. Tennessee v. Garner, 471 U.S. 1, 14 (1985).
6. *Id*. at 12.

standard of reasonableness for deadly force, reflecting that the calculus of police lethality had changed, and rejecting the common law rule in the process.[7] Killing solely to prevent escape was no longer constitutionally reasonable because the radius of the officer's lethality had greatly expanded, and therefore escape while within killing distance no longer necessarily involved hand-to-hand violence, or any violence at all.[8] *Graham v. Connor* incorporates *Garner*'s logic in establishing a reasonableness metric for all use of police force, lethal and otherwise.[9] *Graham* and *Garner*, the current leading U.S. Supreme Court precedent on police use of force, are premised on two assumptions: one stated, that police who use force make split-second decisions in doing so;[10] and one unstated, that police who use force are always fairly close to, and in direct line of sight with, the target of that force. The former was never always true, and the latter was destroyed by a pound of C-4 in the back hallway of a Dallas community college. As it did when firearms were introduced to policing a century and a half ago, police lethality has changed. Now police can kill around corners, hidden from their target, from a position of safety, and from greater (and theoretically almost limitless) distances. Once again, the reasonableness metric for police use of force needs updating.

This Comment proposes such an update. In Part I, I detail the incident in Dallas in which, for the first time in American law-enforcement history, a remotely controlled vehicle was armed with a deadly weapon and used to kill an armed suspect.[11] In Part II, I discuss law enforcement's increasing use of remotely controlled vehicles, many of them designed for, and purchased from, the U.S. military. In Part III, I examine the *Graham* standard, the

7. *Id.* Writing for the Court, Justice White's distress at the absurd outcomes resulting from the common law's view that it is "better that all felony suspects die than that they escape" is apparent. *Id.* at 11. White starkly contrasts Garner, a five-foot-four-inch, fifteen-year-old boy weighing under 110 pounds, visibly unarmed, posing no threat, and running from the police with ten dollars and a purse he had stolen from a home, with the almost-sociopathic, black-and-white, mechanical simplicity of the common law justification for shooting him in back of the head: "Convinced that if Garner made it over the fence he would elude capture, [the officer] shot him." *Id.* at 4. As one commentary put it, White "did not merely want to replace the common law rule: he wanted to bury it." Chad Flanders & Joseph Welling *Police Use of Deadly Force: State Statutes 30 Years After* Garner, 35 ST. LOUIS U. PUB. L. REV. 109, 109 (2015).
8. *Garner*, 471 U.S. at 14–15.
9. Graham v. Connor, 490 U.S. 386 (1989).
10. *Id*. at 396–97.
11. Because the details of the incident are key to the application of the test I propose, *see infra* Part V, I describe the incident in Part I in greater detail than might otherwise be expected of a *Law Review* Comment.

current framework for analyzing the constitutionality of police use of force, the assumptions underlying it, and its inadequacy in situations in which police have time to contemplate the situation and think over their options, as all instances in which police deploy remotely controlled vehicles to deliver force will likely be. In Part IV, I propose what I call the Dallas test, a four-factor addendum to the *Graham* reasonableness analysis that hinges on whether the officer's decisionmaking process was a split-second one, driven as much by instinct, adrenaline, and training as by rational thought, or whether it was drawn out, giving the officer time to consider her options. Although initially conceived in response to the Dallas police's use of a remotely controlled vehicle in killing a suspect (hence its name), and originally purposed on creating an analytical rubric for that specific type of force, the test applies to all uses of deadly force in which the officer has time to think. Finally, in Part V, I apply this new test to the incident in Dallas, examining two separate seizures of Johnson by police in order to demonstrate how a particular case might be analyzed under this proposed update to the current constitutional jurisprudence on police use of force.

I. THE DALLAS INCIDENT

At 7:00 PM on July 7, 2016, despite the 95-degree heat, 800 people gathered at Belo Garden in downtown Dallas to rally and march in protest of the recent killings of two black men:[12] Philando Castile in Falcon Heights, Minnesota[13] and Alton Sterling in Baton Rouge, Louisiana.[14] It was one of a number of protests nationwide that night, and one of many that had occurred over the preceding several years in response to the highly publicized police

12. Daniel S. Levine, *Dallas Police Shooting: Locations, Map & Timeline*, HEAVY (July 8, 2016, 5:04 PM), http://heavy.com/news/2016/07/dallas-police-shooting-locations-map-timeline-micah-johnson-texas-black-lives-matter-murder-death [https://perma.cc/76K9-7TEU]; *Weather History for KDFW—July, 2016*, WEATHER UNDERGROUND, https://www.wunderground.com/history/airport/KDFW/2016/7/7/DailyHistory.html?&reqdb.zip=&reqdb.magic=&reqdb.wmo= [https://perma.cc/MDA2-PKTT].

13. *See generally* James Poniewozik, *A Killing. A Pointed Gun. And Two Black Lives, Witnessing.*, N.Y. TIMES (July 7, 2016), https://www.nytimes.com/2016/07/08/us/philando-castile-facebook-police-shooting-minnesota.html (describing the widely circulated Facebook Live video that captured the moments after the police shooting of Castile).

14. *See generally* Richard Fausset et al., *Alton Sterling Shooting in Baton Rouge Prompts Justice Dept. Investigation*, N.Y. TIMES (July 6, 2016) https://www.nytimes.com/2016 /07/06/us/alton-sterling-baton-rouge-shooting.html (describing how the video of police shooting Sterling while he was pinned to the ground by other officers catapulted the incident to national attention and prompted a Justice Department investigation).

violence against unarmed black men.[15] The route was not predetermined, but was improvised in the moment as a long thin rectangle of just under two miles.[16]

Although the protest was angry, it was peaceful.[17] Protesters brought children, some in strollers.[18] Many marchers carried homemade signs.[19] As many as thirty carried assault rifles, some of them the AR-15, a common sight at protests in Texas.[20] "Black lives matter" was among the myriad of chants, but, according to organizers, the march was not a Black Lives Matter event.[21] The Dallas Police Department's presence was substantial, with about one hundred officers on the scene,[22] but was not confrontational: Officers were not in riot gear and were often cordial with marchers, some even taking pictures together.[23] Dallas Police posted multiple photos and videos of the protest on its official Twitter page.[24] As the march wound down, it passed El

15. *See* Manny Fernandez et al., *Five Dallas Officers Were Killed as Payback, Police Chief Says*, N.Y. TIMES (July 8, 2016), https://www.nytimes.com/2016/07/09/us/dallas-police-shooting.html; Jon Schuppe, *How a Peaceful Protest in Dallas Became a Deadly Cop Ambush*, NBC NEWS (July 8, 2016, 10:49 PM), http://www.nbcnews.com/storyline/dallas-police-ambush/how-peaceful-protest-dallas-became-deadly-cop-ambush-n605926 [https://perma.cc/JSB3-Q2W3].
16. *See* CityLab (@CityLab), TWITTER (July 8, 2016, 10:11 AM), https://twitter.com/CityLab/status/751463695012757504/photo/1?ref_src=twsrc%5Etfw [https://perma.cc/3KS3-QPE6] ("Map: Where the Shootings Happened in Dallas"); Richard Fausset et al., *Micah Johnson, Gunman in Dallas, Honed Military Skills to a Deadly Conclusion*, N.Y. TIMES (July 9, 2016), https://www.nytimes.com/2016/07/10/us/dallas-quiet-after-police-shooting-but-protests-flare-elsewhere.html ("Parts of the route were determined on the spot without planning . . . .").
17. Schuppe, *supra* note 15.
18. Austin Huguelet, *Before Shooting, Marchers Stressed Progress, Peace*, DALL. NEWS (July 8, 2016), http://www.dallasnews.com/news/dallas-ambush/2016/07/08/shooting-marchers-stressed-progress-peace [https://perma.cc/4MC6-H2UE].
19. *See id.*
20. *See* Fausset et al., *supra* note 16; Molly Hennessy-Fiske, *Dallas Police Chief: Open Carry Makes Things Confusing During Mass Shootings*, L.A. TIMES (July 11, 2016, 5:36 PM), http://www.latimes.com/nation/la-na-dallas-chief-20160711-snap-story.html [https://perma.cc/GN4K-GUAS]. Texas allows open carry of long guns (rifles and shotguns) with no permit or license requirement. Fausset et al., *supra* note 16.
21. Huguelet, *supra* note 18. One of the protest's organizers, Dominique Alexander of the Next Generation Action Network, stated, "There is no local chapter of the Black Lives Movement . . . . That's just national rhetoric." *Id.*
22. Wilson Andrews et al., *How the Attack on the Dallas Police Unfolded*, N.Y. TIMES (July 8, 2016), https://www.nytimes.com/interactive/2016/07/08/us/dallas-police-shooting-map.html.
23. *See* Levine, *supra* note 12.
24. Dall. Police Dep't (@DallasPD), TWITTER (July 7, 2016, 6:11 PM), https://twitter.com/DallasPD/status/751222050673430528/photo/1 [https://perma.cc/5PUQ-7V9G] (".@DPDAnderson with Senator Royce West @ demonstration @ Belo Garden Park"); Dallas Police Department (@DallasPD), TWITTER (July 7, 2016, 6:23 PM) https://twitter.com/DallasPD/status/751225103946428418/video/1 [https://perma.cc/BZ8Y-BZWR] ("Demonstrators marching eastbound on Commerce.").

Centro Community College where, just before 9:00 PM, Micah Johnson parked his car.[25]

Johnson was a twenty-five-year-old, six-year veteran of the U.S. Army Reserve who had left the military in disgrace after a sexual harassment accusation was made by a female soldier who had been his close friend.[26] Friends and family described him as "withdrawn, isolated and fixated with guns" after his return home to Texas.[27] He developed a military-style training regimen in his mother's backyard and was seen by neighbors putting himself through drills.[28] He took classes at a local self-defense school that teaches, among other things, courses in tactical weapons use and speed reloading.[29] He kept a journal of advanced combat tactics, including shoot-and-move tactics—"ways to fire on a target and then move quickly and get into position at another location to inflict more damage on targets without them being able to ascertain where the shots are coming from"[30]—used by Special Forces.[31] In April

25. Holly K. Hacker et al., *El Centro College Officials Trace Footsteps of Dallas Police Killer*, DALL. NEWS (July 11, 2016), http://www.dallasnews.com/news/dallas-ambush/2016/07/11/footsteps-killer [https://perma.cc/7PS5-DM7H]; Corbett Smith, *El Centro Chief: Micah Johnson Talked With Police Before Shooting Them*, DALL. NEWS (July 19, 2016), http://www.dallasnews.com/news/dallas-ambush/2016/07/19/el-centro-chief-micah-johnson-talked-police-shooting [https://perma.cc/6GRJ-GCK4].

26. *Dallas Shooting: Who Was Gunman Micah Xavier Johnson?*, BBC NEWS (July 9, 2016), http://www.bbc.com/news/world-us-canada-36751387 [https://perma.cc/Y8YP-MCA8]; *When Army Career Ended in Disgrace, Dallas Gunman Was Ostracized*, CHI. TRIB. (July 15, 2016, 6:58 PM), http://www.chicagotribune.com/news/nationworld/ct-dallas-gunman-micah-johnson-army-discharge-20160715-story.html [https://perma.cc/N5NC-T29F].

27. Terri Langford et al., *Army Investigation Found Problems With Soldier Who Became Dallas Police Killer*, DALL. NEWS (July 29, 2016), http://www.dallasnews.com/news/dallas-ambush/2016/07/29/army-investigation-found-problems-soldier-becamedallas-police-killer [https://perma.cc/5PSC-MBFG]. Johnson's fixation on weapons appears to have predated his ouster from the military. During a search of his quarters in Afghanistan, where he was stationed when the harassment accusation was made, investigators discovered a high-explosive Mk-19 round, a lethal piece of ammunition Johnson had no business possessing, hidden in his sleeping bag. *See* Report of Proceedings by Investigating Officer/Board of Officers, Dep't of the Army (May, 2014), https://assets.documentcloud.org/documents/3001487/FOIA-Reading-Room-Redacted-AR-15-6-Investigation.pdf [https://perma.cc/ZS5M-4EQ9]. The Mk-19 is a "belt-fed grenade machine gun." Kyle Jahner, *Army Building a Better Grenade Machine Gun*, ARMY TIMES (July 2, 2016), https://www.armytimes.com/news/yourarmy/2016/07/02/army-building-a-better-grenade-machine-gun [https://perma.cc/D9LS-ZUHH].

28. Fausset et al., *supra* note 16.

29. Academy of Combative Warrior Arts, *Tactical Applications Program (T.A.P.)*, http://www.combativewarriorarts.com/tactical_applications_program.html (last visited Dec. 13, 2017) [https://perma.cc/3XRJ-28VQ]. The school also teaches "[s]hooting around barriers" and "[d]ynamic movement" in its "Tactical Applications Program." *Id.*

30. Fausset et al., *supra* note 16 (quoting Clay Jenkins, Dallas County's chief executive and director of homeland security and emergency management).

of 2015, Johnson attended at least one protest over the death of Freddie Gray, a black man who died of severe spinal trauma suffered while shackled inside a Baltimore police van.[32] Johnson would, when cornered by Dallas SWAT in the hours before his death, tell police he was upset at the killings of black men by white police officers, that he was angry at whites in general, and that he wanted to kill whites—especially white police officers.[33]

As the protest march approached El Centro Community College, Johnson, wearing body armor,[34] drove up and parked his SUV on the curb with the hazard lights on.[35] He spoke briefly with police officers[36] who were there as they tried to stay ahead of the march,[37] produced a Saiga AK-74 assault rifle[38] from his car, and

31. *Id.*
32. *When Army Career Ended in Disgrace*, *supra* note 26. *See generally* Sheryl Gay Stolberg & Jess Bidgood, *Freddie Gray Died From 'Rough Ride,' Prosecutors Assert*, N.Y. TIMES (June 9, 2016), https://www.nytimes.com/2016/06/10/us/caesar-goodson-trial-freddie-gray-baltimore.html (describing the "rough ride" prosecutors alleged police inflicted on Freddie Gray, deliberately leaving him unbuckled in his seat and driving so as to toss him around the inside of the police van, unable to protect himself due to the shackles).
33. Fernandez et al., *supra* note 15.
34. Jennifer Emily & Tasha Tsiaperas, *Dallas Police Shooter Killed 4 Officers on the Street, 1 Through a Second-Floor Window*, DALL. NEWS (July 14, 2016), http://www.dallasnews.com/news/dallas-ambush/2016/07/14/dallas-police-shooter-killed-4-officers-street-1-second-floor-window [https://perma.cc/472E-H5FC].
35. Holly K. Hacker et al., *El Centro College Officials Trace Footsteps of Dallas Police Killer*, DALL. NEWS (July 11, 2016), http://www.dallasnews.com/news/dallas-ambush/2016/07/11/footsteps-killer [https://perma.cc/7PS5-DM7H].
36. Smith, *supra* note 25 ("[Johnson] parked his vehicle on the Lamar Street doors of our college, got out, we believe engaged two Dallas police officers in a short conversation, then pulled his rifle and shot them . . . . The surrounding officers returned fire, and he was taking cover behind our pillars of our college—shooting back at police as they were returning fire." (quoting Dallas County Community College District Police Chief Joseph Hannigan)).
37. Because Johnson parked ahead of the marchers' progress, the police movement in front of the protest brought them right up to Johnson, something Dallas Police Chief David Brown described as a "fatal funnel." William Branigin & Adam Goldman, *Dallas Police Chief: Shooter Seemed Delusional, Scrawled Cryptic Messages in Blood*, WASH. POST (July 10, 2016), https://www.washingtonpost.com/politics/dallas-police-chief-shooter-seemed-delusional-scrawled-cryptic-messages-in-blood/2016/07/10/bd1c0d96-46a9-11e6-bdb9-70168797 4517_story.html [https://perma.cc/AUY3-CULS].
38. Andrew Blankstein & William Arkin, *Dallas Gunman Micah Johnson Used a Saiga AK-74 Assault-Style Rifle: Sources*, NBC NEWS (July 12, 2016, 10:28 PM), http://www.nbcnews.com/storyline/dallas-police-ambush/dallas-gunman-micah-johnson-used-saiga-ak-74-assault-style-n608311 [https://perma.cc/6EAS-684M]. Initial reports that Johnson was armed with an SKS semi-automatic rifle, one so old that it's classified as a "relic" by the Bureau of Alcohol, Tobacco, Firearms and Explosives, were inaccurate. *Id.*

opened fire, killing three officers, and injuring three others and two civilians in the first volley.[39]

What followed was chaotic, confused, and lethal. Calls of "Shots fired!" and "Officer down!" went out over police radios.[40] Police on the scene shouted "[A]ctive shooter!"[41] A radio barked, "Yo, we got a guy with a long rifle, but we don't [know] where the hell he's at."[42] Protesters fled in all directions and hid behind building pillars and cars.[43] The shooting occurred in bursts as Johnson shot and moved, shot and moved.[44] In the steel and glass canyons of downtown Dallas, the shots echoed everywhere.[45] Johnson's bullets skipped off the pavement and broke apart, fragments of them wounding officers in various directions, including those where Johnson wasn't.[46] There was pervasive confusion as to both the location and number of shooters.[47] Different officers and civilians saw and reported shots coming from different places. People reported multiple shooters and described shooters who did not exist.[48] Police ordered "suspicious looking people" to the ground and detained three they suspected of involvement.[49]

39. Emily & Tsiaperas, *supra* note 34; Stephen Young, *Police Provide Details of Shootout at El Centro*, DALL. OBSERVER (July 20, 2016, 4:05 AM), http://www.dallasobserver.com/ news/police-provide-details-of-shootout-at-el-centro-8504326 [https://perma.cc/VQ9S-2RA7].
40. Schuppe, *supra* note 15.
41. Marjorie Owens, *This Is How the Dallas Sniper Shootings Unfolded*, WFAA-TV (July 8, 2016, 3:30 PM), http://www.wfaa.com/news/nation-now/timeline-how-the-dallas-shooting-developed/267658160 [https://perma.cc/J8T2-JFJN].
42. Schuppe, *supra* note 15.
43. *Id.*; Selk et al., *supra* note 1.
44. *See* Schuppe, *supra* note 15.
45. *See id.*
46. *See* Emily & Tsiaperas, *supra* note 34.
47. *See id.*
48. "I heard on the ground one of the shooters was white, maybe both of them," march organizer Dominique Alexander said. "I talked to a few people who saw a white male up there shooting." Huguelet, *supra* note 18. It's unclear whether the mistaken description of white male shooters was the result of seeing white officers returning fire, seeing white officers or white marchers carrying weapons, assuming that the shots were aimed at the marchers themselves and that someone firing on a group of largely black protesters was likely to be white, or the result of other factors entirely.
49. Schuppe, *supra* note 15; Emily Shapiro et al., *Dallas Shooting Suspect Micah Xavier Johnson Had Rifles, Bombmaking Materials in His Home, Police Say*, ABC NEWS (July 9, 2016, 11:42 AM), http://abcnews.go.com/US/dallas-shooting-suspect-wanted-kill-white-people-white/story?id=40431306 [https://perma.cc/MB2Y-WW7F]. The Dallas Police Department also tweeted a photo of a man they suspected. Arriana McLymore, *Dallas Police Tweet That Wrongly Identified Sniper Suspect Removed Hours Later*, CNBC (July 8, 2016, 12:29 PM), http://www.cnbc.com/2016/07/08/dallas-police-tweet-that-wrongly-identified-sniper-suspect-is-still-posted.html [https://perma.cc/ZQ69-KMBL]. The wrongly identified man turned himself in upon learning he was wanted, and was

For several hours, police believed they were dealing with multiple shooters.[50]

There was only one shooter, it turned out, but he had the officers outgunned.[51] Officers armed with pistols were confronted by an ex-soldier, trained by the Army and by himself in tactical combat, who had been rehearsing this ambush for months and was armed with a much more powerful weapon. In one truly awful video, the disparity in weapons and tactics is all too clear: Dallas Area Rapid Transit (DART) officer Brent Thompson can be seen taking cover behind a concrete pillar about five feet from the wall of a building, his pistol in hand. Johnson emerges behind another pillar, perhaps twenty feet down the sidewalk. Johnson charges Thompson's position, firing rapidly, his shots aimed at the building itself, adjacent to Thompson. Thompson, facing toward where the bullets are landing, presumably assuming that Johnson is running in the direction he is firing, steps slightly back, toward the street, prepared to meet Johnson coming around the building side of the pillar. Johnson, while still firing at the building side of the pillar, comes around the street side of the pillar, behind Thompson, and shoots him point blank in the back of the head. Thompson drops. Johnson moves on. The whole thing takes seconds.[52] Patrol officers are trained in self-defense, not in urban combat, something Johnson clearly knew and used to his advantage.

Although Johnson had the edge in weapons and tactics, the police had numbers. Within minutes police were pouring into downtown Dallas.[53] A brief, street-level gun battle took place between Johnson and police officers.

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subsequently cleared. *Id.* The tweet, however, was online for sixteen hours, was retweeted more than 40,000 times, and the man received death threats as a result of it. *Id.*

50. Nearly two hours after the shooting began, the Dallas Police Department posted, "Tonight it appears that two snipers shot ten police officers from elevated positions during the protest/rally" to its Facebook page. Dallas Police Department, FACEBOOK (July 7, 2016, 10:35 PM), https://www.facebook.com/DallasPD/posts/10154253588372412 [https://perma.cc/7PPU-WA2C]. The report that snipers shot from an elevated position is very likely the result of Johnson shooting from the second-floor window of El Centro Community College. *See infra* text accompanying notes 59–61.

51. Jason Kravarik & Sara Sidner, *The Dallas Shootout, in the Eyes of Police*, CNN (July 15, 2016, 10:59 AM), http://www.cnn.com/2016/07/15/health/dallas-shootout-police-perspective [https://perma.cc/Y2JK-5ZAZ] ("[I]t's a pistol battle against a rifle battle and you're going to lose every time." (quoting El Centro College Police Officer John Abbot, one of two officers inside the El Centro building Johnson attempted to enter)).

52. Matthew Keys, *Graphic Video of Dallas Shooting Suspect Aired on TV*, YOUTUBE (July 7, 2016), https://www.youtube.com/watch?v=-23nlUpUte0. Please note: this video is extraordinarily difficult to watch.

53. *See* Selk et al., *supra* note 1.

Johnson tried several locked doors and tried to shoot his way into one entrance of the El Centro building. El Centro Police Department officers, who had entered the building prior to the marchers' approach in an attempt to avoid provoking confrontation with protesters, returned fire and prevented him from entering.[54] Both officers were wounded in the exchange.[55] Johnson ran toward another entrance, encountering and killing DART Officer Thompson on the way, and shot his way inside. More than fifty students and faculty were still in the building, just finishing up classes.[56] At some point before he made his way into the building, Johnson was wounded by at least one police bullet, leaving a trail of blood from the entrance of the building to where he made his eventual last stand.[57]

Johnson climbed a set of stairs, stopping to exchange gunfire with police who had followed his blood trail.[58] He ran through the college's second-floor library and into a hallway, where he shot at officers down on the street through two different windows. He moved from the first to the second window to get a better angle,[59] killing a fifth officer and injuring another.[60] These shots, coming from a second-story window when many people still believed the shooter was outdoors and at street-level, added to the confusion about how many shooters there were.[61]

Johnson moved farther down the hallway, around a corner, through an emergency exit door, and into a second, shorter hallway leading into the interior of the building.[62] This hallway was crossed just beyond the

54. Young, *supra* note 39.
55. Marina Trahan Martinez, *Surgeon Finds Bullet Inside El Centro Officer 3 Weeks After Dallas Ambush*, DALL. NEWS (July 29, 2016) https://www.dallasnews.com/news/dallas-ambush/2016/07/29/surgeon-finds-bullet-inside-officer-three-weeks-dallas-ambush [https://perma.cc/T4NA-NC4E].
56. *See* Jeff Mosier & Corbett Smith, *El Centro College Moves On After Dallas Police Shooting: 'We Will Not Be Defined by This at All'*, DALL. NEWS (July 15, 2016), http://www.dallasnews.com/news/dallas-ambush/2016/07/15/el-centro-moves-shooting-will-defined [https://perma.cc/HQ7M-VJVC]; Hacker et al., *supra* note 25.
57. *See* Young, *supra* note 39.
58. *Id.*
59. Smith, *supra* note 25. These windows are directly above the El Centro's loading dock. This was likely mistaken by observers for a parking garage, and why many early news reports erroneously placed Johnson's final standoff with police in a garage. Hacker, *supra* note 25.
60. Young, *supra* note 39; Dall. Morning News, *Dallas Police Shooting, July 7: Here's What Happened*, YOUTUBE (July 31, 2016), https://www.youtube.com/watch?v=6uCP3EfXvhc.
61. *See* Faith Karimi et al., *Dallas Sniper Attack: 5 Officers Killed, Suspect Identified*, CNN (July 9, 2016, 1:37 AM), http://www.cnn.com/2016/07/08/us/philando-castile-alton-sterling-protests/index.html [https://perma.cc/XS74-4WLT].
62. Smith, *supra* note 25; *Dall. Morning News*, *supra* note 60.

emergency door by an alcove that led to computer server rooms.[63] The hallway extended another thirty feet beyond the alcove and ended at a door leading to a set of stairs.[64] Johnson had only two exits: One was back the way he had come, through the emergency door, around the corner, and down the long hallway toward the library; the other was through the door that led to the stairwell at the far end of the hallway. By now police were pouring into the building and had taken up strong defensive positions covering both possible exits, so Johnson was trapped. With the door he had come through leading back to the library closed, Dallas SWAT officers engaged Johnson primarily from the stairwell doorway.[65]

Although the alcove offered Johnson no escape, it did offer him cover. Officers had no line of sight on Johnson[66]: As Dallas Police Chief David Brown described it, Johnson was "secreted behind a brick corner."[67] The Dallas Police Department described Johnson's location as a "tactically advantageous position"[68] and as "hard cover,"[69] a military term for a location that offers "both concealment and protection from fire."[70] To open the door through which Johnson had come to enter the alcove would put officers within mere feet of Johnson—who may have been waiting with his rifle trained on the door. To reach him from the other end of the hallway, an officer would have to travel approximately thirty feet from the stairwell door to the brick corner, totally exposed over that entire distance. In a hallway

63. *Id.*
64. *See* Ed Lavandera, *How the Dallas Massacre Unfolded*, CNN (July 20, 2016, 5:13 AM), http://www.cnn.com/2016/07/20/us/dallas-shooter-micah-johnson-movements [https://perma.cc/WA63-3WY3].
65. Stephen Young, *Inside the El Centro Shooting Scene*, DALL. OBSERVER (July 20, 2016), http://www.dallasobserver.com/video/inside-the-el-centro-shooting-scene-YHc5V0PU [https://perma.cc/UJZ9-UQJE].
66. The Dall. Morning News, *supra* note 60.
67. Wilonsky, *supra* note 2.
68. *Individual Shooting Summaries*, DALL. POLICE DEP'T: OFFICER INVOLVED SHOOTINGS NARRATIVE, http://dallaspolice.net/reports/OIS/narrative/2016/OIS_2016_165193-2016.pdf.
69. Smith, *supra* note 25.
70. *Id*. That the position did in fact provide Johnson effective cover is evident in the SWAT bullets that "riddled" the corner after the multiple exchanges of gunfire in the hallway, and yet did not kill Johnson. *See id.* Dallas County Community College District Police Chief Joseph Hannigan went so far as to suggest that Johnson's direct path to a back hallway location that provided hard cover indicates he knew the layout of El Centro ahead of time, and that, although he may not have intended his shooting rampage to end there, when he found himself in the El Centro building, he chose that spot deliberately. *See id.* It is also possible, however, that Johnson merely continued to move away from the pursuing police, that the back hallway was simply where his retreat took him as he went through door after door, and that the tactical advantages it offered him were accidental.

without windows, police snipers outside the building could do no good. "The only way to . . . get a . . . shot to end his trying to kill us," Chief Brown stated, "would be to expose officers to grave danger."[71]

Between the first shot fired and when police cornered Johnson in the hallway, approximately fifteen minutes passed.[72] For more than four hours after that point, Johnson and officers remained locked in a standoff.[73] They exchanged gunfire multiple times.[74] Police negotiated with Johnson for several hours, but the conversations were not productive.[75] Johnson sang, taunted police, asked them how many officers he had killed, told them he wished to kill more, and told them he had planted numerous bombs.[76] He sounded delusional.[77] Johnson was, according to Chief Brown, "lying to us, playing games, laughing."[78] It was later discovered that Johnson had written messages, including unclear markings and the letters "RB," in his own blood, a message that police have yet to decode.[79] According to Chief Brown, Johnson was "determined to hurt more officers."[80]

While the standoff progressed, the people Johnson had shot arrived at Dallas hospitals, many of them undergoing emergency surgery.[81] Chief Brown and Mayor Mike Rawlings held two press conferences. As Brown left the city's Emergency Operations Center just before the second press conference around 12:30 AM, he asked for creative "plans to end the standoff."[82] When he returned fifteen minutes later, he was presented with a plan "to improvise our [remotely controlled vehicle] with a device to detonate behind the corner within a few feet of where [Johnson] was, that would take him out."[83] On the ride to Parkland Hospital to meet with the families of slain

71. Wilonsky, *supra* note 2.
72. Smith, *supra* note 25.
73. *See* Young, *supra* note 39.
74. *Id.*
75. Branigin & Goldman, *supra* note 37.
76. *Id.*
77. *Id.*
78. State of the Union, *Dallas Police Chief: Bomb Robot Saved Lives*, CNN (July 10, 2016), http://www.cnn.com/videos/tv/2016/07/10/dallas-police-chief-bomb-robot-saved-lives.cnn.
79. Branigin & Goldman, *supra* note 37.
80. *Id.*
81. *See* Jessica McBride, *Dallas Police Officers Shot: 5 Five Fast Facts You Need to Know*, HEAVY (July 7, 2016, 11:05 PM), http://heavy.com/news/2016/07/dallas-police-officers-shot-omni-hotel-shooting-black-lives-matter-rally-march-dallas-texas-watch-video-youtube-live-footage-sniper-rifle-officers-down-cops-shot-police-shot-alton-sterling-gun-photos [https://perma.cc/43E4-VFHJ].
82. Wilonsky, *supra* note 2.
83. State of the Union, *supra* note 78.

officers, he decided to authorize the plan.[84] Brown later stated he was concerned that "at a split second, [Johnson] would charge us and take out many more before we would kill him."[85]

At El Centro, negotiations with Johnson broke down, and another shootout erupted.[86] Johnson told police, "[T]he end is coming."[87] Bomb squad officers loaded a pound of C-4 plastic explosive on the claw arm of a remotely controlled vehicle normally designed for bomb disposal.[88] They drove it from the stairwell door, down the thirty feet of hallway, and around the brick corner.[89] Johnson fired at it as it approached, but without effect.[90] The bomb was detonated just before 1:30 AM,[91] killing Johnson.[92]

Just after 2:00 AM, the lockdown at El Centro was lifted,[93] and before 3:00 AM, Dallas Police confirmed that Johnson was killed.[94] The people who had been wrongly detained by Dallas Police were released.[95] Like many cities after an incident of mass violence, Dallas would slowly begin to recover and return to normal.

Normal, however, had changed. In using a remotely controlled vehicle to kill a suspect with a bomb, Dallas police ushered in a new era in law

84. *See* Wilonsky, *supra* note 2 ("When we got out at Parkland [Hospital] the chief told me, 'OK, I've made the decision that we're going to blow this guy up . . . .'" (quoting Mayor Mike Rawlings)).
85. *Dallas Shooting Suspect Had Larger Attack Plans, Police Chief Says*, CHI. TRIB. (July 10, 2016, 11:53 PM), http://www.chicagotribune.com/news/nationworld/ct-dallas-gunman-self-defense-school-20160710-story.html [https://perma.cc/4ZYW-NJ8X].
86. Schuppe, *supra* note 15.
87. Selk et al., *supra* note 1.
88. *See* Sidner & Simon, *supra* note 3; Wilonsky, *supra* note 2 (noting the use of a "plastic explosive"); Molly Hennessy-Fiske et al., *Dallas Shooter Stockpiled Weapons and Was Accused of Harassment*, L.A. TIMES, (July 9, 2016, 9:44 PM) http://www.latimes.com/nation/la-na-dallas-shooting-20160709-snap-story.html [https://perma.cc/9S5T-B5R6].
89. Sidner & Simon, *supra* note 3 (stating that "the robot was maneuvered behind a 'brick wall'"); Wilonsky, *supra* note 2 (noting that Johnson was "behind a brick corner"); Young, *supra* note 65, *Dall. Morning News*, *supra* note 60.
90. Lavandera, *supra* note 64.
91. Selk et al., *supra* note 1 ("At 1:28 a.m., Twitter streams exploded with reports of a loud boom in downtown Dallas . . . ."); Wilonsky, *supra* note 2 ("Just before 1:30 a.m. Friday, a handful of reporters standing a block away from El Centro College . . . were told by officers to 'move, move, move.' Seconds later came the explosion—a loud *boom*, followed by what sounded like shattering glass. At the time, reporters believed it was a flashbang, or stun grenade, intended to roust Johnson from his perch . . . .").
92. Sidner & Simon, *supra* note 3.
93. Owens, *supra* note 41.
94. Caitlin MacNeal, *Timeline: How the Deadly Shooting of Police Officers in Dallas Unfolded*, TALKING POINTS MEMO (July 8, 2016, 7:43 AM), http://talkingpointsmemo.com/news/timeline-dallas-police-shooting-blm-protest [https://perma.cc/J8T2-JFJN].
95. *Id.*; McLymore, *supra* note 49.

enforcement, one that our current constitutional jurisprudence is not fully prepared to meet.

II. LAW ENFORCEMENT BY REMOTE CONTROL IS COMING

Full-blown robotic policing does not yet exist in our communities. ED-209[96] is not yet patrolling the streets. And since the use by Dallas police of a remotely controlled vehicle (RCV)[97] to deliver the bomb that killed Johnson, no other remote or robotic killings by police have occurred.[98] That does not mean, however, that change is not happening. As with many large-scale societal institutions, change in law enforcement occurs slowly—almost imperceptibly from day to day—and it can take years or decades before the shift is apparent. Fingerprinting, for example, took over half a century from the time it was first officially used before it became a standard, accepted

96. ED-209, the Enforcement Droid Model No. 209 from the 1987 film *RoboCop*, is a huge, lumbering, machine gun- and rocket-wielding robot with subpar judgment, poor hearing, and a quick trigger. ROBOCOP (Orion Pictures 1987). It's a satirical, but nonetheless prescient, cautionary example of the danger of automatous robotic policing.

97. A word is necessary on terminology. To describe the machine Dallas police used, and the thousands of similar machines used by law enforcement across the United States, I use "remotely controlled vehicle" or "RCV." I do not use "robot," although many news stories, commentators, and even police decisionmakers do. *See, e.g.*, State of the Union, *supra* note 78 (quoting Dallas Police Chief Brown calling the RCV used in the Dallas incident a "robot"). This distinction is important because there are separate developments in mechanized policing currently ongoing. One is the expanding use of RCVs, which I focus on in this Comment. RCVs are machines that manifest the decisions of the controlling officer, but do not have decisionmaking or independent-action capabilities of their own. A parallel development is also underway: the creation and deployment of machines capable of "collect[ing] information, process[ing] it, and us[ing] it to act upon the world." Elizabeth E. Joh, *Policing Police Robots*, 64 UCLA L. REV. DISCOURSE 516, 523 (2016). That is, machines capable of some level of independent and autonomous decisionmaking. There is an emerging consensus that the word "robot" should be defined as meaning the latter: machines capable of action without direct human control. *Id.* Because this Comment focuses on a machine's ability to extend the deadly reach of an officer's decision to use force, what that means about her decisionmaking process, and the challenges it presents to a constitutional analysis of such a decision, and not on a machine's ability to use force on its own, I use "RCV," not "robot," to describe the machines in question. I use "robot" only when it satisfies the consensus definition. Where appropriate, I have altered quotes to keep this distinction clear. The danger presented by the development of autonomous, decisionmaking, force-employing robots is very real, and the scholarship on it very important, but it poses a separate question. For insight on that issue, see P.W. SINGER, WIRED FOR WAR: THE ROBOTICS REVOLUTION AND CONFLICT IN THE 21ST CENTURY (2009); Joh, *supra* note 97.

98. As of this writing, April 7, 2018.

practice in the United States.[99] The police transition to carrying firearms began in Baltimore in the 1850s, and yet it was not until four decades later that police in New York City began carrying guns.[100] DNA evidence was first used in a criminal investigation in England in 1986 and first used to secure a criminal conviction in the United States in 1987.[101] Yet it was not until 2004 that state lab samples were put into the same database and incarcerated people gained the right to obtain post-conviction tests.[102]

The development of remotely controlled, unmanned, and automated policing has similarly occurred over decades. It began more than half a century ago, and elements of it that once must have seemed straight out of science fiction have become ordinary parts of our daily lives.[103] The first unmanned speed enforcement traffic camera was introduced in the Netherlands in 1961.[104] Red light cameras were in use "in Israel as early as 1969,"[105] and modern red light cameras were introduced in New York City in 1993.[106] Facial recognition systems, which photograph people and compare

99. Sir William James Herschel, Chief Magistrate of the Hooghly district in Jungipoor, India, instituted the use of palm prints as a method of authenticating contracts in 1858. WILLIAM J. HERSCHEL, THE ORIGIN OF FINGER-PRINTING, 7–9 (1916), https://archive.org/stream/originoffingerpr00hersrich#page/n9/mode/2up. It wasn't until 1902 that fingerprinting was introduced into the Civil Service Commission in New York City. *The History of Fingerprints*, ONIN.COM, http://onin.com/fp/fphistory.html [https://perma.cc/ D9FH-DEDD] (last visited Jan. 5, 2018).

100. KENNETT & ANDERSON, *supra* note 4, at 150–51.

101. Lisa Calandro et al., *Evolution of DNA Evidence for Crime Solving—A Judicial and Legislative History*, FORENSIC MAG. (Jan. 6, 2005, 3:00 AM), http://www.forensicmag.com/article/2005/01/evolution-dna-evidence-crime-solving-judicial-and-legislative-history [https://perma.cc/69YR-SAQZ].

102. *Id.*

103. Flying cameras weighing less than a pound and small enough to fit in your palm, and capable of streaming live high-definition video, something unimaginable in the 1960s, are now ubiquitous. *See* Jessica Conditt, *Meet the World's Smallest Camera-Equipped Drone*, ENGADGET (Jan. 2, 2016), https://www.engadget.com/2016/01/02/meet-the-worlds-smallest-camera-equipped-drone [https://perma.cc/78X8-C8S8].

104. *Science in Overseas Industry*, 12 NEW SCIENTIST 687 (1961), https://books.google.com/books?id=HcUrZPUYsDkC&pg=PA687#v=onepage&q&f=false (discussing the development of a "precision speed trap").

105. Richard A. Retting et al., *Effects of Red Light Cameras on Violations and Crashes: A Review of the International Literature*, 4 TRAFFIC INJ. PREVENTION 17, 17 (2003).

106. Heath Row, *Red Light District*, 1996 CIO 116, 116, https://books.google.com/books?id=rQcAAAAAMBAJ&lpg=PA116&dq=New%20York%20city%2C%20automated%20enforcement%20program%2C%20Popolizio&pg=PA116#v=onepage&q=New%20York%20city%2C%20automated%20enforcement%20program%2C%20Popolizio&f=false.

their faces to databases of photos, all without a human controller, have been used by American law enforcement since at least 2001.[107]

Police use of RCVs began in the early 1970s with the development of the first (very crude by modern standards) bomb disposal RCVs.[108] Bomb disposal has been the primary use of police RCVs since their introduction.[109] This, however, is changing. Some change is moving in seemingly positive directions: Safety-purposed search-and-rescue RCVs and robots are currently in use.[110] Some are large enough to grab and drag an injured person away from a dangerous situation where rescuers cannot go, and some are small enough to snake their way through earthquake-damaged buildings and sniff out the carbon dioxide of a trapped victim's breath, alerting rescuers to their location.[111] But RCVs are also being developed and used for offensive purposes.[112] SWAT teams have begun using RCVs to open doors, roust individuals from hiding places, reconnoiter locations prior to entry, and lob canisters of tear gas or pepper spray.[113] Currently popular with SWAT teams, the Throwbot, a dumbbell-shaped RCV weighing less than two pounds, is designed to be tossed into a situation, where it can be wheeled around by the remote operator, providing live audio and video feeds.[114]

107. Lisa Greene, *Face Scans Match Few Suspects*, ST. PETERSBURG TIMES (Feb. 16, 2001), http://www.sptimes.com/News/021601/TampaBay/Face_scans_match_few_.shtml [https://perma.cc/U6QB-TQ65].

108. *See* Peter Ray Allison, *What Does a Bomb Disposal Robot Actually Do?*, BBC (July 15, 2016), http://www.bbc.com/future/story/20160714-what-does-a-bomb-disposal-robot-actually-do [https://perma.cc/H4SR-ZW26].

109. *Id.*

110. Len Calderone, *Robotics in Law Enforcement*, ROBOTICS TOMORROW (Mar. 15, 2013, 8:22 AM), http://www.roboticstomorrow.com/article/2013/03/robotics-in-law-enforcement/132 [https://perma.cc/M65W-QVTN]; Dan Nosowitz, *Meet Japan's Earthquake Search-and-Rescue Robots*, POPULAR SCI., (Mar. 11, 2011), http://www.popsci.com/technology/article/2011-03/six-robots-could-shape-future-earthquake-search-and-rescue [https://perma.cc/BW8V-YGHF].

111. *Id.*

112. *See, e.g.*, Richard Winton & Matt Hamilton, *Man vs. Machine: L.A. Sheriff's Deputies Use Robot to Snatch Rifle From Barricaded Suspect, End Standoff*, L.A. TIMES (Sept. 15, 2016, 9:40 PM), http://www.latimes.com/local/lanow/la-me-ln-robot-barricaded-suspect-lancaster-20160915-snap-story.html [https://perma.cc/5234-5Q65] ("The Andros [RCV used by the Los Angeles Sheriff's Department SWAT Team] cost about $300,000, and . . . the department typically uses the device for bomb disposal. Increasingly, however, the agency is using the [RCV] during encounters with armed suspects.").

113. *See* E.B. Boyd, *Is Police Use of Force About to Get Worse—With Robots?*, POLITICO MAG. (Sept. 22, 2016), http://www.politico.com/magazine/story/2016/09/police-robots-ethics-debate-214273 [https://perma.cc/YE67-JK9Q]; Calderone, *supra* note 110; Nosowitz, *supra* note 110.

114. Drew Kann, *Why Your Local Police Force Loves Robots*, CNN (Apr. 18, 2017, 9:54 AM), http://www.cnn.com/2016/11/10/us/police-officers-future-technology-lisa-ling [https://perma.cc/VJ36-Q8WE].

Many of the RCVs used by police departments were designed for, and are received from, the U.S. military.[115] Between 2003 and 2016, nearly a thousand RCVs "were transferred from the military to law enforcement agencies."[116] The militarization of police had been ongoing for a long time, but it ramped up in the wake of the September 11, 2001 terrorist attacks.[117] While police RCVs are currently used primarily for bomb disposal and reconnaissance, historical trends tell us that technological developments premised on reconnaissance are often later armed.[118] In the 1990s, the U.S. military and intelligence agencies began developing unmanned aerial vehicles as surveillance and reconnaissance tools.[119] Their initial product, named "Amber," would evolve into the General Atomics MQ-1 Predator, which would log more than a million hours of flight time in combat and kill thousands with missile strikes.[120] Predator drones have already entered law enforcement. Since 2005, U.S. Customs and Border Protection has used

115. *Id.*
116. *Id.*
117. *See generally* Nicholas S. Bolduc, *Global Insecurity: How Risk Theory Gave Rise to Global Police Militarization*, 23 IND. J. GLOBAL LEGAL STUD. 267 (2016) (discussing the worldwide trend toward police militarization, and the United States's relatively recent adoption of the same); Cadman Robb Kiker III, *From Mayberry to Ferguson: The Militarization of American Policing Equipment, Culture, and Mission*, 71 WASH. & LEE L. REV. ONLINE 282 (2015) (examining the emergence of police militarization in the United States, and the resulting shift in police culture toward viewing citizens as combat enemies); Jeffrey A. Endebak, Comment, *More Bang for Their Buck: How Federal Dollars Are Militarizing American Law Enforcement*, 47 J. MARSHALL L. REV. 1479 (2014) (discussing the post–9/11 creation of federal programs that distribute to local police both the money for militarization and the military hardware to accomplish it).
118. When militaries began using airplanes, for example, they were premised on reconnaissance, observation, and artillery directing. As World War I began, this was still their primary purpose. By the end, they were shooting each other down and conducting (rather ineffectual) ground attacks. When World War II began twenty-five years later, airplanes were designed to destroy railroads and factories, sink ships, and strafe ground troops. By the end of that war, they were area bombing entire cities to ash. JOHN BUCKLEY, AIR POWER IN THE AGE OF TOTAL WAR 40, 157 (1999).
119. *See* RICHARD WHITTLE, PREDATOR: THE SECRET ORIGINS OF THE DRONE REVOLUTION 81–85 (2014).
120. *Id.*; PETER BERGEN & KATHERINE TIEDEMANN, NEW AMERICA FOUND., THE YEAR OF THE DRONE: AN ANALYSIS OF U.S. DRONE STRIKES IN PAKISTAN, 2004–2010 1–6 (2010), https://web.archive.org/web/20110315175041/http://counterterrorism.newamerica.net/sites/newamerica.net/files/policydocs/bergentiedemann2.pdf [https://perma.cc/9RG7-RTQW]; Fact Sheet, MQ-1B Predator, U.S. AIR FORCE (Sept. 23, 2015), http://www.af.mil/About-Us/Fact-Sheets/Display/Article/104469/mq-1b-predator [https://perma.cc/HDQ9-6E7V]; Richard Tomkins, *Predator Drones Surpass 4 Million Flight Hours*, UNITED PRESS INT'L (Sept. 21, 2016, 11:11 AM), https://www.upi.com/Defense-News/2016/09/21/Predator-drones-surpass-4-million-flight-hours/1361474467936 [https://perma.cc/R5FB-7XZ2].

Predators at the Mexican border.[121] In 2013, a Predator was used in a firefighting operation in California.[122] Like assault rifles and armored personnel carriers, military drones are being repurposed for civilian applications.

Militaries are also using ground-based lethal RCVs and robots. In South Korea, robot sentries armed with machine guns are being considered for use at the demilitarized zone.[123] The Israeli military helped develop a small, flat RCV on tank-like treads designed to carry a hidden Glock pistol that can be fired rapidly by a remote operator.[124] The U.S. military deployed SWORDS (special weapons observation remote reconnaissance direct action system), RCVs armed with machine guns, in Iraq in 2007.[125] Although the RCV used by Dallas Police was not built to be a killer, its use foreshadows the coming tide of armed, military-style RCVs and robots in American law enforcement, and why police will elect to use them.

Officer safety will always factor into the decisions made by police, whether at the level of the individual officer, commander, or policymaker. It was the rationale provided by Dallas Police Chief Brown for his authorization to use the improvised bomb: The other options that were considered would have put officers in danger, whereas the bomb-carrying RCV did not (at least not to the same degree).[126] The prioritization of safety is, of course, entirely understandable. But in virtually all situations, it would be safer for officers to engage with an individual remotely rather than directly. Thus, it's probable that police will turn to RCVs with greater frequency, especially as they become cheaper, more agile, and more capable. The natural consequence of this will likely be an increase in the use of RCVs to engage individuals with force.

121. Lev Grossman, *Drone Home*, TIME (Feb. 11, 2013), http://content.time.com/time/magazine/article/0,9171,2135132-3,00.html [https://perma.cc/6CQJ-9FMM].
122. Charlotte Alter, *Drone Used to Fight California Rim Fire*, TIME (Aug. 29, 2013), http://nation.time.com/2013/08/29/drone-used-to-fight-california-rim-fire [https://perma.cc/V9TC-8PB2].
123. *See* Andrew Tarantola, *South Korea's Auto-Turret Can Kill a Man in the Dead of Night From Three Clicks*, GIZMODO (Oct. 29, 2012, 11:30 AM), http://gizmodo.com/5955042/south-koreas-auto-turret-can-kill-a-man-in-the-dead-of-night-from-three-clicks [https://perma.cc/GZ44-AJTW].
124. *See* David Hambling, *The Little Tank Robot That Carries a Glock*, POPULAR MECHANICS, (May 18, 2016), http://www.popularmechanics.com/military/weapons/a20924/dogo-glock [https://perma.cc/CHB2-PJKJ].
125. *See* Noah Shachtman, *First Armed Robots on Patrol in Iraq (Updated)*, WIRED (Aug. 2, 2007, 3:56 PM), https://www.wired.com/2007/08/httpwwwnational [https://perma.cc/5GY6-LDL9].
126. *See* Wilonsky, *supra* note 2.

Semi-autonomous robots are already being used for security purposes in the United States. Robots that can supposedly "predict unusual and potentially dangerous behavior" are patrolling malls, campuses, and workplaces.[127] North Dakota recently passed a law permitting law enforcement agencies to arm flying drones with Tasers, pepper spray, and other nonlethal weapons.[128] As military use demonstrates the capabilities and successes of armed RCVs and robots, law enforcement will naturally want to follow suit.[129]

But as militarized RCVs continue to increase their presence in combat, and as police use of RCVs continues to grow, there is a very high likelihood—in fact, one could reasonably argue, an inevitability—that the former will bleed into the latter. There is no indication that the militarization of police departments will abruptly reverse course,[130] and armed RCVs stand to be in the next wave of military equipment ready to be repurposed into civilian law enforcement. Although the Pentagon has yet to sell an offensive RCV to law enforcement, the killing of Micah Johnson by Dallas Police should serve as a wake-up call to the legal community that the rules governing the use of force need to be ready for the next time police use a remotely controlled vehicle to kill. The current standard is not.

III. THE *GRAHAM* STANDARD AND WHERE IT FAILS

The constitutionality of the government's use of force against a non-incarcerated individual is "properly analyzed under the Fourth Amendment's objective reasonableness standard."[131] The Fourth Amendment guarantees

127. Matt McFarland, *300-Pound Mall Robot Runs Over Toddler*, CNN (July 14, 2016, 3:58 PM), http://money.cnn.com/2016/07/14/technology/robot-stanford-mall [https://perma.cc/S3EB-KHZF].

128. Mike Murphy, *North Dakota Is the First State in the US to Legalize Police Use of Drones With Tasers and Pepper Spray*, QUARTZ (Aug. 26, 2015), https://qz.com/489204/north-dakota-is-the-first-state-in-the-us-to-legalize-police-use-of-drones-with-tasers-and-pepper-spray [https://perma.cc/P78J-5FZL].

129. *See* Kann, *supra* note 114. The same was true of the use of nonlethal RCVs: "[I]t was the military's successful use of robots to disarm explosives in Iraq and Afghanistan that piqued the interest of law enforcement." *Id.*

130. In fact, the Trump administration has reversed Obama-era policies limiting transfers of some military equipment to law enforcement; the new regime is now offering up more of the military's arsenal, including grenade launchers and bayonets, to police departments. *See* Adam Goldman, *Trump Reverses Restrictions on Military Hardware for Police*, N.Y. TIMES (Aug. 28, 2017), https://www.nytimes.com/2017/08/28/us/politics/trump-police-military-surplus-equipment.html.

131. Graham v. Connor, 490 U.S. 386, 388 (1989) (internal quotations omitted). "[T]he Fourth Amendment provides an explicit textual source of constitutional protection

"[t]he right of the people to be secure in their persons . . . against unreasonable . . . seizures . . . ."[132] Thus, constitutionally, force need only be reasonable when used in the seizure of an individual, so an analysis of the constitutionality of any particular use of force must begin with a determination of whether a seizure has occurred.

A. Seizure

A governmental seizure of an individual can occur in two ways. In the first, the individual submits to an assertion of authority.[133] In the second, the government "appli[es] . . . physical force with lawful authority" against the individual.[134] This physical force must be "intentionally applied" with the aim of "terminat[ing the individual's] freedom of movement."[135] Thus, a seizure by the government

against this sort of physically intrusive governmental conduct. . . ." *Id.* at 395. For incarcerated individuals, protection against excessive government force is found in the Eighth Amendment. *See id.* at 394. The Fourth and Eighth Amendments are "the two primary sources of constitutional protection against physically abusive governmental conduct." *Id.* Some commentators have pointed out that, contrary to the Court's assumption, the Fourth Amendment does not, by its language, demand an objective standard in examining reasonableness. *See, e.g.*, Allen H. Denson, *Neither Clear Nor Established: The Problem With Objective Legal Reasonableness*, 59 ALA L. REV. 747, 759 (2008) (suggesting that some courts gravitate toward objective standards for their easier applicability). Indeed, in examining instances of police use of force, it applies an objective measure to an entirely subjective moment. The supposedly objective measure may simply be substituting one subjective standard for another. *See infra* note 158 and accompanying text. It can be argued that if a case arose in which the officer's motivation to use lethal force against an individual was entirely unreasonable, motivated by nothing but personal animus, but under the circumstances, a hypothetical officer could think it objectively reasonable to use deadly force, the very application of an objective reasonableness standard would be inherently illogical.

132. U.S. CONST. amend. IV.

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

134. *Id.* at 624.

135. Brower v. Cty. of Inyo, 489 U.S. 593, 596–97 (1989). The definition adopted in *Brower* narrowed the Court's earlier attempts at defining a seizure by making the officer's intent to seize a necessary component. Justice Scalia, writing for the majority, gave an illustration:

> [I]f a parked and unoccupied police car slips its brake and pins a passerby against a wall, it is . . . not a violation of the Fourth Amendment. And the situation would not change if the passerby happened, by lucky chance, to be a serial murderer for whom there was an outstanding arrest warrant—even if, at the time he was thus pinned, he was in the process of running away from two pursuing constables. . . . [A] Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally desired termination of an individual's freedom of movement (the

(when not submitted to willingly) requires both the intent to apply force with the purpose of stopping the individual, and the actual application of that force. In order for a seizure to occur, however, the force need not actually stop the individual: "The mere . . . application of physical force with lawful authority, whether or not it succeed[s] in subduing the arrestee [is] sufficient."[136]

Johnson was seized at least twice on the night of July 7, 2016. He was seized when he was wounded by police gunfire during the street-level shootout,[137] and he was seized when the bomb killed him in the El Centro hallway.[138] It's clear that in both of these actions, force was applied to Johnson with the intent of terminating his freedom of movement, thus making them seizures under the Fourth Amendment.

It's important to note that these applications of force were not, for the purpose of Fourth Amendment analysis, a single seizure. The Supreme Court has long held that a seizure is not a drawn-out process: "A seizure is a single act, and not a continuous fact."[139] When a suspect is at large after an initial application of police force, there is not "for Fourth Amendment purposes . . . a *continuing* [seizure] during the period of fugitivity."[140] If an initial seizure is made from which the individual escapes only to be recaptured moments later, during the time between the two seizures, he does not fall within the scope of the Fourth Amendment because no seizure is ongoing.[141] The separation of distinct applications of force into distinct seizures is important because a "proper application [of the Fourth Amendment] requires careful attention to the facts and circumstances of each particular case."[142] The facts and circumstances of the two seizures of Johnson were very different. Although this Comment focuses on the seizure by RCV-delivered bomb (which I call "the final seizure"), the distinction between that and the street-level seizure by

fleeing felon), but only when there is a governmental termination of freedom of movement through means intentionally applied.

Id. at 596–97. Compare this to *Tennessee v. Garner*, 471 U.S. 1, 7 (1985), which, just four years earlier, held that "[*w*]*henever* an officer restrains the freedom of a person to walk away, he has seized that person." (emphasis added).

136. *Hodari*, 499 U.S. at 624 (citing, with approval, *Whitehead v. Keyes*, 85 Mass. 495, 501 (1862), which held that "an officer effects an arrest of a person whom he has authority to arrest, by laying his hand on him for the purpose of arresting him, though he may not succeed in stopping and holding him.").
137. *Supra* text accompanying note 57.
138. *See supra* text accompanying note 92.
139. Thompson v. Whitman, 85 U.S. 457, 471 (1873).
140. *Hodari*, 499 U.S. at 625.
141. *See id.*
142. Graham v. Connor, 490 U.S. 386, 396 (1989).

police bullet ("the first seizure") is important, and the constitutionality of each must be analyzed separately.[143]

B. Reasonableness

Graham v. Connor[144] is the leading U.S. Supreme Court case on the constitutionality of the use of force by police, and it provides something of a muddled framework for analysis.[145] In it, the Court rejected a four-factor test that a majority of lower courts had adopted in excessive force cases, which included an examination of the subjective motivations of the officer who applied the force in question.[146] Instead, the Court held that "the

143. It's unclear whether Johnson was wounded additionally during the shootouts in the El Centro hallway, or if he suffered all his pre-bomb injuries during the street-level gun battle. Because the information available is inconclusive, it is of little value to hypothesize about such possible injuries and analyze them; if they did occur, they would of course be separate seizures requiring separate analyses. The very real possibility that Johnson sustained additional injuries in the hallway gun battles—as can be inferred from the walls surrounding his final position in the El Centro hallway being "riddled" with SWAT bullets, *see supra* note 70—is why I refer to the final seizure as such, and not as the "second seizure."

144. 490 U.S. 386.

145. The muddled-ness of the framework, while problematic and at times seemingly counterintuitive, may also be inevitable. No matter what framework courts use, and no matter how insistently courts describe Fourth Amendment reasonableness as an "objective" standard, reasonableness is an inherently subjective and deeply personal concept, influenced not only by the law, but also by one's philosophy, politics, religion, and personal experience, as well as countless other factors. The concept of a singular, definitional "reasonable person" or "reasonable officer" is impossible. One person's reasonable is another's madness. When the Court asks a judge to examine the facts from the perspective of a hypothetical "reasonable officer on the scene," what it is essentially asking is that the judge put herself into the situation, and determine whether she personally would find the actions reasonable—for what judge considers herself unreasonable? Thus, the Court is replacing the officer's subjective reasonableness with the judge's, which is just as deeply personal and just as much the product of a thousand inexorably interwoven subconscious influences, the individual strands of which the judge herself may be unable to parse. Add to this the fact that the circumstances in which force is used are themselves often muddled, the analysis of them relying significantly on the testimony of those involved, who have very obvious stakes in the outcome. While Courts and commentators can list factors and demand certain forms of analysis, the very concept of objective reasonableness is nonsensical. It is, however, more sensible than the alternative: The officer's subjective reasonableness, which is impossible to discern or verify and would effectively eliminate Fourth Amendment protections by making the officer's own testimony the primary—and often sole—evidence on the issue.

146. *Graham*, 490 U.S. at 390, 393. The four factors previously considered were known as the "*Johnson v. Glick* test," and consisted of: (1) the need for the use of force, (2) the relationship between the need and the amount of force actually used, (3) the extent of the injury inflicted, and (4) whether the officer applied the force in good faith or

reasonableness inquiry . . . is an objective one: the question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."[147] While the officer's intent has no bearing on the reasonableness of her actions, the suspect's culpability does.[148] His fault in putting innocent lives at risk is a factor in whether the officer is justified in "exposing [him] to possible harm" in order to end that risk.[149]

In the objective Fourth Amendment analysis, the *Graham* Court held that the actions in question "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[150] From this, the question seems to be: Would a reasonable officer on the scene, at the time events were unfolding, have thought the force in question an appropriate response to the situation? If the answer is yes, the use of force does not violate the individual's Fourth Amendment rights.

But the *Graham* Court also instructs that "[d]etermining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake."[151] From this, the question

"maliciously and sadistically for the very purpose of causing harm." *Id.* at 390, 398 (quoting Graham v. City of Charlotte, 644 F. Supp. 246, 248 (W.D. N.C. 1986), *rev'd*, 490 U.S. 386 (1989) (citing Johnson v. Glick 481 F.2d 1028, 1033 (1973)).

147. *Id.* at 397 (internal quotations omitted). While immaterial for determining the reasonableness of an officer's actions, the officer's motivation or intent is determinative of whether a seizure has occurred at all. *See supra* note 135 and accompanying text. Additionally, the officer's intent and motivation may be considered by the factfinder "in assessing the credibility of an officer's account of the circumstances that prompted the use of force." *Graham*, 490 U.S. at 399 n.12. An officer's "evil motive or intent" may also be used in determining whether punitive damages are appropriate in cases in which a jury has determined a constitutional violation did occur. Smith v. Wade, 461 U.S. 30, 56 (1983).

148. Scott v. Harris, 550 U.S. 372, 385 (2007) (holding that because the plaintiff ignored police warnings to stop his car during a high-speed chase, and was therefore culpable for the danger to all, and because "those who might have been harmed [had a chasing officer not forced his car off the road, paralyzing him] were entirely innocent . . . . [the Court had] little difficulty in concluding [the officer's actions were] reasonable."). Lower courts have adopted this reasoning. *See, e.g.*, Espinosa v. City and Cty. of S.F., 598 F.3d 528, 537 (9th Cir. 2010) ("[W]hich party created the dangerous situation and which party is more innocent, may also be considered" in deciding the reasonableness of an officer's use of force.).

149. *Scott*, 550 U.S. at 384–85 n.10.

150. *Graham*, 490 U.S. at 396.

151. *Id.* (quoting United States v. Place, 462 U.S. 696, 703 (1983)). The court omits from *Place* key language making clear specifically which governmental interests are relevant to the analysis: The nature and quality of the intrusion are balanced "against the

seems to be a much more academic one, and one for which hindsight is a necessity; for how can we know the full "nature and quality of the intrusion on the individual's Fourth Amendment interests"[152] until we sift through its aftermath?[153] Some courts have called into question the very idea of this type of balancing test as coming almost entirely without guidance on how the balancing is to work and how to aggregate the findings on the various factors.[154] Courts have criticized it as "creating the [false] illusion of precision,"[155] and as being "a comforting metaphor for judicial work"[156] but unworkable in reality and "tolerating in practice rather subjective qualitative consideration[s] of the importance of the values at stake."[157] It is quite possible that the *Graham* factors are simply the convenient post hoc

importance of the governmental interests *alleged to justify the intrusion*." *Place*, 462 U.S. at 703 (emphasis added).

152. *Graham*, 490 U.S. at 396 (quoting *Place*, 462 U.S. at 703).

153. As if to prove the point, Dethorne Graham, the plaintiff in the namesake case, suffered a broken foot (something that can only be properly diagnosed via x-ray) and developed a ringing in his ear (something that can take months to develop) as a result of having his head slammed down by police onto the hood of a car. Graham v. City of Charlotte, 827 F.2d 945, 947 (4th Cir. 1987), *rev'd* 490 U.S. 386 (1989). The full nature of the intrusion, therefore could not possibly be known by anyone on the scene at the time events were unfolding, reasonable officer or otherwise. Courts differ in how much they include the particulars of the actual injury suffered by the individual in their analysis of the nature of the intrusion. *Compare* Jones v. Buchanan, 325 F.3d 520, 527 (4th Cir. 2003) (holding that "the extent of the plaintiff's injury is . . . a relevant consideration" in analyzing the nature and quality of the intrusion), *with* Deorle v. Rutherford, 272 F.3d 1272, 1275, 1279–80 (9th Cir. 2001) (focusing only on what the officer knew about the potential destructiveness of the force he employed (a lead-pellet-filled cloth shotgun "beanbag" round) and not on the specific injuries suffered by the plaintiff (the loss of an eye and lead pellets imbedded in his skull) in determining the nature of the intrusion).

154. *See, e.g.*, Brown v. City of New York, 798 F.3d 94, 102 (2d Cir. 2015) ("All that can realistically be expected [in conducting a *Graham* factor analysis] is to make some assessment as to the extent to which each relevant factor is present and then somehow make an aggregate assessment of all the factors. As is true of many methods of analysis that courts prescribe, the excessive force determination is easier to describe than to make.").

155. *Id.*; *see also* Salomaa v. Honda Long Term Disability Plan, 642 F.3d 666, 675 (9th Cir. 2011) ("'Weighing' is a metaphor. Real weighing is done with a scale. For fine work one may gradually add two gram brass weights on one side of the scale, or use the one gram slider, until the trays on both sides are level. . . . [T]his connotes careful, precise, scientifically accurate results . . . . But unlike weighing potassium bromide and potassium ferricyanide in a traditional darkroom, our 'weighing' is done without a scale, without the little brass weights, and without a substance to weigh that has any weighable mass."); Ford Motor Co. v. Ryan, 182 F.2d 329, 331 (2d Cir. 1950) ("'Weighing' and 'balancing' are words embodying metaphors which, if one is not careful, tend to induce a fatuous belief that some sort of scales or weighing machinery is available. Of course it is not.").

156. *Salomaa*, 642 F.3d at 675.

157. McEvoy v. Spencer, 124 F.3d 92, 98 n.3 (2d Cir. 1997).

framework into which the gut-feeling or common-sense judgment of a court regarding any particular instance of the use of force by police can be rationalized.[158] Despite these apparent incongruities, the *Graham* analysis is the current standard for Fourth Amendment excessive force inquiries.[159]

In *Graham*, the Court analyzes three factors to determine the reasonableness of an officer's actions.[160] The list is non-exhaustive, but many courts nonetheless model their analysis on it, without examining additional factors.[161] The first factor is "the severity of the crime at issue."[162] The crime's severity is not judged in a vacuum, but rather against the use of force an officer used in response to the crime.[163] Courts measure the severity of the crime differently: Some analyze the length of the possible jail sentence should the suspect be convicted of such a crime;[164] some draw a felony/misdemeanor distinction;[165] and others look to whether or not the crime is violent.[166] Some courts have suggested that the severity factor "is intended as a proxy for

158. Some courts tacitly acknowledge this. *See, e.g.*, *Brown*, 798 F.3d at 102 (stating that "[a]ll that can realistically be expected" is for a court to acknowledge the factors and somehow weigh them in its decisionmaking). Some courts go so far as to dispense with a Fourth Amendment analysis under *Graham* or *Garner* entirely. In *Carter v. Buscher*, the Seventh Circuit's analysis was four sentences long, and essentially boils down to stating that the justification was so obvious, legal analysis is unnecessary: "Was shooting [the deceased] 'reasonable' under the Fourth Amendment? We need not linger long on this question. [His] shooting rampage threatened the lives of all the officers at the scene. Therefore, the rule in *Garner* unquestionably justified the use of deadly force . . . ." Carter v. Buscher, 973 F.2d 1328, 1333 (7th Cir. 1992).

159. *See, e.g.*, United States v. Schatzle, 901 F.2d 252, 254 (2d Cir. 1990) ("[T]he Supreme Court handed down *Graham v. Connor*, in which it outlined the standard governing the right to be free from excessive force . . . .") (internal citations omitted); Yates v. Terry, 817 F.3d 877, 884–86 (4th Cir. 2016) (thoroughly analyzing what it describes as the "*Graham* factors" in determining whether excessive force was used) (italics in original).

160. Graham v. Connor, 490 U.S. 386, 396 (1989).

161. *See, e.g.*, *Yates*, 817 F.3d at 884–86.

162. *Graham*, 490 U.S. at 396.

163. *See, e.g.*, Luchtel v. Hagemann, 623 F.3d 975, 981 (9th Cir. 2010) (holding "that the circumstances were *sufficiently severe to account for the amount of force the officers used*." (emphasis added)). Thus, the same crime (slapping a police officer, say) could be judged sufficiently severe to justify the officer's use of force if she Tasered the suspect, but insufficiently severe if she shot him.

164. *See, e.g.*, Brown v. City of New York, 798 F.3d 94, 102 (2d Cir. 2015) (holding that the severity of the crime is "unquestionably slight" because, among other reasons, the offense carried a maximum of fifteen days in jail).

165. *See, e.g.*, Alexis v. McDonald's Rest. of Mass., 67 F.3d 341, 353 (1st Cir. 1995) (holding that the severity factor weighed "heavily" against the government because the crime was a misdemeanor).

166. *See, e.g.*, *Yates*, 817 F.3d at 885 (holding that because the crime was nonviolent, the severity factor weighs against the government); Mellott v. Heemer, 161 F.3d 117, 122 (3d Cir. 1998) ("Looking first to the 'severity of the crime' factor from *Graham*, we note that the marshals were not arresting the Mellotts for a violent crime . . . .").

determining whether an officer had any reason to believe that the subject of a seizure was a potentially dangerous individual."[167] Under this view, the severity question does not examine the crime itself, but simply asks: Was it reasonable, based on the nature of the crime, for the officer to think the suspect was dangerous?[168]

The second factor is "whether the suspect poses an immediate threat to the safety of the officers or others."[169] The third is "whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight."[170] Some courts adhere to these factors strictly, analyzing them each in turn,[171] while others reduce the analysis to the more basic question the Court in *Graham* acknowledges the balancing test is attempting to answer: "whether the totality of the circumstances justifies a particular sort of seizure."[172]

C. Where Graham Fails

There are three aspects of *Graham* and its progeny that combine to create an analytical framework that fails in situations like the Dallas incident: (1) the presumption of split-second situations; (2) the non-requirement that police use the least intrusive or least deadly means in apprehending an individual; and (3) the deference courts give to officers' decisionmaking.

The Court in *Graham* stated that "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make

167. Estate of Armstrong *ex rel.* Armstrong v. Vill. of Pinehurst, 810 F.3d 892, 900 (4th Cir. 2016) (internal quotations and punctuation omitted) (quoting Smith v. Ray, 781 F.3d 95, 102 (4th Cir. 2015)).

168. From a common-sense perspective, this seems the most appropriate interpretation of the seriousness-of-the-crime factor. It obviously incorporates the violent/nonviolent distinction that some other courts use, but it eliminates the length-of-sentence and misdemeanor/felony distinctions that could be used to justify force where none is necessary. Notorious American fraudster Bernie Madoff, for example, was charged with eleven felonies and eventually sentenced to 150 years in prison, and yet his financial crimes could not, by themselves, possibly justify a use of violent force by police when seizing him. *Bernard L. Madoff Charged in 11-Count Criminal Information*, FBI (Mar. 10, 2009), https://archives.fbi.gov/archives/newyork/press-releases/2009/nyfo031009.htm [https://perma.cc/HXP8-QVK5]; Diana B. Henriques, *Madoff Is Sentenced to 150 Years for Ponzi Scheme*, N.Y. TIMES (June 29, 2009), http://www.nytimes.com/2009/06/30/business/30madoff.html?_r=1&hp.

169. Graham v. Connor, 490 U.S. 386, 396 (1989).

170. *Id.*

171. *See, e.g.*, Poole v. City of Shreveport, 691 F.3d 624, 639–40 (5th Cir. 2012) (analyzing each factor in a separate part of the opinion).

172. *Graham*, 490 U.S. at 396 (quoting Tennessee v. Garner, 471 U.S. 1, 8–9 (1985)) (internal punctuation omitted); *see, e.g.*, St. John v. Hickey, 411 F.3d 762, 771 (6th Cir. 2005) (describing this as "[t]he ultimate question").

split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."[173] The split-second nature of the decision to use force is very often emphasized by reviewing courts.[174] Some courts take this further, focusing entirely on the moment in which deadly force was used, and deliberately disregard the larger context of the situation.[175] This creates an obvious danger: That courts will manufacture post hoc a split-second aspect to every officer's decision to use lethal force—including those that were made over the course of hours—by artificially cramming that decision into a framework that examines only the moment before the fateful trigger was pulled. By focusing so narrowly on what an officer knew in the moment prior to the use of deadly force, the analyses of very different scenarios inevitably converge. The analysis of an officer's shooting of a suspect who turns suddenly and draws a gun on her, and the analysis of a police sniper's decision to shoot a gun-holding suspect hours into an unchanging standoff, become identical: Did the officer know the suspect was armed with a gun at the time she pulled the trigger? Yes. But the two situations are anything but identical. One is a true split-second, life-or-death decision, and the other—while the situation could evolve into that—is not. In this way, courts transform an understandable

173. *Graham*, 490 U.S. at 396–97.

174. *See, e.g.*, Terrell v. Smith, 668 F.3d 1244, 1255 (11th Cir. 2012) ("Officer Smith was forced to make a split-second decision concerning whether the use of lethal force was necessary."); Thomas v. Durastanti, 607 F.3d 655, 666 (10th Cir. 2010) ("[T]his was a split-second decision concerning the use of deadly force under hardly ideal circumstances."); Carswell v. Borough of Homestead, 381 F.3d 235, 246 (3d Cir. 2004) ("This case illustrates all too clearly the daily reality in which police officers often have to make split-second, life-and-death, decisions."); Mace v. City of Palestine, 333 F.3d 621, 627 (5th Cir. 2003) ("I remain mindful of our duty to avoid 'second-guessing' the 'split second judgment' of Chief Henderson and his officers during this unquestionably tense encounter . . . ."); Salim v. Proulx, 93 F.3d 86, 92 (2d Cir. 1996) ("The reasonableness inquiry depends only upon the officer's knowledge of circumstances immediately prior to and at the moment that he made the split-second decision to employ deadly force.").

175. *See, e.g.*, Anderson v. Russell, 247 F.3d 125, 132 (4th Cir. 2001) (disregarding other facts as irrelevant because "our focus is on the circumstances as they existed at the moment force was used."); Greenidge v. Ruffin, 927 F.2d 789, 792 (4th Cir. 1991) ("In light of the Seventh Circuit's explicit time frame requirement in determining reasonableness and the Supreme Court's focus on the very moment when the officer makes the 'split-second judgments,' we are persuaded that events which occurred before Officer Ruffin opened the car door and identified herself to the passengers are not probative of the reasonableness of Ruffin's decision to fire the shot."); Ford v. Childers, 855 F.2d 1271, 1275 (7th Cir. 1988) ("This standard 'requires that [Officer Childers's] liability be determined *exclusively* upon an examination and weighing of the information [he] possessed *immediately prior* to and at the very moment he fired the fatal shot.'" (emphasis added) (quoting Sherrod v. Berry, 856 F.2d 802, 805 (7th Cir. 1988))).

forgiveness for split-second decisions into moment-of-trigger-pull tunnel vision that eliminates context and manufactures justification where it may not actually lie.

The Supreme Court "has repeatedly stated that reasonableness under the Fourth Amendment does not require employing the least intrusive means,"[176] a point lower courts emphasize with great frequency.[177] "[T]he real question," according to the Court, "is not what *could* have been achieved, but whether the Fourth Amendment *requires* such steps . . . ."[178] The reason for not faulting police for failing to use less-intrusive or less-forceful means is a pragmatic one aimed at keeping law enforcement functional: "The logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers."[179] In *United States v. Sharpe*, the Court worried that "[a] creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished."[180] The issue, the Court stated, was not the availability of an alternative, "but whether the police acted unreasonably in failing to recognize or to pursue it."[181] Four years later, in *United States v. Sokolow*, the Court connected the reasonableness of an officer's failure to recognize or pursue an alternative to the split-second decisions it assumes the officer is making when reasonableness under the Fourth Amendment is at issue: Tying reasonableness to the availability of less intrusive techniques "would unduly hamper the police's ability to make swift, on-the-spot decisions . . . and it would require courts to indulge in unrealistic second-guessing."[182] The courts have repeatedly made clear that when making split-second decisions, it's

176. Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 837 (2002).
177. *See, e.g.*, Beaulieu v. Ludeman, 690 F.3d 1017, 1029 (8th Cir. 2012) ("[O]fficials are not required in all cases to apply the least-intrusive methods or proceed through a series of progressively more invasive techniques . . . ." (citations and brackets omitted)); Brooks v. City of Seattle, 599 F.3d 1018, 1025 (9th Cir. 2010) ("Officers are not required to use the least intrusive means available; they simply must act within the range of reasonable conduct."); Plakas v. Drinski, 19 F.3d 1143, 1149 (7th Cir. 1994) ("We do not believe the Fourth Amendment requires the use of the least or even a less deadly alternative so long as the use of deadly force is reasonable . . . ."); Forrester v. City of San Diego, 25 F.3d 804, 807 (9th Cir. 1994) ("Police officers, however, are not required to use the least intrusive degree of force possible.").
178. Illinois v. Lafayette, 462 U.S. 640, 647 (1983) (quotations and brackets omitted) (first emphasis added).
179. United States v. Martinez-Fuerte, 428 U.S. 543, 556–57 n.12 (1976).
180. United States v. Sharpe, 470 U.S. 675, 686–87 (1985).
181. *Id.* at 687.
182. United States v. Sokolow, 490 U.S. 1, 11 (1989).

reasonable not to do the least forceful thing, and that so long as the officer's action is "within that range of conduct we identify as reasonable,"[183] no Fourth Amendment violation occurs. The problem, however, is that the range of reasonable conduct is defined by the deference courts give to the split-second decisionmaking it assumes an officer is making.

Courts have stated that the *Graham* standard "contains a built-in measure of deference to the officer's on-the-spot judgment about the level of force necessary in light of the circumstances of the particular case."[184] In the truly split-second situations the Court envisions, this deference is not unreasonable. When an officer is suddenly face-to-face with someone who unexpectedly and rapidly produces a gun[185] or a knife,[186] and the officer grabs for her pistol instead of her Taser or pepper spray, her instantaneous decision—the product of adrenaline, fear, training, and reflexive muscle memory—cannot be honestly judged by slowing down the events, separating them out, analyzing them over hours, days, or months, and then pretending that she should have conducted the same analysis, and should have reached the same conclusions. As one circuit court puts it, "[w]hat constitutes 'reasonable' action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure."[187] When the decision is not a split-second one, however, the deference must be tempered, and the range of reasonable conduct must be narrowed to reflect the time the officer had to make

183. Scott v. Henrich, 39 F.3d 912, 915 (9th Cir. 1994).

184. Burchett v. Kiefer, 310 F.3d 937, 944 (6th Cir. 2002); *see also Scott*, 39 F.3d at 915 (rejecting any argument that would "entangle the courts in endless second-guessing of police decisions made under stress and subject to the exigencies of the moment").

185. *See, e.g.*, Cass v. City of Abilene, 814 F.3d 721, 726 (5th Cir. 2016) (evaluating a situation in which a man drew a handgun seconds after police entered his business to serve a search warrant, and was immediately shot by an officer); Webb v. Raleigh Cty. Sheriff's Dep't, 761 F. Supp. 2d 378 (S.D.W. Va. 2010) (evaluating a situation in which a man, upon seeing deputies approach, stepped away from his truck, revealing an AK-47 held in firing position and pointed toward deputies, who immediately fired on him); Powell v. Fournet, 846 F. Supp. 1443 (D. Colo. 1994) (evaluating the situation of a man who burst naked from his home onto his front porch with a rifle, levering a round into the chamber and turning the rifle toward an approaching officer, who fired on him immediately).

186. *See, e.g.*, Rush v. City of Lansing, 644 Fed. App'x 415 (6th Cir. 2016) (evaluating a situation in which a woman produced a knife from her coat and slashed at officers from an arm's length distance, and the officer fired two immediate shots); Rockwell v. Brown, 664 F.3d 985, 991 (5th Cir. 2011) (evaluating a situation in which officers entered a man's bedroom and he charged at them with knife in each hand and was shot); Chappell v. City of Cleveland, 585 F.3d 901, 904, 910 (6th Cir. 2009) (considering a situation in which a young man emerged from a dark closet with knife upraised at a distance of less than seven feet from officers, advanced on them, and was shot).

187. Smith v. Freland, 954 F.2d 343, 347 (6th Cir. 1992).

decision, anticipate consequences, and consider alternatives. The fact that officers sometimes don't have the time to step back and think things through doesn't mean they should be excused from doing so when they do have the time.

In circumstances in which police departments are engaging with an individual over a drawn-out period of time, and especially where they are engaging with him remotely, *Graham* and its progeny fail to account for the deliberation and decisionmaking time that officers have. Under these circumstances, the deference courts give police in making decisions tips too sharply away from protecting the people from the excessive use of force by police.

IV. THE DALLAS TEST: AN ADDENDUM TO *GRAHAM*

In *Tennessee v. Garner*, the Supreme Court took a long view of the common law rule that had for centuries authorized police officers to use deadly force as a last resort to apprehend a fleeing felony suspect, and the Court set that rule aside:

> There is an additional reason why the common-law rule cannot be directly translated to the present day. The common-law rule developed at a time when weapons were rudimentary. Deadly force could be inflicted almost solely in a hand-to-hand struggle during which, necessarily, the safety of the arresting officer was at risk. Handguns were not carried by police officers until the latter half of the last century. Only then did it become possible to use deadly force from a distance as a means of apprehension. As a practical matter, the use of deadly force under the standard articulation of the common-law rule has an altogether different meaning—and harsher consequences—now than in past centuries.[188]

Although buried fourteen pages into the opinion, and given as an "additional reason"[189] for holding that an officer may not shoot an unarmed, fleeing suspect in the back if she does not believe him to be an immediate threat to herself or others,[190] the Court's reasoning for laying aside the old rule is instructive: As the weapons police bring to bear against suspected criminals advance, so too must Fourth Amendment jurisprudence. For a century police

188. Tennessee v. Garner, 471 U.S. 1, 14–15 (1985).
189. *Id.* at 14.
190. *See id.* at 11.

were lethal at no more than an arm's length.[191] When police began carrying firearms, the calculus changed.[192] Now an officer could be lethal at a distance, and although it took a century for the law to catch up, in *Garner*, the Court incorporated that change into its analysis of the reasonableness of police use of deadly force.

From the latter half of the nineteenth century, when police began carrying firearms, until very recently, the lethal ability of the average officer remained more or less unchanged: a handgun carried on the hip. Modern pistols may be slightly more accurate and reliable, and they may carry more rounds than the six-shooters carried by law enforcement then, but the patrol officer is still deadly at a distance of about twenty yards with a pistol, and a specialist may be deadly at a distance of several hundred yards with a rifle. And more importantly for this analysis, over the last century and a half it has remained true that police officers—both the patrol officer with her handgun, and the sniper with her rifle—are deadly only when they are in unobstructed, line-of-sight contact with the individual.

As it last did in the middle of the nineteenth century when police lethality expanded from a nightstick's reach to that of a pistol shot, the lethality of the police has once again greatly expanded. Now police can kill around corners, from a position of safety, hidden from the suspect, and from greater (and theoretically almost limitless) distances. Just as *Garner* brought Fourth Amendment law up to date with the firearm's fundamental change to police lethality, an update is again necessary to allow the law to contend justly with the newly expanded lethal abilities of the police—abilities that *Garner*'s standard, as subsumed into *Graham*, is ill-equipped to meet. Unlike *Garner*, however, this time the update need not come a century late.

To this end, I propose the Dallas test, not as a replacement, but as an addendum to the *Graham* standard. The test would be most applicable in situations that do not involve *Graham*'s presumptive split-second decisions, but rather where officers have time to contemplate their approach. Like all reasonableness tests, it asks the court to weigh factors: how much time the officer or officers had in making the decision to use lethal force; whether or not less-than-lethal options were available and practical, in light of the circumstances, and whether or not the officer considered those options; whether the situation was static or fluid; and whether, at the time the deadly

191. *Id.* at 14.

192. The change from unarmed to armed police forces was a slow one; Baltimore authorized its policemen to carry firearms in the 1850s, but New York did not issue revolvers until the 1890s. KENNETT & ANDERSON, *supra* note 4, at 150–51.

force was deployed, the suspect posed an actual imminent threat to safety, or merely was in a position in which he could pose an imminent threat to safety.

A. How Much Time the Officer(s) Had in Making the Decision to Use Lethal Force

The Fourth Amendment requires nothing of a seizure other than reasonableness.[193] What is reasonable in any particular situation is entirely fact-dependent, and time is the most important fact in a use-of-force analysis. What is reasonable for an officer to perceive, comprehend, process, and decide in the span of two seconds is entirely different than what is reasonable in the span of two minutes or two hours. All determinations of reasonableness in decisionmaking must begin with the amount of time an officer had to make that decision.

This factor is directly tied into all the other factors of the Dallas test, and if the officer has no significant decisionmaking time, as when a suspect suddenly produces a gun or a knife,[194] much of the Dallas test becomes moot. Thus, how much time the officer had to make her decision is, in essence, a threshold question for the Dallas test. If the officer had time only to perceive the threat and respond, the analysis should proceed along the lines of a traditional *Graham* test.[195]

But when an officer has enough time to process and understand the situation clearly, and to consider her options, the lens through which courts judge the decision she makes must be undistorted by the deference courts give officers in split-second cases. It is, of course, entirely possible that even with sufficient time, and even after careful consideration of the alternatives, the most reasonable decision an officer could come to would be to pull the trigger and kill the suspect. But it is also very possible that an officer would hold back, that she would retreat from the situation so as not to exacerbate its dangers or provoke a response, that she would use her Taser or pepper spray instead of her gun, that a Bomb Squad would load a flash-bang grenade, a canister of tear gas, or an aerosol anesthetic[196] onto a remotely controlled

193. U.S. CONST. amend. IV.

194. *See supra* notes 185–186.

195. In some circumstances, however, the immediate availability of nonlethal alternatives, even in cases of split-second decision making, can affect the reasonableness of the officer's decision to use lethal force. *See infra* note 202 and accompanying text.

196. Aerosol anesthetics have been used in prior incidents, although not without controversy. In the 2002 Moscow theater hostage crisis, an aerosol anesthetic made

vehicle instead of high explosive.[197] The presence of significant decisionmaking time in any scenario does not by itself make an officer's use of deadly force unreasonable. But it does increase the scrutiny with which courts should judge the use of force and the decisionmaking that leads to it.

B. The Availability, Practicality, and Viability of Nonlethal Alternatives, and Whether Officers Considered Those Alternatives

In *Graham*, the Court held that a reasonableness analysis "requires careful attention to the facts and circumstances of each particular case, including" the three factors the Court gives: severity of the crime, resistance and flight, and threat.[198] As discussed in Part III, many courts analyze these factors as though they are the only factors. Other courts point out that the three factors provided by the *Graham* court are not exhaustive, and that the totality of the circumstances may include other aspects of the situation.[199] In some instances, courts specifically examine "an additional factor . . . in [the] *Graham* analysis[:] the availability of alternative methods of capturing or subduing a suspect."[200] But many courts disregard the issue of possible alternative methods of seizing a suspect as being irrelevant to the inquiry into the constitutionality of the force actually employed.[201]

To dismiss the availability of alternative means of seizing a suspect as irrelevant to the inquiry dismisses outright what could be a legitimate argument against a finding of reasonableness, depending on the facts.[202]

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from fentanyl, a narcotic derived from opium, was used to incapacitate both hostages and hostage-takers alike before troops stormed the theater. *Russia Names Moscow Siege Gas*, BBC (Oct. 31, 2002, 2:25 AM), http://news.bbc.co.uk/2/hi/europe/2377563.stm [https://perma.cc/L88R-3428]. The aerosol killed more than a hundred of the hostages. *Gas 'Killed Moscow Hostages'*, BBC (Oct. 27, 2002, 4:39 PM), http://news.bbc.co.uk/2/hi/europe/2365383.stm [https://perma.cc/WB42-ZLE2].

197. This obviously presumes the availability of such means, discussed *infra*, Subpart IV.B.

198. Graham v. Connor, 490 U.S. 386, 396 (1989).

199. *See*, *e.g.*, Johnson v. Carroll, 658 F.3d 819, 831 (8th Cir. 2011) ("*Graham* cites those particular circumstances as illustrative examples, not an exhaustive list"); Fisher v. City of Las Cruces, 584 F.3d 888, 902 n.1 (10th Cir. 2009) ("[We are] mindful of *Graham*'s admonition that its factors were never meant to be exhaustive . . . ."); Ciminillo v. Streicher, 434 F.3d 461, 467 (6th Cir. 2006) ("The *Graham* factors do not constitute an exhaustive list . . . .").

200. Smith v. City of Hemet, 394 F.3d 689, 703 (9th Cir. 2005).

201. *See supra* note 177; text accompanying note 183.

202. For example, if a man suddenly charged at an officer with a baseball bat from a distance of fifteen feet, and the officer dropped the bottle of water she held in her hands, drew her pistol, and shot him, her actions would likely be reasonable: A person can cover fifteen feet in one or two seconds, thus making her decision a split-second one, likely driven by reflex and training more than thoughtful decisionmaking; a baseball bat can kill with a

When the officer has a significant amount of time in which to analyze the situation and anticipate the responses or consequences of various approaches, and especially if she has time to consult other officers, the availability of nonlethal methods to seize a suspect must be taken into account, and must weigh heavily in the final balancing.

Many standoff situations last for hours. Some last for days. At least one lasted for years.[203] With more time to respond to a situation, more options present themselves because police have more time to think of them and to then consider and analyze them. In some standoff situations, police have been very creative in how they employ RCVs. Police have used them to deliver pizzas and cell phones,[204] to search dangerous areas for suspects,[205] and

single blow, thus making him a deadly threat. Suppose, however, the officer had her Taser, or a shotgun loaded with a beanbag round (a less-than-lethal cloth bag filled with lead pellets), already aimed at the suspect, and suppose that either of those nonlethal weapons would stop the man. If, when he rushed her with the baseball bat, she dropped the nonlethal weapon to draw her pistol and shoot him dead, the fact that the nonlethal alternative was available to her in the moment must necessarily enter into the analysis of the reasonableness of her decisionmaking, regardless of its split-second nature. When courts refuse to analyze the alternatives available to her, and only analyze whether the force she actually did employ was objectively reasonable, dropping the water bottle to draw her pistol and dropping the perfectly effective nonlethal weapon to draw her pistol become the same thing. Instead of asking "was it reasonable for her to drop *what she did* in order to draw her pistol and shoot a man charging her from fifteen feet with a bat?" many courts only ask, "When a man with a bat charges an officer from fifteen feet, is it reasonable for the officer to draw her pistol and shoot him?" The answer to the first question is different for the two scenarios: reasonable to drop her water bottle and reach for her pistol, but unreasonable to drop a perfectly effective nonlethal weapon and reach for a lethal one. The answer to the second question becomes "yes" for both scenarios because the form of the inquiry makes the two scenarios identical by ignoring what the officer dropped and looking only at the actual force she used in a vacuum. Thus, although "availability" in a split-second case must be construed very narrowly, to the point that an officer having a nonlethal alternative on her belt may not affect the conclusion on reasonableness, even in a standard *Graham* analysis without the Dallas test addendum, whether a nonlethal alternative was available should always at least be examined, and the officer's decision not to use it should always be acknowledged, even if the court gives her split-second decision a great deal of deference.

203. *See, e.g.*, Laura Bult, *Texas Man Is Free After Longest Standoff in U.S. History*, DAILY NEWS (Jan. 8, 2016, 11:18 AM), http://www.nydailynews.com/news/national/texas-man-free-longest-standoff-u-s-history-article-1.2490012 [https://perma.cc/LUT9-W9S5].

204. *See, e.g.*, Hilary Pollack, *Police Used a Pizza-Delivering Bomb Disposal Robot to Talk a Man Out of Killing Himself*, VICE (Apr. 21, 2015, 11:00 AM), https://munchies.vice.com/en_us/article/een-suicidale-man-werd-gered-door-een-robot-die-hem-een-pizza-aanbood [https://perma.cc/WP9A-RCDT].

205. *See, e.g.*, *Police Search for Suspect in Standoff*, NEWSCHANNEL 10 (Apr. 6, 2016, 7:14 AM), http://www.newschannel10.com/story/31650570/police-search-for-suspect-in-standoff [https://perma.cc/G39V-97DV].

to negotiate with people via two-way speaker systems.[206] In one almost comical episode, in the seventh hour of a standoff with a rifle-armed individual hunkered down in a dip in the ground in an open field, police distracted him with loudspeaker announcements and a low-flying helicopter while they stealthily drove an RCV up behind him and used its claw arm to steal away his rifle, leading to his quick surrender.[207] Obviously, not all situations will lend themselves to remote searches, and not all suspects will be pliable with pizza or gullible enough to set down their gun. But those types of options, which are not possible in split-second situations, are open to police in drawn-out situations.

In circumstances in which some degree of force becomes necessary, there are a number of less-than-lethal remote alternatives to killing a suspect. Some foreign police departments already employ Taser-armed RCVs,[208] and some RCVs are currently equipped to fire pepper spray, tear gas, and other nonlethal weapons.[209] In a situation in which officers have the time to arm an RCV or drone with a lethal bomb or a gun,[210] they would presumably have the time to arm it with a less-lethal alternative. If such

206. *See, e.g.*, Richard Chin, *Police Use Remote-Run Robot to End St. Paul Dad's Standoff*, TWIN CITIES PIONEER PRESS (Sept. 21, 2016, 12:33 PM), http://www.twincities.com/2016/09/20/robot-helps-police-end-standoff-with-st-paul-man-according-to-complaint [https://perma.cc/6REV-RJP9].

207. Winton & Hamilton, *supra* note 112.

208. Sophie Williams, *Meet the Cop of the Future: Robotic Policeman 'Anbot' Begins Patrolling in China and Will Give Trouble-Makers a Ruthless TASER*, DAILY MAIL (Sept. 23, 2016, 7:46 AM), http://www.dailymail.co.uk/news/peoplesdaily/article-3803748/Robotic-policeman-Anbot-begins-patrolling-China-trouble-makers-ruthless-TASER.html [https://perma.cc/LP85-S6FS].

209. *Riot Control Drone Armed With Paintballs and Pepper Spray Hits Market*, RT (June 21, 2014, 4:00 PM), https://www.rt.com/news/167168-riot-control-pepper-spray-drone [https://perma.cc/Q9YD-22YW]; David Hambling, *These 6 Drones Are Ready and Waiting to Tear Gas You*, POPULAR MECHANICS (Feb. 1, 2016), http://www.popularmechanics.com/flight/drones/g2445/tear-gas-capable-drones [https://perma.cc/69KV-CT9C]; *see also* Murphy, *supra* note 128.

210. It is believed that the first time law enforcement in the United States armed an RCV with a gun was during the Ruby Ridge standoff, when agents strapped a shotgun to an early model law enforcement RCV as part of the government's attempt to persuade the Weaver family to surrender. Cori Brosnahan, *Ruby Ridge, Part Three: Fear & Faith*, AMERICAN EXPERIENCE, http://www.pbs.org/wgbh/americanexperience/features/general-article/ruby-ridge-part-three-fear-faith [https://perma.cc/4YXE-YU8F] (last visited Jan. 6, 2018). It's unclear if the RCV was capable of firing the shotgun, or whether it was used simply as a show of force. The shotgun was removed from the RCV by Weaver family members. The Special Agent in Charge at the time later called the decision to arm the RCV an "oversight." Virginia Heffernan, *Weaver's Last Stand*, SLATE (Apr. 24, 2003, 8:18 PM), http://www.slate.com/articles/arts/television/2003/04/weavers_last_stand.html [https://perma.cc/Q6JD-M2DS].

options are available to an officer and she forgoes them in favor of a lethal alternative, that decision, and whatever led the officer to make it, must affect the balance of the overall analysis of the reasonableness of her use of force.

This factor examines three separate, but related, aspects of the nonlethal alternatives in question: availability, practicality, and viability. Availability is self-defining: An officer who does not have access to a Taser, tear-gas canister, or other nonlethal alternative cannot be expected to have used such an alternative, nor to have spent time considering it.[211] Practicality asks whether there are logistical or physical reasons the nonlethal alternative will or will not be effective in a given situation: A Taser with a range limitation of about thirty-five feet is not practical against an individual farther away, and tear gas is not practical outdoors in a windstorm. Viability turns on how effective a nonlethal alternative would be in bringing about the safe seizure of the individual, based on the totality of the circumstances. If a suspect has a gas mask, tear gas is not a viable alternative. If a suspect is militantly vegan, delivering Domino's Pizza via RCV will not calm the situation. Micah Johnson, in all likelihood, was not going to put down his rifle in exchange for food. And if police had used tear gas, it was entirely possible that instead of inducing surrender, it would have provoked the gun-blazing suicide charge Chief Brown was so concerned about.[212] In many barricade situations, however, nonlethal options are viable, practical, and very possibly could end the standoff without death. Indeed, they often do.[213]

From a purely common-sense standpoint, the availability of practical and viable nonlethal alternatives to lethal force is a large part of the reasonableness of an officer's use of lethal force. If an officer has three weapons on her belt, two of them nonlethal and one of them lethal, and has time to consider which one to use, by reaching for the lethal one she invariably invites the question, "Why

211. While an officer should not be held liable for failing to employ means not available to her, the unavailability of the nonlethal alternatives could itself be evidence of unreasonableness at a policy level, if the unavailability of a nonlethal option created a situation in which the only method of seizure available to the officer was a lethal one.

212. *See infra* Subpart V.B.5.

213. *See, e.g.*, Tori Fater, *Police Standoff Ends Peacefully After 2 Hours*, COURIER & PRESS (Feb. 9, 2017, 2:14 PM), http://www.courierpress.com/story/news/local/2017/02 /09/police-standoff-ends-peacefully-after-2-hours/97680620 [https://perma.cc/UC7Q-8GYE]; Emily Palmer & Eli Rosenberg, *New York Police Standoff With Queens Man Ends Quietly at Columbus Circle*, N.Y. TIMES (July 21, 2016), https://www.nytimes.com/2016/07/22/nyregion/new-york-bomb-squad-called-after-package-thrown-at-police-van.html?_r=0; Yesenia Robles, *Aurora Police Peacefully Resolve Standoff Involving Children*, DENV. POST (July 16, 2016, 3:08 PM), http://www.denverpost.com/2016/07/16/aurora-police-peacefully-resolve-standoff-involving-children [https://perma.cc/LW4Q-F6FJ].

didn't you reach for a nonlethal one?" It's a perfectly reasonable question.[214] Of course, the officer may have a perfectly reasonable response. Either way, her answer to it should play an important part in determining whether her use of the lethal weapon was reasonable. That basic bit of common sense should not be excluded from a court's analysis of the constitutionality of any use of force, and certainly not in a situation in which the officer had time to consider the question before taking action.

C. Whether the Situation Was Static or Fluid

If a situation is static, the officers on the scene and their commanders, either at the scene or at police headquarters, have more time to think, plan, and come up with options. When a man barricades himself in his home and police establish a perimeter, the situation often remains static for hours, if not longer. In such a situation, the creativity that Chief Brown asked for during the shooting in Dallas[215] has a much greater chance of effecting a positive outcome to the situation.

At the same time, even an hours-long situation can be fluid and changing, requiring constant reaction from police. The most obvious example of this is an extended vehicle pursuit, which can last for hours. Police involved at ground-level are forced to focus their attention on their own driving and on responding to the suspect's actions and the constantly changing surroundings. Although the situation may be occurring over the course of hours, the police immediately involved don't have the time to step back and think things over. Similarly, those officers not on the scene, while better able to think of alternative methods of seizing the suspect, are doing so for a constantly changing set of circumstances. A tremendously safe and creative solution for ending a freeway chase becomes useless when the suspect exits onto side roads. A plan to block off Third Street becomes moot when the suspect veers off and drives down Fourth.

While having more than split-second time to comprehend the situation, process it, and to consider alternatives must fundamentally change the nature of the analysis of the police use of force, just as not all use of force is the same,

214. Any reasonable person on the scene, officer of otherwise, would ask this obvious question. The fact that many courts go out of their way to ignore it strains the credulity of claiming their analysis is a search for reasonableness and is itself evidence of the absurdity and the fiction of the "objective reasonable officer" test as it's currently applied. *See supra* note 145.

215. *See supra* text accompanying note 82.

not all time is the same. Whether, and to what degree, the nature of the situation permits or hinders police in actually using the time they have to comprehend the situation and plan out their actions must be taken into account. This factor is, essentially, a reexamination of, and combination of, the first two factors in the Dallas test. If a situation is tremendously fluid, constantly changing in significant ways, even if it is hours old, police are going to respond to new developments in the split-seconds they happen. This also affects the availability, practicality, and viability of alternative methods of ending the situation, as it is much more difficult to come up with realistic alternatives when the situation changes moment to moment. The ultimate purpose behind this factor is to keep courts from mechanically applying the other factors; a drawn-out situation doesn't necessarily mean an officer had time to consider her options.

D. Whether, at the Time Deadly Force Was Used, the Suspect Actually Posed an Imminent Threat or Whether He Was Merely in a Position to Pose an Imminent Threat

The final factor asks whether the suspect presented an actual threat, or whether he was simply in position to pose a threat. This may seem like an obvious consideration, but courts often do not examine whether the suspect posed an actual threat in their constitutional analysis of an officer's actions—or at least, they don't let it significantly affect the outcome of that analysis. In many cases, the officer's perception of a threat—something given great deference thanks to its split-second provenance—is sufficient for the reviewing court to justify the use of force, even if no threat actually existed.[216] As one scholar succinctly stated, "[P]olice decisions to use force, even deadly force, do not have to be correct, only objectively reasonable."[217] Some courts uphold police use of force as constitutional because they find it was reasonable for police to hypothesize possible scenarios, and to then act in response to those hypotheses, sometimes with deadly force.[218] These

216. *See, e.g.*, Tracy v. Freshwater, 623 F.3d 90, 97 (2d Cir. 2010) (holding that an officer's perception that a suspect was making a threatening sudden move, the result of him slipping on ice, made reasonable the officer's striking him in the head with a flashlight, and that the fact that the suspect posed no actual threat is immaterial because the situation is analyzed from the officer's perspective at the time, and it was reasonable for the officer to *believe* he posed a threat).

217. Joh, *supra* note 97, at 536.

218. *See, e.g.*, Scott v. Harris, 550 U.S. 372, 379–81 (2007) (because it was possible that a fleeing motorist would endanger others on the road, even though he posed a threat to no one in the immediate vicinity, police were reasonable in using deadly force (ramming

decisions are often made more reasonable in courts' eyes when they are made with the confusion, incomplete information, and reflexive response that attend split-second judgments.[219] But, as with the other factors in the Dallas test, when the police have time to more fully understand all the facts, and to more completely think through possibilities, the difference between posing an imminent threat and posing a potential, future threat becomes much larger, and mistaking one for the other becomes less reasonable.

The widely reported Laquan McDonald shooting by police in Chicago makes this distinction all too clear. Officers approached the teenager after he allegedly tried to break into cars.[220] They trailed him as he walked nearly half a mile, calling for backup from Taser-equipped units.[221] McDonald held a three-inch folding knife and behaved erratically, according to police, and he refused to comply with their orders.[222] Police later stated he had PCP in his system.[223] Although the knife he was carrying was small, it was certainly a potentially deadly weapon. A person who refuses to obey police orders to halt and carries a potentially deadly weapon must be treated as potentially dangerous, and the responding officers' initial decision to call for nonlethal backup to effectuate a seizure of McDonald was reasonable. Had officers arrived and Tasered McDonald, that decision would likely have been constitutionally permissible both under the existing *Graham* standard, and under the Dallas test I propose.

Laquan McDonald was potentially dangerous, but he was not yet actually dangerous. As he walked and jogged down the busy street, he was clearly not an imminent threat to anyone's safety. He was not in the process

his car off the road at high speed) in order to seize him); Montoute v. Carr, 114 F.3d 181, 185 (11th Cir. 1997) ("In view of all of the facts, we cannot say that an officer in those volatile circumstances could not reasonably have *believed* that Montoute *might* wheel around and fire his shotgun again, or *might* take cover behind a parked automobile or the side of a building and shoot at the officers or others." (emphasis added)).

219. *See, e.g.*, *Tracy*, 623 F.3d at 97 ("[W]e emphasize that the events in question took place at night and during inclement weather which undoubtedly reduced visibility and made all the more reasonable Freshwater's split-second judgment that Tracy's sudden movement constituted non-compliant and threatening behavior." (internal quotations omitted)).

220. Jeremy Gorner & Jason Meisner, *FBI Investigating Death of Teen Shot 16 Times by Chicago Cop*, CHI. TRIB. (Apr. 14, 2015, 6:15 AM) http://www.chicagotribune.com/news/ct-feds-probe-police-shooting-met-20150413-story.html [https://perma.cc/9Q6E-3Z64].

221. *See id.*

222. Annie Sweeney & Jason Meisner, *A Moment-by-Moment Account of What the Laquan McDonald Video Shows*, CHI. TRIB. (Nov. 15, 2015, 6:00 AM) http://www.chicagotribune.com/news/ct-chicago-cop-shooting-video-release-laquan-mcdonald-20151124-story.html [https://perma.cc/JT67-JVCE].

223. *Id.*

of attacking, preparing to attack, or threatening to attack. None of his movements in the dashboard-camera footage released by police show him lunging toward, running toward, or even approaching officers or bystanders.[224] He was not pointing the knife at anyone or preparing to throw it. In fact, the video shows him moving away from the police vehicles as they arrived. The possibility of an imminent threat was still only that: a possibility. It had not manifested itself as an actual threat. Thus, when a police officer arrived on the scene, immediately drew his pistol, stepped toward McDonald, and shot him sixteen times,[225] his use of deadly force could not be justified on the basis of a threat posed by McDonald. There was only the possibility that McDonald could, at some point, pose a threat. That possibility is insufficient to justify deadly force. The Cook County State's Attorney's Office recognized the difference between the possibility of a threat and an actual threat in the Laquan McDonald case, charging the officer who shot McDonald with, among other counts, first-degree murder.[226]

It is difficult to ask a police officer, in the confusion of real-time, split-second decisionmaking, when their own and other people's lives are at risk, to parse and contemplate the difference between someone posing an actual threat, and someone posing the possibility of becoming a threat. But when a situation is drawn out over a significant span of time, such as when police follow a young man for half a mile down the street, or when a suspect is holed up in a house for hours, it is reasonable to expect officers to make that distinction. Not everyone in possession of a weapon is an imminent threat to safety.[227] Under the Dallas test, if the situation is not a split-second one, deadly force would almost always be unreasonable if the individual only presents the possibility of a threat, not an imminent one.[228]

224. *See id.*
225. *Id.*
226. Andy Grimm, *16 Shots, 16 Counts: New Charges in Laquan McDonald Shooting Case*, CHI. SUN TIMES (Mar. 23, 2017, 5:39 PM), http://chicago.suntimes.com/news/van-dyke-faces-additional-charges-in-laquan-mcdonald-case [https://perma.cc/RM3U-C3KF]. Although charges were brought, fierce criticism rained down on the prosecutors' office for failing to file charges for more than a year, and doing so hurriedly and only after—and, some argue, in response to—the release of the dashboard camera footage and the nationwide outrage that followed. *See id.*
227. *See* Robinson v. Nolte, 77 F. App'x 413, 414 (9th Cir. 2003) (holding a police shooting unconstitutional because, although the individual lay with a shotgun across his lap, "[s]imply possessing a gun, without more, is insufficient cause to justify the use of deadly force" when there is "no other indication that [the individual] intend[s] to use the gun . . . ." (internal citations omitted)).
228. As with everything else in judgment-call situations, there is no bright-line rule for determining when someone poses an imminent threat. The decision must be based on

Like the *Graham* test, not every factor in the Dallas test would be neatly applicable to all instances of police use of force that were not split-second decisions, nor even to all instances of police use of remotely controlled vehicles to deliver force. The underlying question must still remain "whether the totality of the circumstances justifie[s] a particular sort of . . . seizure."[229] As with any balancing test, there are no precise measures to apply to the facts, and there is no formula for balancing them.[230] The end result would be as dependent on a judge or jury's gut feeling as it is with any other test. Like all standards for balancing tests, the Dallas test would not necessarily dictate different outcomes because it uses a different formula, but it would require that courts at least address the factors included. It would prevent courts from ignoring the difference between split-second decisions and decisions made with time to consider. It would prevent courts from ignoring the difference between an actual threat and a potential threat. It would prevent courts from ignoring the availability of alternative methods of seizure. And it would demand courts at least address the reasonableness of an officer's decision to forgo those alternatives. Often simply requiring someone to engage in such a detailed analysis, and to articulate their thinking, can bring about a shift in their view from a gut feeling to a more analytically sound line of reasoning.[231]

V. THE CONSTITUTIONALITY OF THE SEIZURES OF MICAH JOHNSON UNDER THE *GRAHAM* STANDARD AND THE DALLAS TEST

In this Part, I analyze the seizures of Micah Johnson under the framework I propose in Part IV in order to demonstrate how the Dallas test would operate in determining the constitutionality of a particular instance of police use of force. Johnson was seized at least twice by police the night of July 7, 2016.[232] The two seizures occurred under very different circumstances, and require separate analyses.

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the entirety of the circumstances. The imminence of the threat can come from the combination of several factors, as it did with Micah Johnson. *See infra* Subpart V.B.5.

229. Tennessee v. Garner, 471 U.S. 1, 8–9 (1985).

230. *See supra* note 155 and accompanying text.

231. My own experience writing this Comment is anecdotal evidence of this. I started from a gut-feeling position that the Dallas Police Department's use of the improvised bomb to kill Micah Johnson was unreasonable, that it was a summary execution in retaliation for the five officers killed. But by forcing myself to go through a complete analysis of the three *Graham* factors and my own proposed Dallas test factors, my conclusion about the constitutionality of the Dallas Police Department's use of force changed substantially. *See infra* Subpart V.B.

232. *Supra* Subpart III.A.

A. The First Seizure

The first seizure occurred at street-level when Johnson was wounded by police gunfire in the minutes between the time he started shooting and the time he entered the El Centro building,[233] and it was undoubtedly constitutional under both the current *Graham* standard and the revision I propose with the Dallas test.

The first factor in the Dallas test—whether officers had time to consider and plan—must be examined before the individual *Graham* factors and the other Dallas test factors because it is determinative of the scrutiny courts should apply to the officers' decisionmaking. Here, because officers were dealing with an active, ongoing killing spree, and many were pinned by Johnson's gunfire behind vehicles or building pillars, they had neither the time nor the opportunity to step back and analyze the situation. Thus, for the first seizure, an analysis along the lines of the *Graham* standard is appropriate.

The first *Graham* factor—the severity of the crime—weighs heavily in the government's favor, regardless of which court's interpretation of this factor is applied.[234] Johnson's crime was among the most severe imaginable: an ongoing mass murder.[235] He shot a dozen unsuspecting people,[236] most of them police officers, including at least one execution-style in the back of the head.[237] He fired hundreds of rounds at police and told them his goal was to kill as many white officers as he could.[238] While sharing their anger, Johnson was the antithesis of the protesters, whose peaceful march against police violence he co-opted into a capture-mechanism to herd murder targets toward him,[239] and which he perverted into a platform for spewing mass death. Even judged against the use of lethal force, Johnson's crime was

233. *See supra* Part I.
234. *See supra* notes 164–167 and accompanying text (discussing the various ways different courts determine the severity of a crime in a *Graham* analysis).
235. The FBI defines a mass murder as four or more murders with no "cooling-off period" in between. U.S. DEP'T JUSTICE & FED. BUREAU INVESTIGATION, SERIAL MURDER: MULTI-DISCIPLINARY PERSPECTIVES FOR INVESTIGATORS 8, https://www.fbi.gov/stats-services/publications/serial-murder/serial-murder-july-2008-pdf.
236. Fernandez et al., *supra* note 15.
237. *See supra* text accompanying note 52.
238. Fernandez et al., *supra* note 15.
239. *See* Branigin & Goldman, *supra* note 37.

extraordinarily severe. Thus, this *Graham* factor clearly weighs in favor of the constitutionality of the actions of the police officer (or officers) who shot him.[240]

The second *Graham* factor—whether the suspect was attempting to evade or resist arrest—also weighs in the government's favor. When an officer (or multiple officers) shot and wounded Johnson just after 9:00 PM, he was at street-level.[241] While police had established roadblocks for the protest,[242] these were the type that divert traffic, not the type that could keep a heavily armed man within their confines. Thus, while Johnson was on the streets and sidewalks, police could not contain him, which courts have held adds to the reasonableness of using deadly force.[243] There was confusion about the number and location of the shooters.[244] There was mass panic as hundreds of people fled the area, and police converged upon it.[245] It was quite possible in those moments that if Johnson got away, he could escape the scene entirely, possibly blending in with the dozens of fleeing people with assault rifles. In *Tennessee v. Garner*, the Court stated that an officer is justified in using deadly force to prevent the escape of a suspect if she has probable cause to believe he poses "a threat of serious physical harm, either to the officer or to others."[246] As an active spree-shooter, Johnson clearly posed a threat of serious physical harm to everyone in the area. Thus, under *Garner*, the interest in preventing Johnson's escape alone was sufficient to justify using lethal force against him. Moreover, even if escape had not been possible, Johnson was "actively resisting"[247] to the most violent extent a person can; he was shooting police with an assault rifle.[248] Thus, for the first seizure, whether seen as flight, resistance, or both, this factor of the *Graham* analysis tilts in the government's favor.

240. It is important to note, however, the severity of the crime cannot in and of itself constitute a justification to kill the perpetrator. If it did, police would be justified in never arresting anyone suspected of a murder, but rather simply killing them all, which is obviously an absurd result.
241. *See supra* text accompanying note 57.
242. *See* Selk et al., *supra* note 1.
243. *See* Forrett v. Richardson, 112 F.3d 416, 420 (9th Cir. 1997) (stating, in holding that no Fourth Amendment violation occurred when police shot an unarmed burglary suspect through a fence he had just scaled while fleeing, that the fact police had not "established an *escape-proof* cordon at the time [the suspect] was shot" weighs in the government's favor in a *Graham* balancing test).
244. *See supra* note 50 and accompanying text.
245. *See* Selk et al, *supra* note 1.
246. Tennessee v. Garner, 471 U.S. 1, 11 (1985).
247. Graham v. Connor, 490 U.S. 386, 396 (1989).
248. *See* Branigin & Goldman, *supra* note 37.

The third factor—whether the suspect posed an immediate threat to the officers or others—weighs in the government's favor as well. On the sidewalk, Johnson engaged in a moving firefight with Dallas Police officers who—although they outnumbered him—he significantly outgunned.[249] The streets had, only minutes earlier, been filled with hundreds of people, with many still present taking cover behind building pillars and cars.[250] Johnson was shooting rapidly with a high-powered rifle.[251] Every officer and civilian on those streets was in extraordinary, imminent danger. Thus, this factor too weighs heavily in the government's favor.

The additional factors I propose in the Dallas test change little in the analysis of the first seizure. In fact, even if officers did have time to pause and consider their options, it is likely that firing deadly weapons on Johnson under those circumstances would have been the most reasonable course of action. Inaction was not an option, as Johnson was still firing on officers and the crowd. Nonlethal alternatives were not viable, as patrol officers do not carry tear gas, and both pepper spray and Tasers are effective only at short range, which was out of the question given that getting close to Johnson would have very likely resulted in an officer's death. In fact, officers who closed on him, even with lethal weapons, were killed.[252] Under the circumstances of the first seizure, the Dallas test, although it would require an acknowledgement by the reviewing court as to why nonlethal alternatives were not an option, would not significantly change the *Graham* analysis.

The government's interest at the time of the first seizure was clear: stopping a body-armored active shooter with a high-powered rifle targeting police, but willing to kill anyone. The danger in that moment was extreme and ongoing. Eliminating the source of the danger as rapidly as possible was of the utmost importance to the government.

While an individual's Fourth Amendment interest in his own safety is always a strong one, Johnson's culpability in putting hundreds of innocent bystanders at risk weakened this interest and made the use of deadly force against him more reasonable. In *Scott v. Harris*,[253] the Supreme Court suggested that when an officer must choose between putting a suspect at risk, or allowing the suspect to put innocent lives at risk, the suspect, by creating the danger for all, effectively renounces any claim that his safety be prioritized

249. *Supra* note 51 and accompanying text.
250. Selk et al., *supra* note 1.
251. *Id.*
252. *See supra* text accompanying note 52.
253. 550 U.S. 372, 385 (2007).

equally with those he endangers.[254] By endangering hundreds of innocent people peaceably exercising their right to assemble—a danger which his own apprehension would cure—and by creating a situation in which his apprehension could only occur via deadly force, under the framework of *Scott v. Harris*, Johnson effectively waived his right not to be killed by police.

Thus, Johnson's Fourth Amendment interest in his own life at the time of the first seizure was clearly outweighed by the government's interest in stopping an active killing spree. Under either the *Graham* standard or the Dallas test, the first seizure was constitutional.

B. The Final Seizure

1. Whether Officers Had Time to Consider and Plan in Their Decisionmaking

As previously discussed, this factor of the Dallas test is determinative of the degree of scrutiny courts should employ in assessing the *Graham* factors and the remaining Dallas test factors, so it is essential to examine it first. Johnson began his killing rampage a few minutes before 9:00 PM.[255] By 9:20, he was "secreted" in the alcove in the El Centro hallway.[256] He was killed by the bomb at just before 1:30 AM.[257] Thus, from the time he effectively barricaded himself at El Centro to the time lethal force was used, more than four hours elapsed. It was enough time for Police Chief Brown, who ultimately made the command decision to use the bomb, to hold two press conferences, hold a meeting about the situation in the city's Emergency Operations Center, and meet with slain officers' families.[258] It was enough time for bomb squad members to conceive of, construct, and deliver to El Centro the improvised bomb. This was clearly not the split-second reaction that *Graham* envisions officers making. Instead it was a reasoned, debated, planned decision.[259] Because of this, the decisions made by the officers, as

254. *Id.* at 384 n.10 ("Culpability *is* relevant . . . to the *reasonableness* of the seizure—to whether preventing possible harm to the innocent justifies exposing to possible harm the person threatening them." (emphasis in original)). It is important to note that this does not justify killing such a suspect retributively, but instead simply adds weight to the government's side of the scale, and removes weight from the individual's, in the *Graham* balancing test.
255. *See supra* text accompanying note 40.
256. *See* Wilonsky, *supra* note 2; *supra* text accompanying notes 66–71.
257. *See supra* note 91 and accompanying text.
258. Wilonsky, *supra* note 2.
259. *See supra* text accompanying notes 82–85.

examined through the lens of the *Graham* factors as well as the Dallas test's additional factors, must be analyzed with heightened scrutiny, with less deference given to their decisionmaking than the split-second decisions of the first seizure.

2. Whether the Situation Was Fluid or Static

The situation was effectively static. For four hours Johnson was in the alcove in the back hallway of El Centro Community College, and police SWAT teams were at the ends of that hallway. Gunfire was exchanged a number of times, and negotiations meandered, but the situation was more or less unchanging.[260] Dallas police were both on the scene and working elsewhere.[261] In other words, the time officers had in which to make decisions wasn't consumed by constantly changing circumstances, and thus the level of scrutiny to which the officers' decisionmaking must be subjected is unaffected by this factor.

3. Severity of the Crime

The analysis of this *Graham* factor remains largely unchanged from the analysis of the first seizure.[262] The most sensible interpretation of the severity factor examines whether the nature of the crime gave officers reason to believe the individual was dangerous.[263] Johnson announced his dangerousness with gunfire and death, and by repeatedly stating his determination to kill more people.[264] Although the circumstances were very different, and although the crowd of hundreds was no longer threatened by Johnson's gunfire, his crimes remained extraordinarily severe, and the belief on the part of officers that his crimes' severity indicated he was dangerous remained entirely reasonable. The severity factor, therefore, clearly weighs in favor of the government.

Despite its severity, the awfulness of Johnson's crimes does not by itself justify the use of deadly force against him. Indeed, we have seen many instances of appalling crimes in which suspects were apprehended without being killed.[265] In a similar episode three months later in Palm Springs,

260. *See supra* Part I.
261. *See* Wilonsky, *supra* note 2.
262. *Supra* text accompanying notes 235–240.
263. *See supra* notes 167–168.
264. Branigin & Goldman, *supra* note 37.
265. Timothy McVeigh was apprehended alive after setting off a bomb that killed 168 people in Oklahoma City. Jeffery Dahmer was apprehended alive by officers who discovered a

California, a gang member who ambushed and shot three police officers with an assault rifle, killing two of them, and then barricaded himself in his home while exchanging gunfire with SWAT members, was captured alive after a twelve-hour standoff.[266] The *Graham* severity factor weighs heavily in the government's favor, but cannot alone tip the balance of constitutionality.

4. Resistance and Flight

At the time of the final seizure, flight had clearly become a nonissue. There were only two routes out of that hallway, and the Dallas SWAT team had both thoroughly covered.[267] Reporters were clustered on the street barely a block from where the standoff was ongoing, and were allowed there by police.[268] Had Johnson posed any threat of breaking free from SWAT containment and once again threatening the community, there is no doubt that police would have established additional perimeters and moved potential victims out of harm's way.

Johnson's resistance, however, remained extraordinarily fierce. Exchanges of gunfire with police occurred numerous times throughout the four-hour standoff, including after negotiations broke down near the end.[269] Thus, although flight was a non-issue, Johnson was resisting about as ferociously and dangerously as one possibly can, and this factor too, therefore, weighs in the government's favor.

severed head in his refrigerator and evidence of numerous dismembered and consumed corpses in his home. The awfulness of a crime, in and of itself, in no way necessitates the killing of its perpetrator in order to arrest him.

266. *See* Brett Kelman et al., *Palm Springs Police Shooting Suspect Captured After 12-Hour 'Nightmare' for Community*, DESERT SUN (Oct. 18, 2016, 11:32 AM), http://www.desertsun.com/story/news/crime_courts/2016/10/08/palm-springs-officer-involved-shooting-leads-heightened-police-activity/91797350 [https://perma.cc/74ZE-9CNL]; *see also* Richard Winton, *Palm Sprigs Officers Were Killed With Assault Rifle Equipped With Extended Magazine, Authorities Say*, L.A. TIMES (Oct. 11, 2016, 6:45 PM) http://www.latimes.com/local/lanow/la-me-palm-springs-shooting-20161011-snap-story.html [https://perma.cc/74ZE-9CNL].

267. *See supra* text accompanying note 65.

268. *See* Wilonsky, *supra* note 2.

269. *See* Schuppe, *supra* note 15. From media accounts it is difficult to know exactly when the last of these gunfire exchanges occurred. Police indicated that "in Friday's early morning hours, negotiations broke down, and a shootout erupted." *Id.* From this it's clear that the shootout in question occurred closer to the end of the standoff than the beginning. But this could mean just after midnight (almost an hour and a half before Johnson was killed) or it could mean mere moments before the bomb was deployed.

5. Immediate Threat

Johnson repeatedly shot at police with a high-powered rifle during the El Centro hallway standoff.[270] This type of weapon "represents an extremely high quantum of force."[271] In *Carter v. Buscher*,[272] a man produced an automatic weapon from a car and began firing at police, killing one officer and wounding another before being shot dead.[273] The court did not even bother with a full Fourth Amendment analysis, and instead declared that because his "shooting rampage threatened the lives of all the officers at the scene . . . [it was] unquestionably justified."[274] The parallels between that case and this are, on the surface, striking: a man with a powerful weapon, firing at every officer he can, ultimately being killed by police.

But a distinction can be made. Unlike the situation in *Carter*, and unlike the circumstances of the first seizure, the facts suggest that Johnson's gunfire, so long as he was holed up in the alcove, was not as great an immediate threat to police. Police had been emplaced at both ends of the hallway for four hours—trading gunfire with Johnson multiple times—and none were wounded or killed during that time. This indicates that the positions police had assumed offered relatively sufficient defilade from Johnson's fire. At the time of the final seizure, police were not exposed to Johnson without cover the way they were during the first seizure, or in a situation like that in *Carter*. The fact that the degree of danger was lessened somewhat does not mean, of course, that there was no danger; police positions were under assault-rifle fire from a man hell-bent on killing police.[275] They were undoubtedly in a significant degree of danger. But it does suggest that the immediacy of Johnson's threat was not as great as it had been earlier that evening.

But the fragile safety that officers found in their positions of cover at the ends of the hallway is not the end of the story on whether Johnson posed an immediate threat. During negotiations, Johnson repeatedly threatened police, telling them he intended to kill more people.[276] Verbal threats are considered by courts in determining whether the threat a suspect posed—or

270. *See* Blankstein & Arkin, *supra* note 38.
271. Booke v. Cty. of Fresno, 98 F. Supp. 3d 1103, 1118 (E.D. Cal. 2015) (discussing another high-powered assault-rifle, an AR-15).
272. 973 F.2d 1328 (7th Cir. 1992).
273. *Id.* at 1330.
274. *Id.* at 1333.
275. *See* Branigin & Goldman, *supra* note 37.
276. *Id.*

appeared to pose—justified an officers' use of force.[277] In this case, Johnson's threats were clearly not idle ones; killing had been his goal from the moment he arrived. He made his threats at various times during the ultimately fruitless negotiations with police. Whatever time lag existed between Johnson making the last of his threats and the police detonating the improvised bomb, there was no reason to believe that the impetus behind those threats became any less forceful, or that Johnson's resolve to continue killing had diminished in any way. In fact, courts have held that a threat from an individual made even days prior to the officers' actions can still weigh heavily in the government's favor if it's reasonable for the officer to believe the threat is still in force.[278] The threat Johnson posed to the officers on the scene was, according to Chief Brown, at the forefront of his decisionmaking when he authorized the bomb squad to kill Johnson. His primary concern was that "at a split second, [Johnson] would charge us and take out many more before [SWAT officers] would kill him."[279] That fear was not unwarranted. Johnson had, when confronted by DART officer Thompson, done exactly that: taken the offensive, charged the officer, and killed him. Based on his actions throughout the night, a suicidal charge was not outside the realm of reasonable possibility, or even outside the realm of probability. It was reasonable for officers to infer that Johnson would continue to act violently and that his goal of killing as many as possible was unchanging. Courts have held that such an inference is sufficient to justify deadly force.[280] In the moments between the shootouts with SWAT officers, it was, therefore, still reasonable for police to treat Johnson as an immediate threat.

There was also the threat to other civilians. Johnson told police he had planted "bombs all over the place and downtown."[281] Police must take every

277. *See, e.g.*, Raiche v. Pietroski, 623 F.3d 30, 37 (1st Cir. 2010) (discussing whether or not the suspect had made verbal threats in analyzing this *Graham* factor); *see also* Mellott v. Heemer 161 F.3d 117, 119–20, 123 (3d Cir. 1998).

278. *See, e.g.*, *Mellott*, 161 F.3d at 119–20, 123 (holding that a landowner's threat made days prior—and relayed to officers through an intermediary—to shoot any agent who came on his property weighed heavily in the officers' favor, and was the deciding factor in finding the officers' actions objectively reasonable).

279. *Dallas Shooting Suspect Had Larger Attack Plans, Police Chief Says*, *supra* note 85.

280. *See, e.g.*, Cass v. City of Dayton, 770 F.3d 368, 375 (6th Cir. 2014) ("An officer may, however, continue to fire at a fleeing vehicle even when no one is in the vehicle's direct path when the officer's prior interactions with the driver suggest that the driver will continue to endanger others with his car." (quoting Hermiz v. City of Southfield, 484 Fed. App'x. 13, 16 (6th Cir. 2012)) (internal quotations omitted)).

281. Lee Williams, et al., *5 Officers Killed, Others Wounded in Dallas Shooting; Suspects Arrested*, STAR-TELEGRAM (July 7, 2016, 11:35 PM) http://www.star-telegram.com/news/local/community/dallas/article88375577.html [https://perma.cc/596D-PJL6].

bomb threat seriously,[282] but in this case, circumstances demanded they give the threats even more credence. Although bomb threats are almost always empty,[283] this was not a phoned-in threat to a high school by a student unprepared for an exam. This one came from a man trained in military tactics and weaponry, who had already shot more than a dozen people and killed five of them, and who had told police that the purpose of his actions was to kill as many as possible. Bombs would certainly be one way of accomplishing that goal. It was very reasonable, therefore, for police to believe that bombs were a part of his plan.

Homemade bombs can be easily connected to, and detonated by, cell phone.[284] In recent years, American terror attacks involved bombs detonated by cell phone, and by parts converted from remote-controlled toys.[285] If Johnson had planted bombs elsewhere in the city, he could have detonated them at any time. It's likely Johnson knew he would soon be dead, either as a result of the injuries he had already sustained, or because he was determined that the current situation would end that way. This knowledge on his part can also be reasonably inferred both from the fact that he was writing messages in his own blood, something a person generally doesn't do if he believes he'll be alive to deliver the message in a conventional manner, and from the fact that

282. *See What to Do—Bomb Threat*, DEP'T OF HOMELAND SEC. (Dec. 19, 2016) https://web.archive.org/web/20170428130343/https://www.dhs.gov/what-to-do-bomb-threat [https://perma.cc/7XVM-B4XT] ("Bomb threats . . . should always be taken seriously.").

283. *See* Daniel Walters, *Idle Threats: Expert Says Bomb Threats Are Pretty Much Always Duds*, INLANDER (Apr. 10, 2015, 2:38 PM), http://www.inlander.com/Bloglander/archives/2015/04/10/idle-threats-expert-says-bomb-threats-are-pretty-much-always-duds [https://perma.cc/SG4R-MX4D] ("Here [in the United States], bombers bomb, but [they] don't make threats. Threat-makers sling bomb-threats, but not real bombs.").

284. David Axe, *Cellphone Bombs: The New American Terror*, DAILY BEAST (Sept. 20, 2016, 1:03 AM) http://www.thedailybeast.com/articles/2016/09/20/cellphone-bombs-the-new-american-terror.html [https://perma.cc/PU3H-NAV7] ("All it takes is a phone, five bucks worth of parts, and a few minutes of tinkering—plus, for first-timers, any one of scores of easy-to-follow internet tutorials. Working the trigger is equally simple. Just get a safe distance away from your bomb and dial the number of the phone attached to the detonator. Boom.").

285. *See id.* (stating that Ahmad Khan Rahami apparently used cellphone-triggered bombs in his attacks in New York and New Jersey); *see also Boston Marathon Bombs Were Triggered by Remotes Taken From TOYS*, DAILY MAIL, (Apr. 24, 2013, 11:48 PM) http://www.dailymail.co.uk/news/article-2314479/Boston-Marathon-bombing-Devices-detonated-remotes-taken-toys.html [https://perma.cc/K83E-4J2U] (stating that the two homemade bombs detonated at the Boston Marathon by brothers Dzhokhar and Tamerlan Tsarnaev were triggered with parts harvested from remote-controlled children's toys).

he was surrounded by SWAT officers who were "riddl[ing]"[286] the corridor with bullets. If he had planted bombs that could be detonated by cell phone, he would know that it was now or never to set them off. It was entirely possible, therefore, that Johnson would, at any moment, produce a cell phone, dial a number, and set off a bomb in the building, in downtown Dallas, or somewhere hundreds of miles away. *Graham*'s reasonable officer on the scene, aware of the bomb threats Johnson was making, would undoubtedly be aware of this possibility.

Under the Dallas test, the hypothetical reasonable officer would be expected to factor Johnson's bomb threats into her decisionmaking, along with Johnson's military background (if that information had been relayed to the police by that time), the ease with which a bomber can detonate bombs via cell phone, and the fact that a cornered man with no hope of escape, whose intention is to kill as many as he can, is likely to attempt to detonate his bombs before dying. This line of thinking could not be expected of an officer making a split-second decision, but a reasonable officer with hours to consider would think through these possibilities and their possible consequences and should be expected to have done so.

The expectation that officers with time to consider use it to think through various possibilities cuts both ways in analyzing the reasonableness of police actions. An officer must be expected to analyze the situation carefully and consider the nonlethal alternatives to ending it. The time to think weighs against the reasonableness of her actions if she does not consider those options or have good reason for dismissing them. But she must also consider all the dangers posed by the individual, including those not immediately apparent when judging the situation in a split second. Thus, the time-to-think factor could weigh in the government's favor if the officer is reasonable in conceiving of these dangers and in believing they constitute immediate threats. In this case, the reasonable officer could have concluded that Johnson's threats were real and presented an imminent danger to an unknown number of additional people, wherever Johnson had placed the bombs he claimed to have planted. Thus, a reasonable officer could conclude that so long as Johnson remained capable of dialing a number on a cell phone, he presented an immediate danger to innocent people, thereby necessitating direct action—including lethal action—to prevent further death.

But killing Johnson also eliminated any possibility that police could learn from him the location of bombs he may have planted. If Johnson's

286. Smith, *supra* note 25.

claimed bombs were triggered not by cell phone, but by timers or by some mechanical means (a tripwire, for example, or the opening of a door, or the starting of an engine), his death would not prevent their detonation. Questioning Johnson might have been the only way for police to learn the location of these bombs. By killing him, police may have effectively ensured that any timed or mechanically triggered bombs he had planted would detonate as he intended them to. For this reason, the decision to kill Johnson was reckless.

Johnson's bomb threats also cast some doubt on the reasonableness of the Dallas Police Department's choice of weapon to kill him. If Johnson did have bombs on his person, the detonation of the improvised bomb could have triggered whatever explosives he was carrying, significantly multiplying the force of the blast. The reason police bomb squads have C-4 in their operational stores in the first place is for use as a countercharge—to destroy bombs they do find, often detonating the original bomb in the process.[287] Police had no way of knowing whether Johnson had a significant quantity of explosives on his body and therefore, although they could predict the blast of their own C-4, they could not know how large an explosion they were about to set off. In a building occupied by dozens of police officers and fifty students and teachers still on lockdown, the decision to detonate the improvised bomb only feet from someone who promised he had bombs of his own was reckless.

6. The Availability, Viability, and Practicality of Nonlethal Options and Whether Officers Considered Those Options

Dallas Police did attempt to negotiate with Johnson over the course of the four hours he was barricaded in the El Centro hallway, so persuasive means were attempted. They obviously failed. The Dallas Police Department has and continues to use a number of nonlethal[288] weapons: flashbang

287. *See* Philip Bump, *Why the Dallas Police Had Explosives, and How Those Explosives Were Fatal*, WASH. POST (July 8, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/07/08/why-the-dallas-police-had-explosives-and-how-those-explosives-were-fatal/?utm_term=.3ffb58c1c2cc [http://perma.cc/P7EU-UP6D].

288. The "nonlethal" description has the potential to mislead. While all of these weapons are designed to be nonlethal alternatives to gunfire, all can be, and have been, deadly. *See* Cheryl W. Thompson & Mark Berman, *Improper Techniques, Increased Risks*, WASH. POST (Nov. 26, 2015) http://www.washingtonpost.com/sf/investigative/2015/11/26/improper-techniques-increased-risks/?utm_term=.c836692d1c5b [https://perma.cc/56GV-GV58] (reporting that about one death per week in the U.S. is associated with police Taser use); Julia Angwin & Abbie Nehring, *Hotter Than Lava*, PROPUBLICA (Jan. 12,

grenades,[289] tear gas,[290] and Tasers.[291] There are no reports of police attempting to use any of these during the Dallas incident, and it's unclear from media reports whether or not they were available on scene.

Even if these nonlethal methods were available, it is unlikely that they were practical or viable. In order to use a Taser, one needs to be in direct line of sight, similar to a firearm.[292] This would require officers to either open the closed door mere feet from Johnson, or to travel the thirty feet of exposed hallway from the stairwell in order to round the alcove's corner to reach him. Both of these would have exposed them to Johnson's fire. While there are police robots armed with stun guns overseas,[293] and while Taser International is investigating the creation of Taser-armed police RCVs for American use,[294] current police RCVs aren't designed for Tasers and don't have the capacity to use them. Thus, for the same reasons police couldn't get a sniper shot at Johnson, using a Taser wasn't practical. It also may not have been viable. A Taser may have been less effective against Johnson's body armor, as the probes which deliver the electricity may not have made contact with his skin.

2015), https://www.propublica.org/article/flashbangs [https://perma.cc/DV79-YBGB] ("[A]t least 50 Americans, including police officers, have been seriously injured, maimed or killed by flashbangs since 2000."); Ben Winsor, *Tear Gas Can Cause Deaths, Amputations, and Miscarriages*, BUS. INSIDER (Aug. 19, 2014, 4:31 PM), http://www.businessinsider.com/side-effects-of-ferguson-tear-gas-can-kill-2014-8 [https://perma.cc/VS9C-GZF2] (reporting that thirty-seven Egyptian protesters were killed by suffocation when tear gas was fired into vans transporting them).

289. *See* Dall. Police Dep't (@DallasPD), TWITTER (Mar. 25, 2014, 10:04 AM), https://twitter.com/dallaspd/status/448505802588831744 [https://perma.cc/M4M9-6Z8D] ("SWAT just set off a flash bang as a distraction device.").

290. *See* Elizabeth Djinis, *Woman Surrenders After Police Send Robot, Then Tear Gas Into Dallas Home*, DALL. NEWS (July 14, 2016, 3:45 PM), http://www.dallasnews.com/news/crime/2016/07/14/swat-team-mesquite-lends-dpd-hand-standoff-east-oak-cliff-home [https://perma.cc/5HQ9-G33S].

291. *See* Tristan Hallman, *Dallas Police to Be Given More Latitude to Use Tasers*, DALL. NEWS (Apr. 2015), http://www.dallasnews.com/news/crime/2015/04/19/dallas-police-to-be-given-more-latitude-to-use-tasers [https://perma.cc/JLR5-6V6L].

292. A Taser is essentially a projectile weapon; compressed gas propels the electrodes, similar to the operation of a BB gun. Tom Harris, *How Stun Guns Work*, HOW STUFF WORKS, http://electronics.howstuffworks.com/gadgets/other-gadgets/stun-gun5.htm [https://perma.cc/8CSB-36FD].

293. *See* Jeffrey Lin & P.W. Singer, *China Debuts Anbot, the Police Robot*, POPULAR SCI. (Apr. 27, 2016), http://www.popsci.com/china-debuts-anbot-police-robot [https://perma.cc/5CNH-D9JQ].

294. *See* Zusha Elinson, *Taser Explores Concept of Drone Armed With Stun Gun for Police Use*, WALL STREET J. (Oct. 20, 2016, 5:05 PM), https://www.wsj.com/articles/taser-explores-concept-of-drone-armed-with-stun-gun-for-police-use-1476994514.

Taser use may "exacerbate the situation by inducing rage in the suspect,"[295] which could have provoked the last-ditch charge down the hallway Chief Brown so feared.[296] Even if police could get a shot at him with a Taser, it may not have incapacitated him to the degree necessary to allow them to seize him. Because using a Taser against Johnson was both impractical and of questionable viability, the officers on the scene were reasonable in not using it.

A flashbang grenade is designed to disorient and momentarily blind and deafen.[297] It does not incapacitate, and it is most effective when it catches the target off guard. A flashbang is normally thrown, so the same line-of-sight problem that would make a Taser impractical would make an officer's direct delivery of a flashbang impractical. It is possible it could have been attached to the RCV that was ultimately used to kill Johnson and delivered that way, but Johnson would have been aware of the RCV's approach, as he was when the deadly payload was delivered.[298] Thus, he would have been able to prepare himself for it, deflect it, or even throw it back toward officers before it detonated. Even if it had detonated as hoped, a flashbang's value is in momentary disorientation, which allows police to act, usually breaching a room or rushing a suspect. Thus, for a flashbang to have had any tactical value in that moment, it would have required police to immediately follow it down the hallway or to come through the other door. Either way, this would expose officers to Johnson's fire. All a flashbang would have accomplished was giving officers attempting to rush Johnson a couple seconds in which Johnson may have been suffering disorientation or flash blindness (assuming his eyes were open when the flashbang detonated). But Johnson would still have been armed, angry, and extraordinarily dangerous. As a result, using a flashbang, although possibly practical, was not a viable option.

Tear gas would have been slightly more practical than a Taser or a flashbang. Tear gas can be delivered by RCV, just as the bomb was. And unlike a flashbang, which could also be remotely delivered, tear gas requires no immediate police follow-up. The purpose of the gas is to drive people out of, or away from, wherever they are by making that location painful to be in. Thus, police could conceivably have filled the hallway with gas and waited for its effects to drive Johnson from the alcove. The obvious problem is that there

295. POLICE EXEC. RESEARCH FORUM, 2011 ELECTRONIC CONTROL WEAPON GUIDELINES, 14 (2011), http://www.policeforum.org/assets/docs/Free_Online_Documents/Use_of_Force/electronic%20control%20weapon%20guidelines%202011.pdf [https://perma.cc/9PEP-YEJH].

296. *See supra* text accompanying note 85.

297. Louise Knapp, *A Stunning New Flash-Bang*, WIRED (Apr. 20, 2002, 2:00 AM), https://www.wired.com/2002/04/a-stunning-new-flash-bang [https://perma.cc/4K2F-65U7].

298. *See supra* text accompanying note 90.

is nothing to indicate Johnson would have left the alcove unarmed, or less intent on killing. As Chief Brown noted, a very real concern was that Johnson would charge police, firing as he did, and that more police would be killed.[299] Had police used tear gas, it would have very likely provoked such a charge. Tear gas is effective against a person who does not intend or want to die; it drives them from the safety of their location out into the open, and by doing so forces them to choose between throwing down their weapon or being killed when they emerge armed. But against a person who is willing or intending to die, tear gas is likely to provoke a final shootout in which many others may die. Filling the hallway with gas also would have provided Johnson with an effective shroud. Thus, if he had attempted a last charge, instead of emerging clearly visible from the alcove thirty feet from the officers' position at the end of the hallway, he might have emerged from a cloud of gas right on top of the officers, giving his final charge greater surprise and greater potential lethality. Thus, tear gas, while practical, was not a viable option. These are considerations the Dallas test would expect officers on the scene, with hours to consider their alternatives, to think of. Whether Dallas Police went through such thinking is unclear.

Because the particular geography of the El Centro hallway precluded line-of-sight weapons, and because the only reasonable inference from Johnson's actions and communication with police was that he was intent on dying that night, the nonlethal weapons known to be available to Dallas Police were not practical, not viable, or both. The final nonlethal option, a weaponless one, would be to simply wait Johnson out, letting him either die from his injuries or eventually surrender. This option was obviously available, as it requires only patience. It was also practical, in that nothing physically prevented its use. Its viability, however, is highly questionable. Johnson may have died or lost consciousness from blood loss as a result of the wounds he suffered during the first seizure. It's also possible that he would have surrendered or taken his own life, as cornered suspects sometimes do. It's unknown how much blood Johnson had lost in the four hours of the standoff, and how close he was to losing consciousness or dying as a result of it. But the other possibilities seem unlikely. From everything Johnson had done and said over the course of incident, it would be unreasonable to believe surrender a legitimate possibility. Suicide was possible, and indeed his actions over the course of the evening could be viewed as a drawn-out suicide-by-police. His statements about wanting to kill as many as possible

299. *See supra* text accompanying note 85.

suggest that if he decided on suicide, he would likely have tried to do so by attacking police positions and taking more of them with him. Thus, the option of waiting Johnson out would counteract neither the greatest threat he posed, according to Chief Brown, nor the possibility that he might trigger a bomb via cell phone. Waiting Johnson out would have allowed him to dictate if and when a final confrontation with police or a final exercise of his lethal power would occur, and it would have put any advantages that come with surprise in Johnson's hands. Thus, while waiting him out was an available and practical alternative, it was not a viable one. It would not have alleviated the threats he posed in any meaningful way, and therefore the officers' decision to forgo it was a reasonable one.

The only nonlethal option that was available, practical, and at least potentially viable, negotiation, was employed, and it failed. The other options that were available were either impractical or nonviable. Thus, this factor cannot be held to weigh against the reasonableness of the police's ultimate decision to use lethal force.

7. Whether the Suspect Posed an Imminent Threat, or Merely Could Have Posed an Imminent Threat

The circumstances of the Dallas incident were unique. If the situation, and the threat, had been confined to the hallway itself and the weapons Johnson carried, this factor may tip toward a finding of unreasonableness because in the moment Johnson was killed, he was not an imminent threat. He certainly had been one earlier in the evening, and he could have quickly become one again, but the possibility of becoming an imminent threat does not equate to being an imminent threat.

But the situation was not confined only to the circumstances of the hallway. Johnson, a man with a military background, using military weapons and military tactics, with an announced goal of killing as many as he could, repeatedly asserted he had planted bombs. It was entirely reasonable for police to believe those threats, and to believe that Johnson might at any moment detonate one of his bombs. Because of this, Johnson was an imminent threat to the officers, the staff and students still trapped in the building, and to the public at large, endangered by the bombs that Johnson claimed to have placed. That the bomb threats turned out to be empty does not delegitimize the police's belief that they were true, and does not diminish the reasonableness of acting on that belief. Thus, although no officers were directly in Johnson's line of fire at the time the RCV rolled up to him and its

C-4 payload was detonated by Dallas police officers, it was reasonable for officers to conclude that Johnson was an imminent threat to people's lives.

8. The Use of Lethal Force Was Reckless but Reasonable

Most of the *Graham* and Dallas test factors weigh in favor of finding the officers' use of lethal force reasonable, and therefore constitutional. Although officers had time to consider the situation, and deliberately plan their actions, the threats posed by Johnson both to the officers and others on the scene, and to anyone who might have been near the bombs he claimed to have planted, rose to the level of an imminent and "immediate threat to the officer[s or] . . . others."[300] Because the physical constraints of the El Centro hallway made impractical any viable, nonlethal options for seizing Johnson, and because Johnson's stated and demonstrated intentions made nonviable any practical, nonlethal options, there were no nonlethal alternatives that officers should have employed instead of resorting to lethal force.

Using a remote bomb to kill Johnson was not only a first in American law enforcement, but it was also an act of recklessness. Police killed a man they had every reason to believe had planted bombs, killing the only man who could have told them those bombs' locations. They killed a man who told them he carried bombs in a manner that very possibly could have detonated any bombs he was carrying. Black's Law Dictionary defines recklessness as "[c]onduct whereby the actor does not desire harmful consequences but nonetheless foresees the possibility and consciously takes the risk."[301] This is what Dallas Police did: Aware of the risks, they nonetheless detonated their bomb.

The decision was reckless, but under the circumstances, a reckless act was the most reasonable option available. The Dallas test requires the officers, both those on the scene and those in the department's Emergency Operations Center, to consider all of the competing concerns discussed above and make a reasonable decision after having done so. They had to take into account the fact that if Johnson had planted bombs, cell phone detonation was quite likely, whereas Johnson revealing the location of timed or mechanically triggered bombs to officers during questioning was relatively unlikely, considering everything Johnson had said and done up to that point (plus the fact that even if Johnson was willing to talk, questioning would be impossible for a significant amount of time, as Johnson's injuries—which

300. Tennessee v. Garner, 471 U.S. 1, 11 (1985).
301. *Recklessness*, BLACK'S LAW DICTIONARY 1462 (10th ed. 2014).

police were aware of, having followed a trail of his blood into the building—would have required hospitalization and possibly surgery). They had to take into account the likelihood of a last rampage charge at officers, and weigh that against the likelihood that Johnson had explosives on his person, and the likelihood that their improvised bomb would detonate those explosives. And they had to take into account the fact that the longer they waited, the more time it gave Johnson to engage them on his own terms, and in a way most to his own tactical advantage. While the decision was not without grave risks, it was reasonable for police to view every alternative as being worse.

Because the police decision to use force, while a dangerous one, was reasonable under the *Graham* standard and under the Dallas test, the seizure of Johnson via remotely detonated bomb was a constitutional one.

CONCLUSION

The use of RCVs by police has been increasing since their introduction in the 1970s. Although, to date, there has only been one incident in which police employed lethal force via RCV, it is likely not the last. Their capacity to deliver lethal force—by improvisation, as was the case in Dallas, or by design, as is the case with many currently in development—is increasing, and American law enforcement agencies are increasingly turning to RCVs and robots to perform more functions. The desire to engage a potential threat from a position of safety is an understandable one, and as RCVs allow police to do so, it's likely they will elect to send machines into situations with greater frequency.

Now that police have the ability to use lethal force remotely and from a position of safety, the law analyzing the constitutionality of the use of force must be updated. The Dallas test I propose would require courts to analyze whether a decision was split-second or made with time to consider. If the latter is found, courts would analyze whether alternative less-forceful methods of seizure were available and, if so, whether they were practical in the moment. It would also place heightened scrutiny on the difference between an imminent threat and the possibility of imminent threat, a line that is rarely currently drawn.

Court decisions determining what is reasonable under the Constitution must, by their nature, be retroactive. Courts do not issue advisory opinions or predictive rulings. But the increasing militarization of police forces, and the very real possibility that weaponized, remotely controlled vehicles will soon be common equipment for law enforcement, demand that the current

standard under *Graham* and *Garner* be bolstered to properly examine use of force in the age of remote and robotic policing. It took more than a century for the law to catch up to the reality that police carried firearms and that the use of firearms changed what was reasonable. The law must not wait another century to acknowledge and respond to the new reality that police can kill remotely. The Dallas test I propose is one possible framework for analyzing the constitutionality of the use of force when police have time to consider their options, and it is especially applicable to the inevitable increase in police use of remotely controlled lethal force.