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EXCESSIVE LETHAL FORCE

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INTRODUCTION

On July 7, 2016, police officers in Dallas, Texas killed a gunman suspected of having just murdered five area police officers and wounded several others.[1] The use of lethal force to end the hours-long standoff between police and the gunman appeared to be justified in the circumstances.[2] The heavily armed gunman barricaded himself in an occupied college building, refused to surrender, and threatened to kill more officers.[3] He also claimed to have set bombs nearby.[4] Considering the heinous nature of the crimes that the gunman allegedly committed, the incident would have been notable even if the police had used a firearm to kill the gunman. But there were a few unique twists to the case. The police did not shoot the suspect.[5] Instead, they retrofitted a military robot to carry a one-pound brick of C4, a plastic explosive.[6] Officers operating the robot sent it into the area to approach the barricaded suspect. Then, after visualizing the scene through a video feed from the robot and confirming that the robot was next to the suspect, an officer remotely detonated the bomb. As expected, the suspected gunman was literally blown up.[7] Many commentators immediately thereafter concentrated on debating various legal and ethical issues concerning police using a robot to kill in a domestic police situation.[8] I seek

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[1] Regina F. Graham, *Inside the Bullet-Riddled Community College Where Dallas Cop-Killer Micah Johnson Died When a Police Robot Blew Him Up After He Murdered Five Officers*, DAILY MAIL (July 20, 2016, 8:46 AM), http://www.dailymail.co.uk/news/article-3698498/Damage-shown-blast-stopped-police-killing-sniper.html [https://perma.cc/V4F3-JBWQ].

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *See, e.g.*, Todd Feathers, *Police: Robot Use in Dallas Justified*, SENTINEL & ENTERPRISE (July 17, 2016, 6:55 AM), http://www.sentinelandenterprise.com/news/ci_30136930/police-robot-use-dallas-justified [https://perma.cc/WDG4-2S7T] (raising concerns about whether robots might be asked to use more force than a police officer would); Nadia Prupis, *Legal Experts Raise Alarm over Shocking Use of "Killer Robot" in Dallas*, FINAL CALL (July 14, 2016, 10:57 AM),

here to address what should be at least an equally pertinent question: is it constitutionally permissible for police to use a bomb to slaughter a suspected felon?

Most of the reports about the legality and ethics of the Dallas scene have not considered this question. The few that have cite legal experts as being confident in their responses in the affirmative. More specifically, the legal experts consistently assert that, as a matter of law, so long as a police officer has a constitutional right to use lethal force on a dangerous felon, then the means of that force is irrelevant.[9] The esteemed Professor Eugene Volokh agrees, commenting that the deadly force rule "applies just as much to bomb robots as it does to guns."[10] Even a senior policy analyst with the American Civil Liberties Union concurs, providing a succinct summary of these legal experts' common analysis: "As a legal matter, the choice of weapon in a decision to use lethal force does not change the constitutional calculus, which hinges on whether an individual poses an imminent threat to others, and whether the use of lethal force is reasonable under the circumstances."[11]

This Essay challenges this depiction of the current state of constitutional law. It reviews recent Supreme Court opinions on excessive force cases and concludes that there is no generalized and singular lethal force rule in constitutional doctrine. At one point in time, there may have existed an affirmative, per se rule justifying lethal force.[12] Nonetheless, Supreme Court precedent squarely indicates that such a rule does not now

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http://www.finalcall.com/artman/publish/National_News_2/article_103216.shtml [https://perma.cc/2HXU-N89J] (arguing that problems arise from the fact that police would be programming machines designed to minimize harm to maximize harm instead); Hope Reese, *Police Use Robot to Kill for First Time; AI Experts Say It's No Big Deal but Worry About Future*, TECH REPUBLIC (July 14, 2016, 4:00 AM), http://www.techrepublic.com/article/police-use-robot-to-kill-for-first-time-ai-experts-say-its-no-big-deal-but-worry-about-future/ [https://perma.cc/5BVQ-K8QS] (discussing the potentially dangerous implications behind autonomous weapons performing unexpected actions).

[9] *See, e.g.*, Michael C. Dorf, *Is It Proper for Cops to Use Killer Robots?*, NEWSWEEK (July 15, 2016, 7:50 AM), http://www.newsweek.com/it-proper-cops-use-killer-robots-480482 [https://perma.cc/7FUZ-4FCH] (asserting that guns and explosives are legally the same in police lethal force cases); Jeff John Roberts, *Why It's Legal for Police to Kill with a Robot*, FORTUNE (July 9, 2016), http://fortune.com/2016/07/09/robot-bomb/ [https://perma.cc/X9W3-83KL] (quoting Professor Ryan Calo as stating that the bomb raises no new legal issues); Erik Ortiz, *Dallas Police Used Robot with Bomb to Kill Ambush Suspect: Mayor*, NBC NEWS (July 8, 2016, 4:26 PM), http://www.nbcnews.com/storyline/dallas-police-ambush/dallas-police-used-robot-bomb-kill-ambush-suspect-mayor-n605896 [https://perma.cc/X9W3-83KL] (quoting Professor Seth Stoughton as doubting that the "method of delivery" of death is legally relevant).

[10] Michael Nunez, *Should Police Use Robots to Kill?*, GIZMODO (July 8, 2016, 6:47 PM), http://gizmodo.com/should-police-use-robots-to-kill-1783352496 [https://perma.cc/Z4U7-UN3T].

[11] *Id.*

[12] *See* Tennessee v. Garner, 471 U.S. 1, 11 (1985).

stand.[13] All police use of force cases are subject to a reasonableness balancing test. In addition, within that balancing test, the type and quantum of force used are factors that remain relevant—even for cases involving lethal force—when assessing whether an officer's specific actions constitute excessive force. In other words, American law does indeed recognize the concept of excessive lethal force. Hence, I contend that an officer's use of a gun to shoot a suspect is not synonymous with blowing up a suspect with a bomb.

This Essay is organized as follows. Part I provides an overview of Supreme Court excessive force jurisprudence and introduces the balancing test. Part II argues that, under the balancing test, it is possible for police to use unconstitutionally excessive lethal force. Part III discusses the likely physical effects of explosives like those used in Dallas and argues that police use of a bomb can constitute unconstitutional excessive force in certain circumstances.

I. CONSTITUTIONAL STANDARDS REGARDING EXCESSIVE FORCE

The orienting constitutional provision used to judge whether police used excessive force when seizing a person derives from the Fourth Amendment.[14] The Fourth Amendment protects against "unreasonable searches and seizures."[15] It is well settled that police action in apprehending a suspected criminal by killing him qualifies as a seizure for Fourth Amendment purposes.[16]

The primary standard for judging excessive force in Fourth Amendment cases weighs the objective reasonableness of the officer's actions, considering the totality of the circumstances.[17] The objective nature of the

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[13] *See* Mullenix v. Luna, 136 S. Ct. 305, 309 (2015) (per curiam) (arguing that *Garner*'s statement about the reasonableness of using deadly force on a sufficiently dangerous felon was too general a comment to qualify as a clearly established rule); Plumhoff v. Rickard, 134 S. Ct. 2012, 2020–22 (2014) (citing *Garner* only to clarify that the Court considers a number of factors in cases involving deadly force); Scott v. Harris, 550 U.S. 372, 382 (2007) ("*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'").

[14] Graham v. Connor, 490 U.S. 386, 388 (1989).

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

[16] *Garner*, 471 U.S. at 7. Interestingly, neither the Eighth Amendment nor the Fourteenth Amendment provide protections in a scenario such as that in Dallas. The Eighth Amendment's Cruel and Unusual Punishment Clause applies only to prisoners following an adjudication of guilt. *See* City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983). The Fourteenth Amendment's substantive Due Process Clause, which contains a "shocks-the-conscience" test for claims involving seizures, generally applies to pre-trial detainees, such as those residing in jail. *See, e.g.*, County of Sacramento v. Lewis, 523 U.S. 833, 849, 854 (1998). This leaves the Fourth Amendment as the sole relevant constitutional standard for judging the actions taken by police when seizing suspects in the field.

[17] *Garner*, 471 U.S. at 8–9.

test means that the acting officer's "underlying intent or motivation" is immaterial.[18] The objective reasonableness test requires the court to "balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."[19]

A few of the relevant factors commonly utilized in adjudging the extent of the government's interest in using force to seize a person include the severity of the crime, whether the suspect is a threat to others, and whether the suspect is physically resisting arrest or fleeing from police.[20] Certainly, police may use greater force to seize suspects who pose a greater threat to others or those who resist the police.[21]

Excessive force claims regarding nondeadly police actions to seize a person have long been particularly concerned with the type and amount of force used. Courts have devoted a substantial amount of time and text to analyzing even minor instances of police use of force.[22] A significant number of legal opinions are devoted to judging specific forms of force, such as the use of batons, handcuffs, hogties, or pepper spray.[23] Other opinions focus on what are sometimes perceived as more intermediate forms of force, such as police dogs, tasers, beanbag projectiles, or carotid chokeholds.[24]

Furthermore, judges often do not treat all instances of each of these forms of force equally. For example, the use of a police baton may or may not be justified based on how the baton is used and the degree to which a suspect was cooperating with the police officer.[25] Handcuffing a suspect may be appropriate in many cases of legal arrests, but leaving handcuffs on too tightly and for too long may become unreasonable.[26] These sorts of judgments on the method *and* quantum of force for nonlethal force cases are applied to all of the ways police physically seize suspects.

Legal commentators on the Dallas bombing who endorse the use of any type of force once lethal force is justified would likely not doubt that the form and magnitude of force remain relevant in judging the permissibility of nonlethal force. The commentators seem to believe that when lethal force is

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[18] *Graham*, 490 U.S. at 397.

[19] *Garner*, 471 U.S. at 8 (citing United States v. Place, 462 U.S. 696, 703 (1983)).

[20] *Graham*, 490 U.S. at 396.

[21] *Id.*

[22] *See generally* MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION CLAIMS AND DEFENSES § 3.12[D] (4th ed. Supp. 2017) (describing how courts have ruled on varying degrees of severity of police use of force).

[23] *Id.* at § 3.12[D][1][q].

[24] *Id.* at § 3.12[D][3].

[25] *Id.* at n. 2542.1.4.

[26] *Id.* at § 3.12[D][3][e].

legally justified, some kind of on/off switch is triggered,[27] and once triggered, police may permissibly use any form of force that may be at hand.

However, this view of the law no longer appears to be accurate—if it ever was in the first instance. A focused review of the evolution of the Supreme Court's doctrine on Fourth Amendment excessive force cases demonstrates that the means and magnitude of the lethal force used are relevant to ascertaining whether it was excessive considering the circumstances.

A. Tennessee v. Garner

The notions that there is a single deadly force rule and that deadly force comprises a monolithic category of force arguably derive some validation from a Supreme Court opinion issued three decades ago. In *Tennessee v. Garner*, the Court overturned the common law rule that it was per se reasonable for police to use deadly force to stop all fleeing felons.[28] The *Garner* Court specifically found that it constituted excessive force for an officer to shoot a small-statured, fleeing burglary suspect in the back of the head.[29]

Nonetheless, the *Garner* Court conjectured that it would be reasonable to use deadly force to prevent an escape if "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others."[30] This latter statement is likely the basis for the contention that Fourth Amendment doctrine recognizes a single affirmative rule triggering the rightful use of lethal force to seize a sufficiently dangerous felon. Indeed, without further qualifiers, this language in *Garner* might lead one to conclude that the form of deadly force is not an issue because the statement generically refers to "deadly force." In other parts of the *Garner* opinion, the Court likewise seemed to treat death in a unitary fashion. The opinion confirmed that the "intrusiveness of a seizure by means of deadly force is unmatched."[31] Further, a "suspect's fundamental interest in his own life need not be elaborated upon. The use of deadly force also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment."[32]

On the other hand, the *Garner* decision—and multiple Supreme Court decisions that followed it—contain relevant standards and critical

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[27] *See supra* notes 9–11and accompanying text.
[28] 471 U.S. 1, 19 (1985).
[29] *Id*. at 21.
[30] *Id.* at 11.
[31] *Id.* at 9.
[32] *Id*.

observations that suggest that the law does not treat all forms of deadly force equally. In fact, determining whether the lethal force employed in a particular situation amounts to excessive force calls for a balancing test that involves considering the form and quantum of the force used.

B. Balancing Test

Since *Garner*, the Supreme Court has confirmed that all police use of force cases, including those clearly involving lethal force, are subject to a balancing test. In *Plumhoff v. Rickard*, a police officer fatally shot the driver of a fleeing vehicle.[33] The Court concluded that the force used was reasonable under the circumstances, and cited *Garner* only to support applying the balancing test to cases involving lethal force.[34] In *Tolan v. Cotton*, the police shot a resisting suspect, causing him life-altering injuries.[35] Like *Plumhoff*, the *Tolan* opinion mentioned *Garner* merely to justify applying the balancing test.[36] In *City and County of San Francisco v. Sheehan*, the Court affirmed the reasonableness of an officer's decision to use "potentially deadly force" by shooting the suspect multiple times.[37] The Court again did not rely upon *Garner* in its decision on this issue, but instead referred to discussions of the reasonableness test from *Plumhoff*.[38]

In light of the Court's repeated insistence that the balancing test be applied to all police use of force cases, the remark in *Garner* seeming to issue a per se rule that it is reasonable to use lethal force to seize a sufficiently dangerous felon now appears to be an anomaly. The Court has cited the purported *Garner* lethal force "rule" merely one time since *Garner*, and only in dicta.[39] Rather, the Supreme Court has twice specifically rejected the idea that *Garner* established any special doctrine for deadly force. In *Scott v. Harris*, the majority reasoned that "*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'"[40] Instead, the *Scott* Court characterized the relevant comment in *Garner* as pontificating "about the factors that *might have* justified shooting the suspect in that case."[41] The *Scott* opinion went on to state that "[w]hether or not [the officer's] actions constituted application

[33] 134 S. Ct. 2012, 2018 (2014).
[34] *Id*. at 2020–22.
[35] 134 S. Ct. 1861,1864 (2014).
[36] *Id*. at 1865–66.
[37] 135 S. Ct. 1765, 1775 (2015).
[38] *Id*.
[39] Brosseau v. Haugen, 543 U.S. 194, 197–98 (2004) (per curiam).
[40] 550 U.S. 372, 382 (2007).
[41] *Id*. at 383.

of 'deadly force,' all that matters is whether [his or her] actions were reasonable."[42]

Similarly, in *Mullenix v. Luna*, the Court confirmed that *Garner*'s statement about the reasonableness of using deadly force on a sufficiently dangerous felon was too general a comment to be applied to any specific circumstances or to qualify as a clearly established rule.[43] Considering the Court's various condemnations of any per se rule, there appears to no longer be a viable argument that *Garner* established a particular rule for deadly force cases that differs from the balancing test discussed above.

Consistent therewith, several lower courts, relying upon the Supreme Court's emphasis on applying the balancing test to all excessive force cases, have expressly recognized that no distinct deadly force rule survived *Garner*. These courts construe the Supreme Court rulings in *Scott* or *Plumhoff* as signifying that there is no strict rule that differentiates lethal from nonlethal force in excessive force cases. The single question is whether the force was objectively reasonable in the situation.[44] As an example, a district court recently acknowledged that since the reasonableness review is the same whether or not the force constitutes deadly force, the question is whether the force used was excessive based on the perspective of a reasonable officer at the scene.[45]

In sum, the entrenchment of the balancing test and the Supreme Court's departure from any magical on/off switch specifically addressing lethal force cases means that any supposed per se rule is obsolete. The balancing test also means that there is no monolithic definition of deadly force. If all types of lethal force were equal, then there would be no need to consider the nature and quality of the intrusion.

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[42] *Id*. *See also* Graham v. Connor, 490 U.S. 386, 396 (1989) (citing Bell v. Wolfish, 441 U.S. 520, 559 (1979)) (stating that the Fourth Amendment's reasonableness test "is not capable of precise definition or mechanical application" and therefore "requires careful attention to the facts and circumstances of each particular case").

[43] 136 S. Ct. 305, 309 (2015).

[44] Terranova v. New York, 676 F.3d 305, 308 (2d Cir. 2012) (noting that excessive force claims are judged under the Fourth Amendment objective reasonableness standard); Price v. Sery, 513 F.3d 962, 968 (9th Cir. 2008) ("the touchstone of the reasonableness inquiry was not the subjective strength of the officer's belief, but its grounding in the objective facts"); Peguero v. City of New York, No. 12-CV-5184 (JPO), 2015 WL 1208353, at *8 (S.D.N.Y. Mar. 17, 2015) (discussing an analysis of the totality of circumstances under an objective reasonable test); Stauffer v. Simpkins, No. 13-1094, 2015 U.S. Dist. LEXIS 18751, at *8 (E.D. Pa. Feb. 13, 2015) (explaining that a series of Supreme Court cases show that an objective reasonableness test applies in cases involving deadly force).

[45] Lively v. Theriot, No. 6:13-2756, 2015 WL 3952159, at *4 (W.D. La. June 29, 2015).

II. EXCESSIVE LETHAL FORCE

Assume for a moment both the existence of a per se rule and the following factual circumstances: an officer uses deadly force to seize a fleeing or fighting suspect who poses a threat to the officer or others. Does that mean that there is no legal concept whereby the means or quantum of force used could constitute excessive lethal force, and thus be unreasonable and unconstitutional?

A district court recently discussed whether the means or quantum of lethal force mattered.[46] The Middle District of Tennessee asserted that *Plumhoff* "rejected the argument that where deadly force is reasonable, a police officer can still be liable for using too much deadly force."[47] According to the court, under *Plumhoff*, if an officer "was justified in using deadly force, the sheer volume of bullets he used will not provide an independent avenue to liability, no matter how excessive it may seem."[48]

But this reading of *Plumhoff* is mistaken. The Supreme Court in *Plumhoff* qualified the relevant statement as follows: "It stands to reason that, if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting *until the threat has ended*."[49] Importantly, the *Plumhoff* Court further commented that the Fourth Amendment would have been violated if the officers "had initiated a second round of shots after an initial round had clearly incapacitated" the suspect or the suspect "had clearly given himself up."[50]

Indeed, the Court in *Plumhoff* actually entertained the argument that, even if deadly force was initially permissible, the officers still used too much force. The *Plumhoff* opinion first concluded on the merits that it was reasonable for the officer to shoot at the fleeing felon.[51] Next, the opinion considered the argument that "even if the use of deadly force was permissible, [the officers] acted unreasonably in firing a total of 15 shots."[52] The Court did not reject this claim out of hand, but analyzed whether the police fired an inappropriate number of shots, i.e., whether they had used excessive lethal force.[53] The majority ruled that firing fifteen shots was not unreasonable considering the suspect continued to attempt to flee throughout

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[46] Smith v. Cumberland Cty., No. 2:14-cv-00049, 2015 WL 7302513, at *6 (M.D. Tenn. Nov. 18, 2015).

[47] *Id.*

[48] *Id.*

[49] Plumhoff v. Rickard, 134 S. Ct. 2012, 2022 (2014) (emphasis added).

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

the period the shots were fired.[54] The Court likely would not have entertained the argument about excessive deadly force, or would have summarily dismissed it, if all forms and quanta of lethal force were legally permissible once any use of lethal force was justified.

A. Framing the Form and Quantum of Lethal Force

The Supreme Court in many cases has not treated deadly force as some monolithic category. The *Garner* Court itself considered the form of force used to be important. The *Garner* majority pointed out that "this Court, by balancing the extent of the intrusion against the need for it, has examined the reasonableness of the *manner* in which a search or seizure is conducted."[55] Further, the Court noted that, because the balancing test requires an analysis of the intrusion, "it is plain that reasonableness depends on not only when a seizure is made, but also *how* it is carried out."[56] The *Garner* opinion also cited precedent whereby "a particular *sort* of search or seizure" had been found reasonable or not.[57]

Later Supreme Court opinions also focus on the form of force used. In *Scott*, the Court held that the underlying reasonableness test, whether applied to cases of deadly force or not, requires weighing "the use of a particular *type* of force in a particular situation."[58] Notice the Court's concern in *Garner* and *Scott*, which both entailed police employing deadly force, with the manner or type of seizure and how it was carried out. These rather similar statements in *Garner* and *Scott* confirm that both the form and quantum of force remains a relevant aspect of Fourth Amendment excessive force analysis, regardless of whether or not the act amounted to "lethal force."

Indeed, in cases where the officer's actions endanger human life, the Supreme Court tends to frame the issue in a way that expressly chronicles the form and amount of deadly force used. For example, in *Brower v. County of Inyo*, the Court addressed a scenario involving police chasing the driver of a stolen car who led them on a high-speed chase at night.[59] To stop the fleeing driver, the officers in *Brower* set up a roadblock by parking a tractor trailer across all lanes and behind a curb in the road, with the truck's lights turned off.[60] In addition, they placed a patrol car next to the parked truck with its headlights shining so that an oncoming driver would be blinded and

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[54] *Id.*

[55] Tennessee v. Garner, 471 U.S. 1, 7–8 (1985) (emphasis added).

[56] *Id.* at 8 (emphasis added).

[57] *Id.* at 9 (emphasis added).

[58] Scott v. Harris, 550 U.S. 372, 382 (2007) (emphasis added).

[59] 489 U.S. 593, 594 (1989).

[60] *Id.*

unable to see the truck in its path.[61] The fleeing suspect promptly rounded the bend at a fast pace, crashed into the truck, and died.[62] The Court in *Brower* did not make any conclusions on the reasonableness of this action (because the issue at hand was whether the roadblock constituted a seizure).[63] But the majority did comment that the manner in which the police had set up the roadblock, particularly the risk and likelihood of death to the suspect, would be relevant to the question of reasonableness, which it left to the court of appeals on remand.[64]

In *Brosseau v. Haugen*, the Court indicated that the issue before it was whether it was reasonable for an officer "to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area [were] at risk from that flight."[65] Notice that, in this conceptualization, the fact that the method of force—a gunshot—was expressly incorporated into the specific question posed. In *Scott*, the Court framed the particular issue as whether it was reasonable to "attempt to stop a fleeing motorist from continuing his public-endangering flight by ramming the motorist's car from behind."[66] Similarly, in *Plumhoff*, the Court framed the issue as whether the officers violated the Fourth Amendment when they "shot the driver of a fleeing vehicle to put an end to a dangerous car chase."[67] Again, in these latter two cases the Court fixated on the specific form and amount of lethal force to end high-speed chases.

Hence, at least four times the Court carefully framed the balancing inquiry as not about whether any affirmative lethal force rule was triggered. Instead, it considered the particular form and amount of force used in light of the circumstances surrounding the police's interaction with the dangerous suspects. Additionally, the Court indicated in *Scott* that *Garner* could not provide a controlling precedent where the form of lethal force was different. According to the Court, "*Garner* had nothing to do with one car striking another or even with car chases in general . . . . A police car's bumping a fleeing car is, in fact, not much like a policeman's shooting a gun so as to hit a person."[68] The next Section provides additional support underlying this Essay's disagreement with any conceptualization of deadly force as comprising some discrete classification.

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[61] *Id*.

[62] *Id*.

[63] *Id.* at 594, 598.

[64] *Id*. at 599–600.

[65] 543 U.S. 194, 199–200 (2004).

[66] Scott v. Harris, 550 U.S. 372, 374 (2009).

[67] Plumhoff v. Rickard, 134 S. Ct. 2012, 2016–17 (2014).

[68] *Scott*, 550 U.S. at 383 (quoting Adams v. St. Lucie Cty. Sheriff's Dept., 962 F.2d. 1563, 1577 (11th Cir. 1992) (Edmonson, J., dissenting), *vacated* 982 F.2d 472 (11th Cir. 1993)).

B. Intrusions upon Bodily Integrity

Courts regularly parse the means and quantum of police force used as a constitutional matter. The Fourth Amendment requires it. The Amendment protects one's privacy and dignity against unwarranted intrusion by governmental officials. Thus, when an officer's action involves an assault on a suspect's body, the Supreme Court has recognized that a factor in determining its reasonableness is "the extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity."[69] This factor signifies again that all forms of lethal force are not synonymous for Fourth Amendment purposes.

The Court relied on this factor in *Winston v. Lee* to hold that forced surgery to extract a bullet from the defendant's chest to be used as evidence constituted an unreasonably intrusive procedure.[70] The *Winston* Court distinguished a previous case that sanctioned a forced blood draw to test for intoxicants based on its conclusion that surgically removing a bullet was far more intrusive and medically risky than drawing blood.[71]

The following excerpt from a lower court's discussion of the effect of a taser is another example of the relevance of the physical consequences of a particular form of force:

> The incapacitating effects of tasers in dart mode entail unique intrusions into one's bodily integrity that increase with prolonged exposure. In addition to the pain inflicted, tasers in dart mode result in total loss of control over one's own body, immobilization caused not by any external overpowering force, such as a police control hold, but rather by a forced internal separation of the mind and body.[72]

C. Lethal Force Is Not a Monolithic Category

Determining whether the specific police action constitutes lethal force in the first place is likely a red herring. Definitional issues suggest that courts should not focus on whether the force used was "deadly" force. The Supreme Court has not clearly defined the term as it is used in Fourth Amendment seizure law. Lower courts have tended to define deadly force as an action that carries a "substantial risk of death or serious bodily injury."[73] Yet this definition is not helpful in many cases, as determining the exact risk of injury resulting from police conduct is nearly impossible. In the words of the Court

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[69] Winston v. Lee, 470 U.S. 753, 761 (1985).

[70] *Id*. at 756, 766.

[71] *Id*. at 761, 763–64.

[72] De Contreras v. City of Rialto, 894 F. Supp. 2d 1238, 1254 (C.D. Cal. 2012).

[73] Terranova v. New York, 676 F.3d 305, 308 (2d Cir. 2012).

in *Scott*, "there is no obvious way to quantify the risks" created by an officer's specific action.[74]

Furthermore, many courts have understandably been unwilling to strictly classify particular types of weapons as always being deadly or not deadly.[75] The rationale tends to be that any of the tools typically employed by police can in fact be used in a highly risky manner and that many types of force may thus result in the suspect's death.[76] Even tools that were specifically created to render nondeadly force (such as police dogs, tasers, or projectile weapons) can be used in an unusual way to create a substantial risk of serious injury or death.[77] In contrast, those forms of force that are designed to pose a high risk of serious injury or death, such as firearms, do not always result in serious injury or death. Recognizing these points, some courts refer to methods as "more" or "less" lethal than others.[78] The Supreme Court in *Scott*, for instance, recognized that using a police car to ram a fleeing motorist's car off the road might "pose[] a high likelihood of serious injury or death" to the motorist, "though not the near *certainty* of death posed by, say, shooting a fleeing felon in the back of the head."[79]

In sum, labeling the level (e.g., nonlethal, intermediate, lethal) of force used is not particularly useful. Rather, as Justice Scalia pointed out in his concurrence in *Mullenix v. Luna*, defining police use of force as lethal or not should not be an orienting focus.[80] Instead, the relevant question is simply whether the officer's actions were reasonable under the circumstances, and that question is to be answered using the balancing test.[81] The balancing test is likely why the Court in *Scott* opined that other factors might be relevant in weighing the reasonableness of the officer's actions in terms of the level of

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[74] Scott v. Harris, 550 U.S. 372, 383–84 (2007).

[75] *See, e.g.*, Blake v. City of New York, No. 05 Cv. 6652 (BSJ), 2007 WL 1975570 (S.D.N.Y. July 6, 2007) (indicating whether a police dog constituted deadly force depended on the factual circumstances); Otero v. Wood, 316 F. Supp. 2d 612, 624 (S.D. Ohio 2004) (noting wooden baton round firings could constitute lethal force depending on whether they were directly or indirectly aimed at a person).

[76] *See* Peabody v. Perry Twp., No 2:10-cv-1078, 2013 U.S. Dist. LEXIS 46344, at *14 (S.D. Ohio Mar. 29, 2013) (discussing that a taser could create deadly force).

[77] Thomson v. Salt Lake Cty., 584 F. 3d 1304, 1315 (10th Cir. 2009); Smith v. City of Hemet, 394 F.3d 689, 707 (9th Cir. 2005).

[78] *See, e.g.*, Mullenix v. Luna, 136 S. Ct. 305, 311 (2015) (per curiam) ("The court also rejected the notion that the deputy should have first tried less lethal methods, such as spike strips."); Mercado v. City of Orlando, 407 F.3d 1152, 1160 (11th Cir. 2005) (describing a weapon as "'less lethal' munition"); Whitfield v. City of Newburgh, No. 08-CV-8516 (RKE), 2015 U.S. District LEXIS 169667, at *27–28 (S.D.N.Y. Dec. 17, 2015) (crediting police dogs and tasers with helping police avoid "comparatively more lethal force").

[79] Scott v. Harris, 550 U.S. 372, 384 (2007).

[80] 136 S. Ct. at 312 (Scalia, J., concurring).

[81] *Id.* at 313.

risk to the suspect. It conjectured that a higher probability of a suspect's death may be justifiable if, as in the factual circumstances of *Scott*, a greater number of innocent lives were at stake.[82] This suggests there is no magical threshold in terms of the level of risk for an action to constitute deadly force as a general rule, and that in any case the threshold in terms of the likelihood of the risk in any particular case may be on a sliding scale considering other foreseeable consequences.

The concept of excessive lethal force is not one drawn from whole cloth. Excessive deadly force has been recognized in military situations.[83] A political scientist speaking about killing in wars and times of civil unrest coined the term "extra-lethal violence," which she defines as "physical acts committed face-to-face that transgress shared norms and beliefs about appropriate treatment of the living as well as the dead."[84] This idea of extra-lethal violence can assuredly be applied to excessive force cases in a domestic policing context. Fourth Amendment doctrine can act as a source of societal norms and beliefs concerning a person's justifiable interests in his or her own privacy and bodily integrity.

Societal and judicial disapproval of police use of gratuitous violence also supports the conclusion that police use of excessive lethal violence can be unconstitutional. Judges have recognized that force that is unnecessary and disproportionate may be excessive.[85] This conclusion is in line with the purpose of the balancing test, as excessive force by definition cannot fulfill any legitimate governmental interest.[86]

There is an additional ethical cliff. If the assertion was accurate that all forms of lethal force are synonymous in domestic policing, then police could use any instrument at their disposal or wreak needless havoc on a suspect's mind and body, regardless of how shocking or against popular norms it may be. Could it really be deemed reasonable for police on the streets to engage in gratuitously gory forms of killing, choose unnecessary and disproportionately offensive methods, or use torture? Imagine law enforcement officers on America's streets using such primitive methods as beheading, scalping, stoning, or lynching, or employing biological weapons.

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[82] *Scott*, 550 U.S. at 384.

[83] Joseph Florczak, *A Soldier's-Eye View of the Homefront: Examining Domestic Military Laws Through the Lens of Military Doctrine*, 87 NOTRE DAME L. REV. 2191, 2194 (2012).

[84] Lee Ann Fujii, *The Puzzle of Extra-Lethal Violence*, 11 PERSP. ON POL. 410, 411 (2013).

[85] *See, e.g.*, Fontana v. Haskin, 262 F.3d 871, 879 (9th Cir. 2001) (raising the possibility that force used when transporting a suspect might be excessive); Williams v. Canady, No. 5:10-CV-558-FL, 2014 U.S. Dist. LEXIS 1421, at *20 (E.D.N.C. Jan. 7, 2014) (noting that use of force against an unarmed suspect may lead to the force being excessive).

[86] Phelps v. Coy, 286 F.3d 295, 301 (6th Cir. 2002); Burbank v. Davis, 227 F. Supp. 2d 176, 188 (D. Me. 2002).

The idea that some sort of lethal force trigger would automatically permit any of those nefarious methods offers too much of a slippery slope into even greater absurdity and carnage. Of relevance, too, is that excessive lethal force cases involve violence perpetrated against someone who has not been tried or convicted of any offense.

III. BLAST INJURIES AND EXCESSIVE LETHAL FORCE

As of the time of this writing, Dallas officials had not yet revealed any information about the condition of the suspect's body after the explosion. Still, officials have disclosed the amount and type of explosive material used, described the site and the position of the suspect preceding the detonation, and permitted news agencies to tour and photograph the scene afterward (except for the suspect's body).[87] Together, this information can be used to deduce the possible effects of the explosion on the suspected gunman's body.

Dallas police detonated a one-pound block of C4 next to the suspect, who was at the time up against a wall in a confined area of a college building.[88] C4 is a common type of plastic explosive, typically used in military settings or in terrorist activities.[89] C4 is classified as a high-order explosive, meaning that its initiation detonates into an explosive shock wave with blast effects.[90] To simplify, after a C4 explosion, positive blast pressure occurs with expanding gases rolling out in a wave from the point of detonation at an extreme velocity, creating a path of destruction along its way.[91] The wave then inverts as a negative blast of suction in which a vacuum of pressure forms toward the point of detonation.[92]

The effects of a high-order explosive device, such as C4, are magnified in a confined environment. This means that in a closed space its destructive impact multiplies beyond that directly caused by the explosive on its own.[93] Researchers in a controlled experiment set off a one pound C4 explosive in

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[87] *See* Graham, *supra* note 1.

[88] *Id.*

[89] Tom Harris, *How C-4 Works*, HOW STUFF WORKS, http://science.howstuffworks.com/c-42.htm (last visited Apr. 4, 2017) [https://perma.cc/ZSK5-DD2F].

[90] Graham, *supra* note 1.

[91] FED. EMERGENCY MGMT. AGENCY, REFERENCE MANUAL TO MITIGATE POTENTIAL TERRORIST ATTACKS AGAINST BUILDINGS 4-1 (2003), http://www.fema.gov/media-library/assets/documents/2150 [https://perma.cc/2RRT-855F].

[92] Jeffrey A. Slotnick, Explosive Threats and Target Hardening Understanding Explosive Forces, It's [sic] Impact on Infrastructure and the Human Body at the Fourth International Symposium on Tunnel Safety and Security, 22 (Mar. 17–19, 2010), http://hemmingfire.com/news/fullstory.php/aid/846/Explosive_Threats_and_Target_Hardening_Understanding_Explosive_Forces,_It_92s_Impact_on_Infrastructure_and_the_Human_Body.html [https://perma.cc/WT4R-REV5].

[93] *Id*. at 23.

a confined, ten by eight by eight foot rectangular steel bunker.[94] The size of the bomb and the area circumference in the experimental design appear comparable to the device and enclosed space in which the Dallas bombing occurred.[95] The results of the experiment showed that overpressurization effects after the initial detonation subsequently caused an implosion in the center of the space, which then radiated a secondary pressure wave outwards.[96] The shockwaves then reflected off the walls simultaneously and moved inwards then outwards repeatedly with significant magnitudes of force.[97]

Overpressurization can propel nearby human bodies long distances.[98] In confined spaces, the blast may slam bodies into walls, ceilings, or floors.[99] The force of a blast wave and its after effects can, depending on the circumstances, cause multiple external and internal injuries.[100] Bomb blasts are relatively unique in their ability to impose catastrophic, multi-systemic injuries simultaneously.[101] "Blast injury" has been coined to describe the unique "biophysical and pathophysiological" impacts upon a human body that occurs when exposed to blast effects.[102] Common consequences to a human near a detonation include traumatic brain injury, blast lung injury, ear canal and eyeball rupture, bowel perforation, organ laceration, acute renal failure, ruptured liver or spleen, testicular rupture, blood hemorrhaging, fracture and traumatic amputation, burns, angina, and sepsis.[103]

A blast wave can also discharge large objects which may crush a person. Additionally, fragmentation causes objects within the path of shockwaves to break apart and become projectiles that can penetrate a body.[104] These effects of blast injury tend to be amplified for bodies near walls.[105]

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[94] P.C. Chan & H.H. Klein, *A Study of Blast Effects Inside an Enclosure*, 116 J. FLUIDS ENGINEERING 450, 450 (1994).

[95] *See* Graham, *supra* note 1 (describing the scene of the Dallas bombing through photographs of the aftermath).

[96] Chan & Klein, *supra* note 94, at 453.

[97] *Id*. at 453, 455.

[98] CTR. FOR DISEASE CONTROL & PREVENTION, EXPLOSIONS AND BLAST INJURIES: A PRIMER FOR CLINICIANS, www.cdc.gov/masstrauma/preparedness/primer.pdf [https://perma.cc/9EEP-7WRX].

[99] *Id.*

[100] Sara Sidner & Mallory Simon, *How Robot, Explosives Killed Dallas Sniper*, 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/XV45-57AA].

[101] CTR. FOR DISEASE CONTROL & PREVENTION, *supra* note 98.

[102] James H. Stuhmiller et al., *The Physics and Mechanics of Primary Blast Injury*, *in* CONVENTIONAL WARFARE: BALLISTIC, BLAST, AND BURN INJURIES 241, 242 (Ronald F. Bellamy & Russ Zajtchuk eds., 1991).

[103] CTR. FOR DISEASE CONTROL & PREVENTION, *supra* note 98.

[104] Sidner & Simon, *supra* note 100.

[105] Stephen J. Wolf et al., *Blast Injuries*, 374 LANCET 405, 406 (2009).

It is very likely that the suspected gunman in Dallas sustained many of the various types of blast injuries just mentioned. Photographs of the scene after the bombing show significant structural damage to the building.[106] Walls, ceilings, and doors were torn apart, glass was shattered, and other visual evidence is consistent with a bomb having just exploded.[107] This visual evidence affirms that the suspect likely experienced many of the catastrophic consequences of over-pressurization and fragmentation mentioned above. His body surely would have been pummeled internally and externally both before and after death, likely repeatedly.

The primary purpose of this Essay is to challenge the legal assertion made by several experts after the Dallas events that the form of lethal force is irrelevant to its constitutionality. Assuming the veracity of the facts released to date from police officials, it appears that it was objectively reasonable for officers to believe that they faced a highly dangerous subject who had committed heinous acts of violence. There are strong indications that the officers had good reason to believe at that time that extreme force, even that which posed a high degree of injury and death to the suspect, was necessary to protect the safety of other officers and civilians.[108] Thus, if a police sniper had killed the armed suspect with a single bullet, it would appear to have been objectively reasonable considering the totality of the circumstances.

Nonetheless, the form and amount of force the police used in Dallas on July 7—exploding a pound of C4 in a confined space—are relevant to whether the police acted reasonably. The blast likely resulted in extreme intrusions upon the suspected gunman's bodily integrity, both before and after death.

If litigation were to arise, a court using a proper application of the balancing test should consider the extent of the suspect's likely pain and the potential extent of the damage to the suspect's body. Thus, information on the possible consequences of the bomb on the suspect's bodily integrity should be relevant to determining the reasonableness of the police's decision to kill the suspect using a bomb.[109]

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[106] Graham, *supra* note 1.

[107] *Id*.

[108] Sidner & Simon, *supra* note 100.

[109] There is one prior case in which a court was asked to determine whether a police bombing constituted excessive force. In 1985, a Philadelphia police officer riding in a helicopter overhead dropped a bomb onto a house occupied by a heavily armed revolutionary group who had been resisting arrest. J. Clay Smith, Jr., *The MOVE Bombing: An Annotated Bibliographic Index*, 31 HOW. L.J. 95, 96 (1988). The bomb exploded on the house, causing a fire, which eventually spread and destroyed other homes on the block. *Africa v. City of Philadelphia*, 938 F. Supp. 1278, 1280 (E.D. Pa. 1996). Several of the suspects, plus a few innocent children, were killed. Smith, *supra*, at 97, 101. A survivor and the estates of certain

CONCLUSION

Police officials in Dallas on July 7, 2016, took a novel approach when faced with an armed and dangerous suspect. Officers incapacitated him by blowing him up with a significant amount of explosives. Legal experts and the media have generally ignored the extraordinary form and extreme magnitude of the lethal force used to kill the suspect. However, it should not be presumed that the level of force used by the police was constitutional just because the Dallas police probably could have killed the suspect in some manner without violating the Constitution. Excessive force cases, including those involving lethal force, are judged under the Fourth Amendment using a balancing test that requires courts to consider the form and quantum of the force used. It is at least arguable that the form and quantum of force used in Dallas on July 7, 2016, was unreasonable in light of the extreme injuries the blast could predictably have inflicted on the suspect's body in the location in which he was sequestered.

of the deceased filed a civil suit claiming that the actions of the Philadelphia police during the standoff constituted excessive force. *Africa*, 938 F. Supp. at 1280. A jury agreed. *Id*. at 1281. Nonetheless, the case on its own is not persuasive support for the proposition that killing a suspect with a bomb violates the Fourth Amendment. The plaintiffs had argued several theories in their claim, one of which specifically focused on the bomb being an unreasonable seizure, and it is unclear which of them the jury found convincing. *Africa v. City of Philadelphia*, 910 F. Supp. 212, 216–18 (E.D. Pa. 1995).