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Armed Drones for Law Enforcement: Why It Might Be Time to Re-Examine the Current Use of Force Standard

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I. INTRODUCTION

In 2011, the Montgomery County Sheriff's Office in Conroe, Texas used federal grant funds to purchase a ShadowHawk unmanned helicopter drone.[1] The Sheriff's Office was excited to be "on the ground floor" of utilizing drone technology for police operations.[2] This particular drone could hold a camera system along with "a variety of 'less lethal' munitions."[3] The Sheriff's Office believed "drones armed with an array of non-lethal force options . . . could save lives."[4] While the Sheriff's Office had no immediate plans to use non-lethal weapons on their ShadowHawk drone, Chief Deputy Sheriff Randy McDaniel stated that using armed drones was "certainly something that we could look at."[5]

In response to the growing interest in drone use, Congress passed the FAA Modernization and Reform Act of 2012 (FAA Act), effectively giving a green light to federal and domestic law enforcement agencies around the United States to begin using unmanned aircraft systems or drones in their daily operations.[6] The majority of legal debate over domestic drone use focuses on the Fourth Amendment search standards and privacy issues involved with allowing a law enforcement agency (LEA) to use an *unarmed* drone equipped with a camera or other surveillance equipment, on United States citizens.[7] Commentators have not

1. Stephen Dean, *New Police Drone Near Houston Could Carry Weapons*, CLICK2HOUSTON (Nov. 10, 2011, 1:51 PM), http://www.click2houston.com/news/New-Police-Drone-Near-Houston-Could-Carry-Weapons/-/1735978/4717922/-/59xnnez/-/index.html (on file with the *McGeorge Law Review*).

2. *Id.*

3. Buck Sexton, *Aerial 'Shadowhawk' Police Drones Can Now Deploy Tasers & Tear Gas*, THE BLAZE (Mar. 12, 2012, 4:03 PM), http://www.theblaze.com/stories/2012/03/12/want-to-see-the-aerial-drone-police-could-soon-deploy-in-your-town/ (on file with the *McGeorge Law Review*).

4. *Id.* (noting that "these are technologies 'law enforcement utilizes day in and day out' already").

5. *Id.*

6. *See* FAA Modernization and Reform Act of 2012, Pub. L. No. 112–95, §§ 334–36, 126 Stat. 11, 72–77. ("Not later than 90 days after the date of enactment of this Act, the Secretary shall enter into agreements with appropriate government agencies to simplify the process for issuing certificates of waiver or authorization with respect to applications seeking authorization to operate public unmanned aircraft systems in the national airspace system.").

7. *See, e.g.*, Timothy T. Takahashi, *Drones and Privacy*, 14 COLUM. SCI. & TECH. L. REV. 72, 77 (2012) (addressing various issues surrounding law enforcement's use of a drone for surveillance purposes); JAY STANLEY & CATHERINE CRUMP, PROTECTING PRIVACY FROM AERIAL SURVEILLANCE: RECOMMENDATIONS FOR GOVERNMENT USE OF DRONE AIRCRAFT 15–16 (Dec. 2011), *available at* https://www.aclu.org/files/assets/

discussed how the use of an *armed* drone by a law enforcement officer will affect use of force (UOF) standards under the Fourth Amendment or whether the standards need to change. This is an important debate for two reasons. First, LEAs will inevitably use armed drones[8] due to the reduced costs and increased officer safety associated with operating a drone.[9] Second, as LEA's interest in armed drones grows,[10] concern among civil rights groups about the domestic use of armed drones increases.[11] This Comment argues that allowing domestic LEAs to operate armed drones in order to protect the public is constitutional, but will likely require agencies to create a separate armed drone UOF policy to address material differences in how an officer uses armed force with a drone and to provide guidance for officers in the field.

Part II of this Comment examines the evolution of drone technology from its use in the military to current and potential uses in the United States, with a focus on LEAs. Part III considers the legal basis for a LEA's ability to use and operate drones in national airspace. Additionally, this section discusses pertinent parts of the FAA Act dealing with public agency drone use, current drone rules implemented as a result of the FAA Act, and federal and state responses to the FAA Act. Part IV addresses public policy issues concerning the use of armed drones in the United States. Part V discusses the Fourth Amendment and the

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protectingprivacyfromaerialsurveillance.pdf [hereinafter PROTECTING PRIVACY FROM AERIAL SURVEILLANCE] (on file with the *McGeorge Law Review*) (providing recommendations on ensuring privacy from surveillance drones); *Surveillance Drones*, ELECTRONIC FRONTIER FOUND., https://www.eff.org/issues/surveillance-drones (last visited Mar. 15, 2014) (on file with the *McGeorge Law Review*) (stating concerns over privacy law and drone technology).

8. *See, e.g.*, Dean, *supra* note 1 (quoting the chief executive officer of drone manufacturer Vanguard Defense Industries who said their drones "are designed to carry weapons for local law enforcement.").

9. *See* Stephanie Chuang, *Bay Area Law Enforcement Agencies Test Drones*, NBCBAYAREA.COM (Feb. 14, 2013, 2:53 PM), http://www.nbcbayarea.com/news/local/Bay-Area-Law-Enforcement-Agencies-Test-Drones-173415551.html (on file with the *McGeorge Law Review*) (stating LEAs are considering drones as a "cost-cutting way to replace helicopters, and use technology to fight crime and save lives"). Drones could be used in place of helicopters as security for national high-risk targets. *See Black Hawk Helicopters, Armed Agents Prepared for Super Bowl*, CBSNewYORK (Jan. 30, 2014, 5:41 PM), http://newyork.cbslocal.com/2014/01/30/black-hawk-helicopters-armed-agents-prepared-for-super-bowl/ (on file with the *McGeorge Law Review*) (reporting on the use of Black Hawk helicopters "armed with heavy weaponry . . . to bring down an aircraft" if necessary during the Super Bowl).

10. *See* U.S. CUSTOMS & BORDER PROTECTION, U.S. DEP'T OF HOMELAND SECURITY, CONCEPT OF OPERATIONS FOR CBP'S PREDATOR B UNMANNED AIRCRAFT SYSTEM. 63 (June 2010), *available at* https://www.eff.org/files/filenode/cbp_uas_concept_of_operations.pdf [hereinafter U.S. CUSTOMS & BORDER PROT.] (on file with the *McGeorge Law Review*) ("Additional payload upgrades [on drones] could include expendables or non-lethal weapons designed to immobilize [targets of interest]."); Sexton, *supra* note 3 (stating an opinion of a Texas LEA that "drones armed with an array of non-lethal force options—including impact rounds, chemical munition rounds, and tasers—could save lives").

11. *See* Chris Calabrese & Jay Stanley, *Ban on Arming Domestic Drones: Let's Draw a Line in the Sand*, ACLU (June 15, 2012, 7:44 AM), https://www.aclu.org/blog/technology-and-liberty-free-speech-national-security/ban-arming-domestic-drones [hereinafter *Ban on Arming Domestic Drones*] (on file with the *McGeorge Law Review*) (arguing that no armed drones should be used in the United States); Jennifer Lynch, *Customs & Border Protection Considered Weaponizing Drones*, EFF (July 2, 2013), https://www.eff.org/deeplinks/2013/07/customs-border-protection-considered-weaponizing-drones (on file with the *McGeorge Law Review*) (stating the CBP should "not equip its Predators with *any* weapons—lethal or otherwise").

UOF, including an explanation of unreasonable seizures and the appropriate UOF standard, the application of that standard to armed drones, and a discussion of whether armed drones require a new UOF standard. Part VI offers a comparison of current state and federal UOF policies and provides a model armed drone UOF policy in order to allow an officer to use an armed drone and stay within established Fourth Amendment principles. Part VII concludes that domestic armed drone use by an officer is constitutional but requires either a separate armed drone UOF policy or modification of the U.S. Supreme Court's reasonableness test in order to protect the public from excessive force.

II. THE EVOLUTION OF DRONE TECHNOLOGY

Drones[12] have evolved significantly since the military began using them regularly in 2001.[13] This section explores the non-military uses of drones as well as the expansion of drone technology for domestic law enforcement.

A. Drones Used for War: What Else Are They Good For?

In 2001, the U.S. military began using drones for reconnaissance purposes in Afghanistan.[14] In 2002, the military added "Hellfire missiles" to its Predator drone system, "enabling reaction against intelligence, surveillance, and reconnaissance, close air support, and interdiction targets."[15] Since then, the military and other private companies have continued to develop and deploy drones of various sizes and capabilities.[16] Today, drones are actively used for

12. Drones are "airborne vehicles that fly without an onboard human pilot, most often consisting of an aircraft, ground-based operating personnel, and one of various types of communications networks to connect the two." Jeewon Kim et al., *Unmanned Aerial Systems*, 9 No. 4 A.B.A. SCITECH LAW. 54, 54–55 (2013). While drones are commonly thought of as aerial vehicles, there is a growing interest in other types of drones including ground drones and underwater drones. *See, e.g.*, *Armed Ground Drones to Take Over Battlefields in 5 Years,* RT.COM, (Oct. 21, 2013, 8:57 PM), http://rt.com/usa/robotics-rodeo-ground-drones-512/ (on file with the *McGeorge Law Review*) (stating a growing interest by the military in ground drones); Will Connors, *Underwater Drones are Multiplying Fast*, WALL ST. J. (June 24, 2013, 7:55 PM), http://online.wsj.com/news/articles/SB10001424127887324183204578565460623922952 (on file with the *McGeorge Law Review*) (stating a growing interest in underwater drones).

13. *See generally* Takahashi, *supra* note 7, at 83 ("[Drones] have seen considerable use overseas in the run-up to—and the aftermath of—the Second Gulf War. First generation drones carried only surveillance electronics . . . [l]ater generation drones were adapted to perform 'hunter/killer' missions; they carry both surveillance electronics and weapons.").

14. *See generally Fact Sheet RQ-4 Global Hawk*, U.S. AIR FORCE (Oct. 16, 2008), http://www.af.mil/AboutUs/FactSheets/Display/tabid/224/Article/104516/rq-4-global-hawk.aspx (on file with the *McGeorge Law Review*) ("The Global Hawk UAS provides near-continuous adverse-weather, day/night, wide area reconnaissance and surveillance.").

15. *Fact Sheet, MQ-1B Predator*, U.S. AIR FORCE (July 10, 2010), http://www.af.mil/AboutUs/FactSheets/Display/tabid/224/Article/104469/mq-1b-predator.aspx (on file with the *McGeorge Law Review*).

16. *See* PROTECTING PRIVACY FROM AERIAL SURVEILLANCE, *supra* note 7, at 2–3 (listing various types of drones to include: "large fixed-wing," "small fixed-wing," drones that fit inside a backpack, drones the size of a small bird, and "blimps").

various non-military applications including rescue, agricultural, and environmental operations.[17] Potential future uses include "firefighting, flood monitoring, filmmaking, storm research, mining, aerial news coverage, construction, real-estate, cargo, [and] communications."[18]

B. Drones for Law Enforcement: The New Frontier

As the Iraq and Afghanistan wars wind down and the United States opens the national airspace for drone use, drone manufacturers are shifting their focus towards offering LEAs unarmed, high-tech surveillance drones and armed drones.

1. Drones for Domestic Surveillance

The majority of debate over a LEA's drone use centers on surveillance.[19] Several drone manufacturers tailor their drones to law enforcement operations[20] by equipping drones with digital cameras, a Forward Looking Infrared[21] ("FLIR") system,[22] and "advanced data collection and storage, as well as the live streaming of data in the form of videos . . . . [and] GPS connectivity."[23] Drone denouncers argue that the use of surveillance drones "infringes upon fundamental privacy

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17. *See* MICHAEL TOSCANO, UNMANNED AIRCRAFT SYSTEMS ROADMAP TO THE FUTURE, ASSOCIATION FOR UNMANNED VEHICLE SYSTEMS INTERNATIONAL 18 (2013), *available at* http://www.ncsl.org/documents/environ/MToscano-5-4-13.pdf (on file with the *McGeorge Law Review*) (citing examples of drone use to include: saving a life in a vehicle accident, "spraying crops for pest control," and monitoring "wildlife species").

18. *Id.* at 10. Additionally, drones are being considered for a myriad of other potential applications. *See* Kim, *supra* note 12, at 59 (listing "potential personal uses of [drones]" to include: "adventure photography, science and discovery, child/pet monitoring, [and] herd[ing] animals").

19. *See* RICHARD M. THOMPSON II, DRONES IN DOMESTIC SURVEILLANCE OPERATIONS: FOURTH AMENDMENT IMPLICATIONS AND LEGISLATIVE RESPONSES 1 (Apr. 3, 2013), *available at* http://www.fas.org/sgp/crs/natsec/R42701.pdf (on file with the *McGeorge Law Review*) (describing the widely contested debate over the use of drones in "domestic surveillance operations").

20. *See, e.g.*, *Public Safety*, *Law Enforcement*, VANGUARD DEF. INDUS., http://vanguarddefense.com/public-safety/law-enforcement/ (last visited Mar. 15, 2014) [hereinafter VANGUARD DEF. INDUS.] (on file with the *McGeorge Law Review*) ("Vanguard Defense Industries is committed to supporting our public safety professional with an exceptional platform [UAS] to conduct reconnaissance, surveillance and apprehension."); *Who We Serve, SWAT & Police Robot*, ARA FORCE PROTECTION, http://www.araforcepro.com/who-we-serve/first-responder-police/ (last visited Nov. 1, 2013) (on file with the *McGeorge Law Review*) (offering products including a "Nighthawk Micro UA[S]" to law enforcement); *Unmanned Aircraft Systems*, *Qube: Public Safety Small UAS*, AV AEROVIRONMENT, http://www.avinc.com/uas/small_uas/qube/ (last visited Mar. 15, 2014) (on file with the *McGeorge Law Review*) (offering a small UAS to first responders capable of "transmitting live video directly to the operator").

21. REG'L CMTY. POLICING TRAINING INST. AT WICHITA ST. U., FORWARD LOOKING INFRARED (FLIR) 1, *available at* http://webs.wichita.edu/depttools/depttoolsmemberfiles/rcpi/COPS%20Act%20Papers/COPS%20ACT%20FLIR.pdf (on file with the *McGeorge Law Review*) ("[FLIR] is a night vision enhancement system with many potential applications in law enforcement agencies.").

22. VANGUARD DEF. INDUS., *supra* note 20.

23. Kim, *supra* note 12, at 55.

interests and the ability to freely associate with others."[24] Those in favor of drone use argue that it has many benefits including "protecting public safety, patrolling our nation's borders, and investigating and enforcing environmental and criminal law violations."[25] Despite the benefits of surveillance drones, as more government agencies use them, individuals may experience diminished privacy.[26] However, as LEAs subject the public to increased drone surveillance, it may ultimately give the Supreme Court the opportunity to address privacy laws in light of these new technologies.[27]

2. Armed Drones for Law Enforcement

As LEAs consider ways to cut costs while still protecting the public, drones have become increasingly more attractive.[28] Currently, drones built for law enforcement or military purposes can be equipped with many different types of weapons. For example, Vanguard Defense Industries' ShadowHawk drone can be "fitted with a variety of 'less lethal' munitions" which may include "impact rounds, chemical munition rounds, and tasers."[29] Vanguard also offers lethal weapons on the ShadowHawk, including: a "single or multiple shot 40mm grenade launcher, 25mm Grenade Launcher, [and a] 12g [gauge] shotgun" but presently drone manufacturers do not offer these lethal weapon capabilities to LEAs.[30]

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24. THOMPSON, *supra* note 19, at 1.

25. *Id.*

26. Takahashi, *supra* note 7, at 113.

27. *Id.* This important legal debate over the use of drones for surveillance purposes and their potential Fourth Amendment violation has been written about extensively and is beyond the scope of this Comment. *See, e.g.*, *id.* at 77 (addressing various issues surrounding the police use of a drone for surveillance purposes); Chris Schlag, *The New Privacy Battle: How the Expanding Use of Drones Continues to Erode Our Concept of Privacy and Privacy Rights*, 13 PITT. J. TECH. L. & POL'Y 1, 2 (2013); Ajoke Oyegunle, *Drones in the Homeland: A Potential Privacy Obstruction Under the Fourth Amendment and the Common Law Trespass Doctrine*, 21 COMM. LAW CONSPECTUS 365, 366 (2013).

28. *See* Therese Postel, *State Police Increasingly Turn to Drones to Monitor U.S. Citizens*, POLICYMIC (Jan. 19, 2012), http://www.policymic.com/articles/3433/state-police-increasingly-turn-to-drones-to-monitor-u-s-citizens (on file with the *McGeorge Law Review*) (highlighting potential financial and safety benefits drone use offers to a LEA).

29. Sexton, *supra* note 3. A taser is a "weapon that subdues its targets with jolts of electricity." Bruce Weber, *Jack Cover, 88, Physicist Who Invented the Taser Stun Gun, Dies*, NY TIMES (Feb. 16, 2009), http://www.nytimes.com/2009/02/16/us/16cover.html?_r=0 (on file with the *McGeorge Law Review*). Jack Cover invented the first taser which he originally called the "Thomas Swift Electric Rifle" or TSER and later added the A to create the acronym TASER. *Id.* (internal quotation marks omitted). Vanguard Defense Industries is not the only company developing drones with non-lethal weapon capabilities. A firm called Chaotic Moon recently created a drone helicopter armed with an 80,000 volt taser deployable by its remote pilot. Brent Rose, *Meet CUPID: The Drone That Will Shoot You with an 80,000 Volt Taser*, GIZMODO (Mar. 7, 2014, 6:40 PM), http://gizmodo.com/meet-cupid-the-drone-that-will-shoot-you-with-an-80-00-1539064715/all (on file with the *McGeorge Law Review*).

30. *Specifications*, VANGUARD DEF. INDUS., http://vanguarddefense.com/specifications/ (last visited Mar. 15, 2014) (on file with the *McGeorge Law Review*).

The U.S. Department of Homeland Security (DHS) currently uses Predator drones to patrol the United States' borders and has allowed the Federal Bureau of Investigation (FBI), Secret Service, Texas Rangers, and other local law enforcement to use Predator drones in similar situations.[31] While LEAs currently use these drones only for surveillance purposes, a DHS report to Congress in 2010 left open the idea of placing "non-lethal weapons designed to immobilize [targets of interest]" on the Predator drones.[32]

III. LEGAL BACKGROUND

Congress has passed a number of laws in an effort to establish a legal framework for the domestic use of military grade force. Two bear relevance on drone usage in the United States: The Posse Comitatus Act[33] and the FAA Act.[34]

A. The Legality of LEA Drone Usage Under the Posse Comitatus Act

Since the time of the Revolutionary War, the United States has grappled with how and to what extent local agencies should use federal military forces and equipment to enforce domestic law.[35] In the aftermath of the Civil War, federal troops under the authority of the President established a "cruel and freewheeling martial law" in the southern states.[36] Recognizing the problem with this unchecked use of military authority, Congress enacted the Posse Comitatus Act in 1878.[37] Over the years, federal courts have interpreted, and Congress has codified, exceptions to the Posse Comitatus Act.

In *United States v. Red Feather*, a district court found that the Posse Comitatus Act "does not [pertain to] the use of Army or Air Force equipment or material."[38] The court went on to state that "[t]he prevention of the use of military supplies and equipment was never mentioned in the debates [over the Posse

31. Declan McCullagh, *DHS Build Domestic Surveillance Tech into Predator Drones*, CNET (Mar. 2, 2013, 11:30 AM), http://news.cnet.com/8301-13578_3-57572207-38/dhs-built-domestic-surveillance-tech-into-predator-drones/ (on file with the *McGeorge Law Review*).

32. *See* U.S. CUSTOMS & BORDER PROT., *supra* note 10, at 63.

33. 18 U.S.C. § 1385 (2006).

34. FAA Modernization and Reform Act of 2012, Pub. L. No. 112–95, §§ 331–36, 126 Stat. 11, 72–77.

35. John D. Gates, *Don't Call Out the Marines: An Assessment of the Posse Comitatus Act*, 13 TEX. TECH L. REV. 1467, 1470–73 (1982).

36. *Id.* at 1472–73.

37. *Id.* at 1473. The current version of the The Posse Comitatus Act states:

> "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both."

18 U.S.C. § 1385 (2006).

38. 392 F. Supp. 916, 921 (D.S.D. 1975).

Comitatus Act], nor can it reasonably be read into the words of the Act."[39] Additionally, Congress codified express authorization of the use of military equipment and facilities to "any Federal, State, or local civilian law enforcement official for law enforcement purposes."[40] More recently, officers in North Dakota called in a Predator drone from a local Air Force base to provide surveillance during a standoff situation resulting in "the first known arrests of U.S. citizens on U.S. soil with help from a Predator."[41] Some legal scholars believe this scenario did not violate Posse Comitatus, even though the drone was based out of an Air Force base, because it belonged to the United States Customs and Border Protection (CBP).[42] Therefore, a LEA's use of a non-military armed drone likely does not violate the Posse Comitatus Act so long as the LEA owns the drone and the military does not become directly involved.[43]

B. The FAA Modernization and Reform Act

In 2012, Congress passed the FAA Act giving the Secretary of Transportation, Federal Aviation Administration (FAA), and other federal agencies the authority to create a plan for public drone use.[44] Additionally, the FAA Act requires the Secretary of Transportation to form agreements with "appropriate government agencies to simplify the process for issuing certificates of waiver or authorization[45] . . . to operate public unmanned aircraft systems"[46] in United States airspace.[47] The FAA Act lists specific requirements that

39. *Id.* at 922; *see also* U.S. v. Jaramillo, 380 F. Supp. 1375, 1379 (D. Neb. 1974) (finding no violation of the Posse Comitatus Act by a LEA using "1,100 Star parachute flares, 100,000 rounds, M-16 ammunition, 100 protective vests, 20 sniper rifles, [and] 15 unarmed armored personnel carriers" from the Army).

40. 10 U.S.C § 372 (2012).

41. Takahashi, *supra* note 7, at 74–75 (alteration accepted) (internal quotation marks omitted); *see also* Michael Peck, *Predator Drone Sends North Dakota Man to Jail*, FORBES (Jan. 27, 2014, 7:27 PM), http://www.forbes.com/sites/michaelpeck/2014/01/27/predator-drone-sends-north-dakota-man-to-jail/ (on file with the *McGeorge Law Review*) (discussing the conviction of the suspects arrested in North Dakota with the aid of a Predator drone).

42. Takahashi, *supra* note 7, at 79. If the Predator was owned and operated by the Air Force when it assisted police, would the Posse Comitatus Act apply? *See id.* (stating Posse Comitatus applies only if there is direct involvement by the military).

43. *Id.*

44. FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 332(a)(1), 126 Stat. 11, 72–77.

45. *Id.* § 334(c)(1). Since passage of the Act, the FAA has issued hundreds of certificates of authorization. *See FOIA Responses*, *Public Operations (Governmental)*, *Unmanned Aircraft Systems*, FAA (last updated Aug. 4, 2014), http://www.faa.gov/uas/public_operations/foia_responses/ (on file with the *McGeorge Law Review*) (showing a breakdown of approved COA's since April 26, 2012).

46. A "'public unmanned aircraft system'" must meet the same criteria as a public aircraft. FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 331, 126 Stat. 11, 72–77. A "'public aircraft'" is any aircraft owned by the federal or state government or "a political subdivision of one of these governments." 49 U.S.C. § 40102(a)(41) (2006).

47. FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 334(c)(1), 126 Stat. 11, 72–77 (2012).

government agencies must follow in order to operate a drone over U.S. soil.[48] There is nothing in the FAA Act prohibiting or approving any type of *armed* drone use in the United States.[49]

1. The FAA UAS[50] Comprehensive Plan

The FAA Act requires the Secretary of Transportation to meet with members of the aviation industry, Federal agencies that use drones,[51] and members of the drone industry to "develop a comprehensive plan to safely accelerate the integration of civil[52] unmanned aircraft systems into the national airspace system."[53] The plan provides the "overarching, interagency goals, objectives and approach."[54] It also acknowledges the need to consider various privacy and civil liberty concerns, but does not specifically mention the use of armed drones by LEAs.[55] Instead, the plan emphasizes the need to keep these civil liberty issues in mind as the collaborating members work to integrate drones into the national airspace system.[56]

When asked about the use of armed drones in the United States, Jim Williams, the head of the FAA's Unmanned Aircraft Systems Integration Office, emphasized that "existing rules already bar aircraft from using weapons" and those rules also apply to drones.[57] Specifically, he mentioned that there are "rules in the books that deal with releasing anything from an aircraft, period. Those rules are in place and that would prohibit weapons from being installed on a *civil* aircraft."[58] A federal regulation states that "[n]o pilot in command of a *civil*

48. *See id.* § 334(c)(2)(C) (stating the unmanned aircraft must weigh "4.4 pounds or less . . . operate[] (i) within the line of sight of the operator; (ii) less than 400 feet above the ground; (iii) during daylight conditions; (iv) within Class G airspace; and (v) outside of 5 statute miles from any . . . location with aviation activities").

49. *Id.*

50. UAS stands for "Unmanned Aircraft System." *Id.* § 331(9).

51. Members included "the Departments of Transportation, Defense, Commerce, and Homeland Security as well as the National Aeronautics and Space Administration, and the Federal Aviation Administration." THE JOINT PLANNING & DEVELOPMENT OFFICE, U.S. DEP'T OF TRANSPORTATION, UNMANNED AIRCRAFT SYSTEMS (UAS) COMPREHENSIVE PLAN, A REPORT ON THE NATION'S UAS PATH FORWARD 6 (2013), *available at* http://www.faa.gov/about/office_org/headquarters_offices/agi/reports/media/UAS_Comprehensive_Plan.pdf [hereinafter COMPREHENSIVE PLAN] (on file with the *McGeorge Law Review*).

52. A "'civil aircraft' means any aircraft except a public aircraft." 49 U.S.C. § 40102(a)(16) (2006).

53. FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 332(a)(1), 126 Stat. 11, 72–77 (2012).

54. COMPREHENSIVE PLAN, *supra* note 51, at 6.

55. *See id.* at 7 (stating the significance of "privacy and civil liberties, physical security, and potential economic opportunities . . . in the development of [drone] policy").

56. *See id.* ("Integrating public and civil [drones] into the [national airspace] carries certain national security implications, including cyber and communications security, domestic framework for US government operations, national airspace and defense, airman vetting/general aviation, and privacy concerns.").

57. Ben Wolfgang, *FAA Official: No Armed Drones in U.S.*, WASH. TIMES (Feb. 13, 2013), http://www.washingtontimes.com/news/2013/feb/13/faa-official-no-armed-drones-us/?page=all (on file with the *McGeorge Law Review*). Members of the audience "scoffed at the question" and Mr. Williams "seemed amused by it." *Id.*

58. *Id.* (emphasis added) (internal quotation marks omitted).

aircraft may allow any object to be dropped from that aircraft in flight that creates a hazard to persons or property."[59] Presuming that (1) Mr. Williams was referring to this rule in his answer, and (2) the word "object" in the rule includes a weapon, this rule applies only to *civil* aircraft and not *public* aircraft.[60] The current text of the rule does not seem to forbid a LEA from arming its "public" drone.[61]

2. The FAA Integration of UAS Roadmap

The FAA Act requires the FAA to produce a five-year roadmap, through 2017, for "the introduction of civil [drones] into the national airspace system."[62] The FAA serves as both a regulator of aviation safety and as a service provider of air traffic control in the National Airspace System (NAS).[63] The roadmap acknowledges the challenge of establishing a policy and regulatory framework for drone integration.[64] It does not specifically mention armed drone use in the United States, but notes the need to establish regulations based on several factors in drone operations that could presumably include armed drones.[65]

3. The Memorandum of Understanding Between the FAA and the DOJ

The FAA and the Department of Justice (DOJ) created a Memorandum of Understanding (MOU) to "implement a streamlined training and authorization process to enable [state] law enforcement agencies to operate [drones] within the United States safely, effectively, and lawfully."[66] This MOU meets the FAA Act's requirement to "simplify the process for issuing certificates of waiver or

59. 14 C.F.R. § 91.15 (2014) (emphasis added).

60. *See supra* notes 46, 52. "[T]he FAA has no regulatory authority over [public aircraft operations] other than those requirements that apply to all aircraft operating in the [national airspace] . . . [and generally] regulations that include the term 'civil aircraft' in their applicability do not apply to [public aircraft operations]." FAA, U.S. DEP'T OF TRANSP., ADVISORY CIRCULAR, PUBLIC AIRCRAFT OPERATIONS 3 (Feb. 12, 2014), *available at* http://www.faa.gov/documentLibrary/media/Advisory_Circular/AC_00-1_1A.pdf (on file with the *McGeorge Law Review*).

61. *See supra* text accompanying note 59.

62. FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 332(a)(5), 126 Stat. 11, 72–77.

63. FAA, U.S. DEP'T OF TRANSP., INTEGRATION OF CIVIL UNMANNED AIRCRAFT SYSTEMS (UAS) IN THE NATIONAL AIRSPACE SYSTEM (NAS) ROADMAP 14 (1st ed. 2013), *available at* http://www.faa.gov/about/initiatives/uas/media/uas_roadmap_2013.pdf (on file with the *McGeorge Law Review*).

64. *Id.*

65. *Id.* at 16 ("[R]egulatory drivers include: [d]eveloping minimum standards for Sense and Avoid, Control and Communications . . . [u]nderstanding the privacy, security, and environmental implications of [drone] operations . . . [a]nd developing acceptable [drone] design standards that consider the aircraft size, performance, mode of control, intended operational environment, and mission criticality.").

66. Memorandum of Understanding Between FAA, UAS Integration Office, & The U.S. DOJ, Office of Justice Programs, Nat'l Inst. of Justice Concerning Operation of UAS by Law Enforcement Agencies 1 (2013), *available at* http://www.alea.org/assets/pressReleases/assets/1805/DOJ%20FAA%20MOU.pdf [hereinafter Memorandum of Understanding] (on file with the McGeorge Law Review).

authorization . . . to operate public [drones] in the [NAS]."[67] Specifically, the National Institute of Justice, under the DOJ, worked with the FAA to implement the authorization of LEA drone use.[68] The MOU establishes additional requirements for a LEA to gain authorization to operate a drone[69] and also provides specific rules for flight operations.[70]

C. Legislative Responses to the FAA Act

Amidst growing public concern about drone use in the United States, including ease of LEA approval and ambiguity in the FAA Act, Congress and state legislatures have proposed amendments to clarify how a LEA may use a drone.

1. Federal Responses

On March 12, 2013, Rep. Michael Burgess introduced the No Armed Drones Act of 2013 (NADA) as an amendment to the FAA Act.[71] This amendment would prohibit the Secretary of Transportation from authorizing anyone to use a drone "as a weapon or to deliver a weapon against a person or property."[72] The amendment defines a "weapon" to include both "lethal and nonlethal weapons."[73] This amendment remains in the committee process and has not moved out of committee since March 13, 2013.[74]

2. State Responses: Split on Armed Drone Use

In 2013, forty-three states introduced ninety-six bills on domestic drone use, and eight states ultimately passed new drone laws.[75] The new state drone laws

67. FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 334(c), 126 Stat. 11, 72–77 (2012).

68. Memorandum of Understanding, *supra* note 66, at 2.

69. *Id.* at 5 (stating a LEA must submit a Safety Risk Analysis Plan, operate the drone in a "'Defined Incident Perimeter,'" (DIP) and only use drones that weigh no more than twenty-five pounds).

70. *Id.* at 7 (stating the LEA must operate the drone within a stationary DIP no higher than 400 feet above ground level, during daylight hours, in the pilot and at least one observer's sight, with no pursuit missions outside the DIP, and no flights over groups of people or major roadways). While the MOU is helpful, it does not establish permanent drone requirements because it is subject to change. *Id.* at 4.

71. No Armed Drones Act of 2013, H.R. 1083, 113th Cong. (2013).

72. *Id.*

73. *Id.* (internal quotation marks omitted).

74. CONGRESS.GOV, http://beta.congress.gov/bill/113th/house-bill/1083 (last visited Apr. 3, 2015) (on file with the *McGeorge Law Review*).

75. *See* Allie Bohm, *The Year of the Drone: An Analysis of State Legislation Passed This Year*, ACLU (Nov. 7, 2013 8:50 AM), https://www.aclu.org/blog/technology-and-liberty/year-drone-roundup-legislation-passed-year (on file with the *McGeorge Law Review*) (describing the drone laws passed by Florida, Idaho, Illinois, Montana, Oregon, Tennessee, Virginia, and Texas).

take different approaches to armed drones.[76] For example, Virginia completely prohibits the use of armed drones.[77] Florida's definition of a lawful LEA drone includes one that "[c]an carry a lethal or nonlethal payload."[78] Oregon's drone law states "[a] public body may not operate a drone that is capable of firing a bullet or other projectile, directing a laser or otherwise being used as a weapon."[79] Other states do not mention armed drones at all.[80]

As states debate drone use, several groups have developed model rules or points for state legislatures.[81] The Aerospace States Association, the Council of State Governments, and the National Conference of State Legislatures advise states to consider "prohibiting weapons to be carried by any [drone] in commercial airspace."[82] The International Association of Chiefs of Police Aviation Committee (IACP) "strongly discourage[s]" any weapons on LEA drones because it believes current technology will not give a LEA "the ability to effectively deploy weapons from a small [drone]."[83] The IACP also reasons that "public acceptance of airborne use of force is likewise doubtful and could result in unnecessary community resistance to the program."[84] However, this Comment proposes model language for an armed drone UOF policy that strikes a better balance of these concerns.

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76. *Id.*

77. Va. Acts H.B 2012, Ch. 755 (2013).

78. FLA. STAT. ANN. § 934.50(2) (West Supp. 2013).

79. OR. REV. STAT. ANN. § 837.365 (West Supp. 2014).

80. *See, e.g.*, 725 ILL. COMP. STAT. ANN. 167/5 (West Supp. 2014) (stating no language regarding armed drones); IDAHO CODE ANN. § 21–213 (West Supp. 2014) (stating no language regarding armed drones); TEX. GOV'T CODE ANN. § 423.001 (West Supp. 2014) (stating no language regarding armed drones); MONT. CODE ANN. § 46–5–109 (West Supp. 2013) (stating no language regarding armed drones).

81. *See* AEROSPACE STATES ASS'N, UAS PRIVACY CONSIDERATIONS 1–2 (2013), *available at* http://aerostates.org/wp-content/uploads/2013/08/UAS-State-Privacy-Considerations-Final2.pdf (on file with the *McGeorge Law Review*) (noting that the Aerospace States Association, the Council of State Governments, and the National Conference of State Legislatures have created considerations for legislators developing UAS legislation).

82. *Id.* The FAA divides commercial airspace into several classes. FAA, U.S. DEP'T OF TRANSPORTATION, AIR TRAFFIC ORGANIZATION POLICY, ORDER JO 7400.9X § 1000 (Aug. 7, 2013), *available at* http://www.faa.gov/documentLibrary/media/Order/JO_7400.9X.pdf (on file with the *McGeorge Law Revie*w). Generally, Class A airspace is an altitude of 18,000 feet and above. *Id.* at § 2000. The remaining Class B, C, D, and E airspace altitude levels generally vary by state. *Id.* at § § 3000, 4000, 5000, 6000. Any airspace not covered by one of these classes is uncontrolled and falls under Class G airspace. *Id.* at § 1000. The FAA Act allows a LEA to operate a drone "less than 400 feet above the ground . . . within Class G airspace." FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 334(c)(2)(C), 126 Stat. 11, 72–77 (2012).

83. AVIATION COMM., INT'L ASS'N OF CHIEFS OF POLICE, RECOMMENDED GUIDELINES FOR THE USE OF UNMANNED AIRCRAFT 2 (2012), *available at* http://www.theiacp.org/portals/0/pdfs/iacp_uaguidelines.pdf (on file with the *McGeorge Law Review*).

84. *Id.*

IV. POLICY CONSIDERATIONS

Before a LEA uses an armed drone in daily operations, the agency and the public it serves need to weigh the possible effects of using this new technology as a matter of public policy.[85] Opponents of armed drones assert that allowing LEAs to operate and use armed drones within the United States "would be the latest and arguably most extreme example of the militarization of our police."[86] The public is becoming increasingly skeptical of LEAs who continue to acquire the same or similar weapons and tools as the military.[87] A recent poll "finds the American public supports many applications of [drone] technology . . . [r]outine policing[88] though, [was] not among them."[89] The ACLU believes it will be easier for a LEA to use force against the public, and therefore "force will be used more . . . [and armed] [d]rones may also be more likely to result in harm to innocent bystanders."[90] In 2004, Amnesty International made similar arguments when officers started using tasers to subdue suspects.[91] They expressed concern that officers were "overusing the Taser . . . because Taser markets it as nonlethal, [and] officers often use it on unruly suspects, not just as an alternative to deadly force."[92] The ACLU contends that tasers are unsafe, and that officers continue to

85. *See, e.g.*, Anne-Marie Cusac, *The Trouble with Tasers*, THE PROGRESSIVE (May 2005), *available at* http://progressive.org/mag_amctaser (on file with the *McGeorge Law Review*) (discussing the use of tasers by law enforcement and whether tasers are actually safe to use on humans).

86. *Ban on Arming Domestic Drones*, *supra* note 11.

87. *See* DIANE CECILIA WEBER, WARRIOR COPS: THE OMINOUS GROWTH OF PARAMILITARISM IN AMERICAN POLICE DEPARTMENTS, CATO INSTITUTE BRIEFING PAPERS 1 (Aug. 26, 1999), *available at* http://object.cato.org/sites/cato.org/files/pubs/pdf/bp50.pdf (on file with the *McGeorge Law Review*) (describing how beginning in the 1980s, various police agencies across the United States have been getting trained and equipped by the U.S. military). "Confusing the police function with the military function can lead to dangerous and unintended consequences-such as unnecessary shootings and killings." *Id.*; *see also ACLU Launches Nationwide Investigation into Police Use of Military Technology & Tactics*, ACLU (Mar. 6, 2013), https://www.aclu.org/criminal-law-reform/aclu-launches-nationwide-investigation-police-use-military-technology-tactics (on file with the *McGeorge Law Review*) ("Equipping state and local law enforcement with military weapons and vehicles, military tactical training, and actual military assistance to conduct traditional law enforcement erodes civil liberties and encourages increasingly aggressive policing.").

88. Query whether Americans would consider using drones for "routine police activity." *See* Monmouth University Poll, *U.S. Supports Some Domestic Drone Use*, MONMOUTH UNIV. 1 (June 12, 2012), *available at* http://www.monmouth.edu/assets/0/32212254770/32212254991/32212254992/32212254994/32212254995/30064771087/42e90ec6a27c40968b911ec51eca6000.pdf (on file with the *McGeorge Law Review*) (showing a majority of Americans oppose using a drone to enforce speeding violations but support using a drone for "'special circumstances'" such as "search and rescue . . . track[ing] down runaway criminals . . . and control[ing] illegal immigration").

89. *Id.*

90. *Ban on Arming Domestic Drones*, *supra* note 11.

91. *See* Alex Berenson, *As Police Use of Tasers Soars, Questions Over Safety Emerge*, NY TIMES (July 18, 2004), http://www.nytimes.com/2004/07/18/us/as-police-use-of-tasers-soars-questions-over-safety-emerge.html (on file with the *McGeorge Law Review*) (discussing concerns over taser safety).

92. *Id.*

overuse them.[93] These same arguments will probably apply to officers using armed drones when they become as common as tasers.[94]

On the other hand, LEAs insist that armed drones would benefit the public by saving officers' lives.[95] The cost to operate a drone also benefits LEAs because drones are "much cheaper than helicopters or other aircraft—and they cost much less to operate per hour than do other aircraft."[96] Additionally, drones "will make certain activities easier, safer, [and] more efficient . . . [a]t a time when many states are saddled with enormous debt."[97] Not surprisingly, officers made similar arguments to justify the increasing use of tasers in law enforcement.[98] Despite concerns, some LEAs will likely provide armed drones to officers as another tool to keep them safe and to reduce costs.[99]

V. THE FOURTH AMENDMENT AND THE USE OF FORCE

This section explores how the Supreme Court's interpretation of the Fourth Amendment's "unreasonable seizure" clause established the UOF standard that applies to officers making arrests and detentions. Additionally, this section applies the current UOF standard to armed drone use by analogizing to real cases and scenarios and discusses whether armed drones require a new UOF standard.

A. What Is a Seizure?

The Fourth Amendment of the United States Constitution ensures "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[100] A person may bring a civil action under section 1983 against a government actor for a violation of his or her Fourth Amendment rights.[101] In order to bring a section 1983 action, the plaintiff must show that a seizure occurred and that it was unreasonable.[102]

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93. *See* Rebecca McCray & Emma Andersson, *Tasers No Longer a Non-Lethal Alternative for Law Enforcement*, ACLU (May 3, 2012, 3:39 PM), https://www.aclu.org/blog/criminal-law-reform/tasers-no-longer-non-lethal-alternative-law-enforcement (on file with the *McGeorge Law Review*) (citing safety issues with tasers causing "cardiac arrest and death" as well as the "disturbing trend of officers using Tasers in flagrantly unnecessary situations"); *Ban on Arming Domestic Drones*, *supra* note 11 ("Tasers are often used in clearly unnecessary situations–for example, in retaliation against nonviolent people who have angered a police officer.").

94. *See supra* text accompanying note 90.

95. Sexton, *supra* note 3.

96. Postel, *supra* note 28.

97. *Id.*

98. Berenson, *supra* note 91 (stating the use of tasers "lowers the risk of injury to officers . . . [a]nd Tasers are surely safer than firearms.").

99. *See supra* text accompanying note 98.

100. U.S. CONST. amend. IV. Additionally, a law enforcement officer must have probable cause to seize a person. *Id.*

101. 42 U.S.C. § 1983 (2006).

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

In *United States v. Mendenhall*, the Court held that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave."[103] The Court established two instances where a seizure occurs, either through "physical force or [a] show of authority."[104] Seizure by physical force occurs when a person or their property is intentionally detained.[105] A seizure "by a show of authority" requires actual submission, otherwise it constitutes an "attempted seizure."[106]

B. What Is a Reasonable Use of Force?

In *Tennessee v. Garner*, the Court determined that the "use of deadly force to prevent the escape of an apparently unarmed suspected felon" was unconstitutional.[107] In *Garner*, an officer shot a prowler suspect in the back of the head as he was climbing over a chain link fence.[108] The officer believed the suspect would get away if he climbed completely over the fence.[109] The State of Tennessee, by statute, allowed an officer to use "all the necessary means to effect [an] arrest" of a suspect who flees or resists, including deadly force.[110] The Court held the statute unconstitutional when used to apply "deadly force against . . . fleeing [nonviolent] suspects."[111] The Court found that "it is not constitutionally unreasonable to prevent escape by using deadly force" only when "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others."[112]

In *Graham v. Connor*, the Court established the constitutional standard for an "excessive force [claim] in the course of making an arrest, investigatory stop, or other 'seizure' of [a] person."[113] In *Graham*, the petitioner, a diabetic, "sustained a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder" because officers utilized physical force when conducting an investigative stop

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103. 446 U.S. 544, 554 (1980). The Court lists several examples of a possible seizure to include: "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.*

104. Brendlin v. California, 551 U.S. 249, 254 (2007).

105. *Brower*, 489 U.S. at 596 (citations omitted).

106. *Brendlin*, 551 U.S. at 254.

107. 471 U.S. 1, 3 (1985).

108. *Id.* at 3–4.

109. *Id.* at 4.

110. *Id.* at 4–5 (internal quotation marks omitted).

111. *Id.* at 11.

112. *Id.* at 11–12.

("[I]f the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.").

113. 490 U.S. 386, 388 (1989).

based on suspicion that he was drunk.[114] The Court held that "*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach."[115] Under this rule, "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."[116] Objective reasonableness "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[117] The Court also found that the "'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene."[118]

In *Scott v. Harris*, the Court considered whether an officer could use force that posed a risk of injury or death to a suspect in order to stop the suspect from "endangering the lives of innocent bystanders."[119] In *Scott*, an officer attempted a "Precision Intervention Technique maneuver, which cause[d] the fleeing vehicle to spin to a stop."[120] The officer incorrectly applied the maneuver to a fleeing suspect's vehicle, causing the suspect to crash and sustain permanent, severe injuries.[121] The respondent argued that the officer's actions amounted to deadly force and therefore the preconditions established in *Garner* applied to this case.[122] The Court found that "*Garner* [does] not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'"[123] Under the "reasonableness" test set forth in *Graham*, "all that matters is whether [the officer's] actions were reasonable."[124] The Court held that the reasonableness test includes weighing the "number of lives at risk" and the "relative culpability" of those lives.[125] The officer's actions were reasonable in

114. *Id.* at 388–90.

115. *Id.* at 395.

116. *Id.* at 397.

117. *Id.* at 396.

118. *Id.* at 396–97 ("The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.").

119. 550 U.S. 372, 374 (2007).

120. *Id.* at 375 (internal quotation marks omitted).

121. *Id.* (stating the suspect became a quadriplegic).

122. *Id.* at 381–82 (stating the following preconditions: "(1) The suspect must have posed an immediate threat of serious physical harm to the officer or others; (2) deadly force must have been necessary to prevent escape; and (3) where feasible, the officer must have given the suspect some warning").

123. *Id.* at 382.

124. *Id.* at 382–83.

125. *Id.* at 384.

this case because "those who might have been harmed had [the officer] not taken the action he did were entirely innocent."[126]

Courts continue to use the *Graham* test when analyzing section 1983 excessive force claims.[127]

C. Applying the Use of Force Standard to Armed Drone Use

Today, lower courts frequently apply the Supreme Court UOF reasonableness test to section 1983 excessive force claims against LEAs.[128] The following section analyzes how the use of an armed drone would change the reasonable UOF analysis in the following cases and scenarios: deploying chemical control spray,[129] using a taser,[130] applying lethal force during an armed bank robbery,[131] and deploying a K-9 police dog.[132]

1. Using an Armed Drone to Deploy Chemical Control Spray

In a 2013 Louisiana case, *Elphage v. Gautreaux*, officers detained two individuals suspected of fleeing the scene of a shooting.[133] While officers detained them, fifteen to twenty people converged on the scene, and another officer arrived with his K-9 dog "form[ing] a barrier between the crowd and the deputies detaining the two suspects."[134] The officers verbally warned the crowd that pepper spray would be used "if they did not 'get back.'"[135] One or more of the officers eventually used pepper spray on the crowd.[136] One member of the

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126. *Id.*

127. *See* Graham v. Connor, 490 U.S. 386, 395 (1989).

> ("Today we make explicit what was implicit in *Garner's* analysis, and hold that *all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard.").

Scott, 550 U.S. at 383–84 (incorporating a balancing test within the *Graham* test). In order to overcome qualified immunity, the plaintiff may also show that the constitutional right was "clearly established." *See* Pearson v. Callahan, 555 U.S. 223, 232–36 (2009) (holding that addressing the "clearly established" prong is not required in every case).

128. *See, e.g.*, Jackson v. Pena, 28 F. Supp. 3d 423, 429–31 (D.Md. 2014) (applying the Supreme Court UOF reasonableness test to an excessive force claim for using deadly force).

129. *See, e.g.*, Elphage v. Gautreaux, 939 F. Supp. 2d 493, 497–98 (M.D.La. 2013) (stating an excessive force claim from chemical control spray).

130. *See, e.g.*, Lash v. Lemke, 971 F. Supp. 2d 85, 88 (D.D.C. 2013) (stating an excessive force claim for deploying a taser).

131. *Botched L.A. Bank Heist Turns into Bloody Shootout*, CNN (Feb. 28, 1997, 11:10 PM), http://www.cnn.com/US/9702/28/shootout.update/ (on file with the *McGeorge Law Review*).

132. *See, e.g.*, White v. City of Lagrange, Ga., 952 F. Supp. 2d 1353, 1356–57 (N.D. Ga. 2013) (stating an excessive force claim for deploying a K-9 dog).

133. 939 F. Supp. 2d at 497.

134. *Id.*

135. *Id.*

136. *Id.*

crowd was arrested for "public intimidation, resisting arrest by force, and simple assault."[137] The court found that the officer's actions were "objectively reasonable under the circumstances" and any injuries members of the crowd suffered were minor.[138]

Suppose that rather than a K-9 officer arriving to keep the crowd back, an officer arrived and deployed a drone to form a barrier between the crowd and the officers and give the officers the ability to fire pepper spray from the air. The officers warned the crowd to stay back or they would be pepper sprayed while an officer at the scene operated the drone with the help of an observer.[139] The crowd refused to comply, and the drone operator pepper sprayed the crowd.

Here, under the *Graham* standard,[140] a court would likely find that the drone use was reasonable in light of the belligerent crowd surrounding the officers. First, the officers dealt with a severe crime—a shooting. Second, the crowd posed an immediate threat to officer and public safety as it grew more belligerent and intimidated all of the officers at the scene, including the drone operator. Finally, because the officer controlling the drone was on the scene and able to assess the situation, the court would likely conclude that the force was appropriate.[141]

If the officer controlling the drone was not at the scene, a court might find the UOF unreasonable because the crowd did not pose an immediate danger to the officer initiating the force by maneuvering the drone and deploying pepper spray.[142] For a court to find the force reasonable, the drone operator would have to rely on communications with officers actually at the scene before deploying the pepper spray.[143] Additionally, unless an officer at the scene felt threatened or believed that a member of the public was in danger, a court would likely deem the deployment of pepper spray by a remotely operated drone unreasonable.[144]

In this situation, the analysis of the UOF by the drone and by the officers in the real case is substantially similar.[145] The only difference is how officers deployed the pepper spray—by hand versus by drone. However, the

137. *Id.* at 510.

138. *Id.*

139. *See* FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 334(c)(2)(C), 126 Stat. 11, 72–77 (requiring the drone to be "within the line of sight of the operator").

140. Graham v. Connor, 490 U.S. 386, 396 (1989) (stating objective reasonableness "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight"). "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396–97.

141. "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene." *Id.* at 396.

142. *See supra* notes 139–41.

143. *See supra* note 139.

144. *See supra* note 141.

145. *See supra* text accompanying notes 138–41.

reasonableness analysis potentially changes once the officer operating the drone is no longer "on the scene."[146]

2. Using an Armed Drone to Employ a Taser

In a 2013 District of Columbia case, *Lash v. Lemke*, officers posted notices on "Occupy DC" protesters' tents, informing them of the "government's intent to enforce no-camping regulations."[147] Officers tased the plaintiff after he removed the notices, attempted to flee the officers, and physically resisted arrest.[148] Video footage of the arrest showed the plaintiff yelling at the officers and walking away from them, as well as a gathering crowd yelling at the officers.[149] The court found that the force was reasonable because "the officers were in a hostile environment where protesters were yelling at and following the officers while [they] attempted to arrest [the plaintiff]."[150] Additionally, the court concluded that a "reasonable officer on the scene would have believed [the plaintiff] was actively resisting arrest . . . [and] posed an immediate threat to the safety of the officers or others."[151]

The plaintiff asserted that he was unarmed and was not threatening at any point during the confrontation.[152] The officers argued, and the court found, that "[t]here is always a potential threat to officers when they are that close to an individual who they are trying to arrest, because the individual may try to grab one of the officer's weapons or actually hit an officer trying to arrest him."[153] The plaintiff also claimed that using a taser was unreasonable because the officers did not warn him before using the taser.[154] The court found that "whether a warning is given . . . is not a dispositive factor."[155]

Suppose the officers deployed a drone armed with a taser device over the crowd while the officers posted notices of the government's intent to enforce the law. An officer operated the drone on site, but did not go with the officers

146. *Id.*

147. 971 F. Supp. 2d 85, 88 (D.D.C. 2013).

148. *Id.*

149. *Id.* at 88–90.

150. *Id.* at 95 ("Viewing the situation from the perspective of an officer at the scene, as the court must, [the officer's] use of the taser gun . . . was reasonably proportionate to the difficult and uncertain situation that the . . . officers faced."). The court also considered the fact that the officers were among a large protest, there were many tents within the protest area, and the officers "'reasonably could have anticipated a confrontation' while removing an uncooperative protester from the tent camp." *Id.*

151. *Id.* at 96.

152. *Id.*

153. *Id.* (internal quotation marks omitted).

154. *Id.* at 97.

155. *Id.* ("An order stating that a warning shall be given 'if practicable' cannot be construed to require a warning in all situations."). *Id.* at 98.

posting the notices.[156] When the protester physically resisted arrest and fled the officers, they communicated with the drone operator, giving him a description of the protester and the direction in which he fled. The drone operator located the protester with the drone camera, hovered over him, and shot him with a taser without warning. The officers made their way through the crowd and arrested the immobilized protester.

Here, the protester never posed an immediate threat to the drone operator because he was not near the operator at any point during the confrontation.[157] Additionally, while the protester was attempting to evade arrest, he did not pose an immediate threat to the officers when he was tased because he was not close to them.[158] The protester could also argue that he had not committed a severe crime because he was unarmed and simply tearing down notices.[159] Finally, he could present evidence that the officers failed to warn him that a drone would taser him if he refused to stop.[160]

On the other hand, because the officers faced a hostile crowd while trying to make an arrest, a court might hold the use of force reasonable. Additionally, a court would likely find that, because the officers had already tried and failed to arrest the protestor, the officers reasonably believed that the protestor was evading arrest.[161] However, because neither the drone operator nor the pursuing officers faced immediate danger from the protester at the time the drone operator deployed the taser, a court would likely find the force unreasonable.[162] There is no evidence to suggest that the protester posed an immediate threat of harm to others because the crowd was part of his same protest. If the protester had been standing around the crowd waving a firearm at everyone, there would be a stronger case for deploying a taser via drone because the protestor would pose an immediate threat to others and officers would not be able to get close to the protester to make an arrest.[163]

In this situation, the analysis of the UOF by the drone and by the officers in the real case is different because the real case involved officers in close proximity to the suspect, whereas in the drone scenario the officers were some distance away from the suspect and not in immediate danger. The crowd might

156. *See* FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 334(c)(2)(C), 126 Stat. 11, 72–77 (2012) (requiring the drone to be "within the line of sight of the operator").

157. *See supra* note 140.

158. *See supra* note 140.

159. *Id.*

160. *See supra* text accompanying note 155.

161. *See supra* text accompanying note 150.

162. *See* Nelson v. City of Davis, 685 F.3d 867, 883 (9th Cir. 2012) (holding officers' use of pepperball projectiles to disperse a party was unreasonable because there was no evidence the officers were in immediate danger).

163. *See supra* note 140.

have threatened officers, but a court would still likely find the deployment of a taser by drone unreasonable.[164]

3. Using a Lethally Armed Drone

In 1997, two heavily-armed men unsuccessfully tried to rob a bank in North Hollywood, California.[165] After police responded to the bank robbery, the suspects made their escape by moving into a crowded neighborhood.[166] For an hour, the suspects and police exchanged gunfire.[167] "Wearing body armor and carrying a trunk full of weapons, the robbers . . . fired armor-piercing bullets at anything that moved, and one suspect used a getaway car as a shield."[168] Eventually, both suspects were "killed by helmeted police who fired bullets to the head at close range."[169]

Now suppose during this intense gun battle officers deployed a drone armed with a twelve-gauge shotgun. An officer operated a drone from a mobile command center set up a few blocks from the bank and had been tracking the suspects the entire time. Once officers surrounded the two suspects on a neighborhood street, they radioed the drone operator to open fire because they could not get close enough to shoot the suspects and they judged the situation safe enough for drone use. The drone operator fatally shot both suspects from the air, ending the standoff.

Here, a court would clearly find that deadly force is reasonable because the suspects posed a serious threat of physical harm to officers and the general public.[170] While the dangerous situation clearly justified the officers' use of deadly force, they could not shoot because the gunmen were continually firing at them. A court would likely find that a reasonable officer at the scene could command the drone operator to use deadly force. Therefore, the force would almost certainly be reasonable because the drone operator received a direct command to use deadly force based on observations of an officer at the scene.[171]

In this situation, the UOF analysis for using the drone parallels the UOF analysis for an on-scene officer shooting because an on-scene officer ordered the drone to fire and the suspects clearly posed a threat to the officers on the scene

164. *See* Nelson, 685 F.3d at 883 (finding there was a clear distinction between individuals posing an immediate threat to officers and the plaintiff who was not an immediate threat).

165. *Botched L.A. Bank Heist Turns into Bloody Shootout*, *supra* note 131.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *See* Jean-Baptiste v. Gutierrez, 627 F.3d 816, 818 (11th Cir. 2010) (finding an officer's use of deadly force was reasonable against an armed robbery suspect who fled the scene of the robbery and was "lying in wait" in a residential area).

171. *See supra* note 140.

and the public.[172] Additionally, even if the drone operator had fired without being told to do so by officers, a court may find the action reasonable because the officer could determine the suspects were a threat to the public based on what the officer could see with the drone camera.[173]

4. Pursuit Using an Armed Drone Instead of a K–9 Dog

In 2010, an officer responded to a call about a possible kidnapper walking down a street.[174] The officer found the suspect and told him to "place his hands on the patrol car."[175] The suspect would not let the officer get behind him despite a warning that the officer "could deploy his K–9 if necessary."[176] When the suspect started running, the officer "deployed his K–9, which caught up with [the suspect] and bit him on the arm."[177] The court compared this case to an earlier case where an armed robbery suspect crashed his car after being pursued by multiple officers and then ran into the woods.[178] In that case, the court held that the officer reasonably deployed the K–9 because, along with other factors, "all three of the *Graham* factors[179] weighed heavily against the plaintiff."[180] In *White*, the court found that the suspect "was suspected of the serious crime of felony kidnapping and was actively fleeing from [the officer], creating a danger to the community."[181] The court also reasoned that, because the officer was alone, "his need to use the K–9 to ensure his safety and the safety of the community was even greater" and therefore the officer reasonably used his K–9.[182]

Suppose both officers who responded to the call were trained and certified drone operators who carried the police drone in the trunk of their vehicle. Despite warning the suspect that they would deploy a drone armed with beanbag rounds to pursue him, the suspect fled. The officers deployed their drone, found the suspect, and shot him with several beanbag rounds to keep him from fleeing.

Here, a court would likely find that the use of force by a drone was as reasonable as deploying a K–9 in *White* because (1) the scenario fell within the *Graham* factors,[183] (2) both officers who used the drone were actually at the

172. *Id.*

173. *See infra* Part V.D (discussing how a court could analyze the reasonableness of an officer using an armed drone without guidance from an officer on the scene).

174. White v. City of Lagrange, Ga., 952 F. Supp. 2d 1353, 1356 (N.D. Ga. 2013).

175. *Id.*

176. *Id.*

177. *Id.* at 1356–57.

178. *Id.* at 1358.

179. The court found that "the plaintiff was suspected of armed robbery, . . . actively fled from the police, and . . . the police had every reason to believe that he was armed and dangerous." *Id.*

180. *Id.* at 1358.

181. *Id.* at 1359.

182. *Id.*

183. *See supra* note 179.

scene,[184] (3) there were only two officers on site and trying to pursue the suspect would create a greater danger to others,[185] and (4) the officers warned the suspect that they would deploy the drone if he fled the scene.[186]

D. Do Armed Drones Require a New Use of Force Standard?

In applying the *Graham* standard to the use of an armed drone instead of an officer, it becomes clear that some factors are more dispositive than others. For example, "the severity of the crime at issue"[187] analysis remains the same regardless of whether an officer or a drone applies the force because both would require that the level of force match the severity of the crime.[188] For example, it would be unreasonable for an officer or a drone to shoot a shoplifter with a twelve-gauge shotgun to stop the crime of theft.[189] Therefore, this factor should be included in an armed drone UOF standard. Another factor unchanged by drone use is whether the suspect is "actively resisting arrest or attempting to evade arrest by flight."[190] Standing alone, this factor would not change how a court looks at the reasonableness of UOF, either by drone or by officer, because both would depend on how strongly the suspect resists arrest or what methods a suspect uses in an attempt to flee.[191] Therefore, this factor should also be part of an armed drone UOF standard.

The most dispositive *Graham* factor requires a court to judge "[t]he 'reasonableness' of a particular use of force . . . from the perspective of a reasonable officer on the scene."[192] The Supreme Court explained that "reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."[193] How would an officer pass the "on the scene" perspective the Court requires when the officer is in a building relying only on the armed drone's camera to make a decision to use force against a suspect on the street? While most officers are capable of making split-second judgments on the street or at the scene, officers operating drones have limited perspectives of the

184. *See supra* note 140.

185. *See supra* text accompanying note 179.

186. *See supra* text accompanying note 140.

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

188. *See supra* text accompanying note 112.

189. *Id.*

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

191. *See* Nelson v. City of Davis, 685 F.3d 867, 883 (9th Cir. 2012) (stating officers' use of pepperball projectiles against individuals at a party was unreasonable force because "the officers had no interest in arresting them; and the group engaged in passive resistance, at most, by failing to immediately disperse if and when such an order was given").

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

193. *Id.* at 396–97.

situation.[194] Therefore, without more, this factor would almost always lead a court to decide an officer's use of an armed drone was unreasonable because the officer controlling the drone was not "on the scene."[195]

Another problematic factor for armed drones under the standard UOF analysis is "whether the suspect poses an immediate threat to the safety of the officers or others."[196] Obviously, suspects on the street do not pose an immediate threat to the officer operating the drone from a safe distance. But what if the officer can clearly see the suspect shooting people and no officer is at the scene? The officer can reasonably believe the suspect "poses an immediate threat to the safety of . . . others" because the officer can see the suspect shooting people through the drone camera.[197] A court might find the UOF reasonable if the officer operating the drone could see that the suspect was about to injure a fellow officer on the street. In *Scott v. Harris*, the Court said "it is clear *from the videotape* that respondent posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase."[198] If officers recorded the drone camera feed, the court could analyze the immediate threat to safety similarly to the way it analyzed the issue in *Scott*.[199]

Here, assuming the court did use the drone camera footage to find an imminent threat to public safety, the question remains: how does the lack of an officer on the scene affect the reasonable UOF analysis?[200] In *Scott*, the officers were on the scene at all times in pursuit of the suspect.[201] In order for a court to find the UOF reasonable in the limited circumstances where the officer via drone camera perceived—and the drone footage clearly showed—that the suspect posed a clear and imminent threat to public safety, it must deviate from the *Graham* standard because it could no longer judge the "reasonableness of a particular use of force . . . from the perspective of a reasonable officer on the scene."[202] Therefore, in limited circumstances, courts must essentially expand the definition of "on the scene" to include the "perspective of a reasonable officer" watching the scene through a drone camera.[203]

However, use of an armed drone falls completely within the current *Graham* standard in some circumstances. For example, having an officer on the scene either controlling the drone or directing an off-scene drone operator will likely meet the "reasonable officer on the scene" factor because the circumstances

194. *See supra* text accompanying notes 192–93.

195. *Id.*

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

197. *Id.*

198. 550 U.S. 372, 384 (2007) (emphasis added).

199. *Id.*

200. *See supra* text accompanying note 197.

201. *Scott*, 550 U.S. at 379–80.

202. *Graham*, 490 U.S. at 396 (internal quotation marks omitted).

203. *See supra* text accompanying note 201.

involve someone physically present where the force will occur.[204] The size of the scene is irrelevant. So long as an officer is directing the drone or drone operator to engage in force based on the *Graham* reasonableness factors, a court would likely find such use of an armed drone reasonable and no different than any other law enforcement tool.[205] However, specific situations will undoubtedly arise requiring courts to either modify the current *Graham* standard to expand the "on the scene" factor or find the use of an armed drone unreasonable within the current standard.[206] Until then, LEAs who desire to use armed drones will need to create an armed drone UOF policy that conforms to the existing *Graham* standard.[207]

VI. CREATING A LAW ENFORCEMENT USE OF FORCE POLICY FOR ARMED DRONES

The following section considers actual UOF policies that state and federal LEAs have implemented and proposes a model UOF policy that encompasses the *Graham* standard while also seeking to minimize public skepticism over armed drone use.

A. Current Law Enforcement Use of Force Policies

Based on the reasonableness standards established by the Supreme Court, all state and federal LEAs have policies designed to minimize excessive force claims.[208]

1. State LEA Use of Force Policies

The Los Angeles County Sheriff's Department states that "determining whether force is 'unreasonable' shall be consistent with [*Graham v. Connor*]."[209] The policy also defines "objectively reasonable" to mean that "[d]epartment members shall evaluate each situation requiring the use of force in light of the known circumstances . . . in determining the necessity for force and the appropriate level of force."[210]

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204. *See supra* Part V.C.1.

205. *Id.*

206. *Scott*, 550 U.S. at 381–83 "[I]n the end, we must still slosh our way through the factbound morass of 'reasonableness.'" *Id.* at 383.

207. *Infra* Part VI.B.

208. *Infra* Part VI.A.1–2.

209. L.A. CNTY. SHERIFF USE OF FORCE POLICY 2, *available at* http://www.lasdhq.org/divisions/leadership-training-div/bureaus/mpp/force-policy.pdf (on file with the *McGeorge Law Review*).

210. *Id.* (listing examples of known circumstances to include: "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the member of others, and whether the suspect is actively resisting").

The Chicago Police Department gives the same reasonableness guidelines as the Los Angeles County Sheriff's Department, but also gives its officers a UOF Model "in order to provide members guidance on the reasonableness of a particular response option."[211] The UOF Model classifies an individual interacting with an officer as a "cooperative subject," "resister," or "assailant."[212] When a person is considered a resister or assailant, the model gives increasing methods of physical control over the individual.[213] For example, an officer may begin by physically holding a person who qualifies as a resister.[214] As the resister becomes increasingly difficult to control, the officer may use chemical spray, a taser, or a canine.[215] If the person moves into the assailant category, the officer may use impact weapons, munitions, or deadly force.[216]

The Boston Police Department (BPD) has three separate policies that outline the use of non-lethal force,[217] less lethal force,[218] and deadly force.[219] In the non-lethal force policy, the BPD includes the *Graham v. Connor* rule regarding use of force.[220] The policy generally restricts non-lethal force to "defensive situations where (1) an officer or other person is attacked, or (2) an officer is met with physical resistance during an encounter."[221] The policy also allows an officer to

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211. CHI. POLICE DEP'T, USE OF FORCE GUIDELINES, GEN. ORDER G03–02, CHICAGOPOLICE.ORG (last updated Sept. 23, 2002), http://directives.chicagopolice.org/directives/data/a7a57be2-128ff3f0-ae912-8fff-44306f3da7b28a19.html (on file with the *McGeorge Law Review)*.

212. CHI. POLICE DEP'T, THE USE OF FORCE MODEL, GEN. ORDER G03–02–01, CHICAGOPOLICE.ORG (last updated May 16, 2012), http://directives.chicagopolice.org/directives/data/a7a57be2-128ff3f0-ae912-8fff-cec11383d806e05f.html?ownapi=1 (on file with the *McGeorge Law Review)*.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. BOS. POLICE DEP'T, RULES & PROCEDURES, RULE 304 - USE OF NON-LETHAL FORCE (Apr. 29, 2013), *available at* http://static.squarespace.com/static/5086f19ce4b0ad16ff15598d/t/52af5f43e4b0dbce9d22a824/1387224899721/Rule%20304.pdf [hereinafter BOS. POLICE DEP'T, RULE 304—USE OF NON-LETHAL FORCE] (on file with the *McGeorge Law Review*) (defining non-lethal force as "that amount of force that will generally not result in serious bodily injury or death").

218. BOS. POLICE DEP'T, RULES & PROCEDURES, RULE 303A - USE OF LESS-LETHAL FORCE (June 22, 2000), *available at* http://static.squarespace.com/static/5086f19ce4b0ad16ff15598d/t/52af5f3ae4b0dbce9d22a81a/1387224890009/Rule%20303A.pdf [hereinafter BOS. POLICE DEP'T, RULE 303A—USE OF LESS-LETHAL FORCE] (on file with the *McGeorge Law Review*) ("Less-Lethal Force Philosophy is a concept of planning and force application that meets operational objectives, with less potential for causing death or serious physical injury than the use of deadly force.").

219. BOS. POLICE DEP'T, RULES & PROCEDURES, RULE 303 - USE OF DEADLY FORCE (Apr. 11, 2003), *available at* http://static.squarespace.com/static/5086f19ce4b0ad16ff15598d/t/52af5f30e4b0dbce9d22a80d/1387224880253/Rule%20303.pdf [hereinafter BOS. POLICE DEP'T, RULE 303— USE OF DEADLY FORCE] (on file with the *McGeorge Law Review*) (defining deadly force as "that degree of force likely to result in death or great bodily injury").

220. BOS. POLICE DEP'T, RULE 304 - USE OF NON-LETHAL FORCE, *supra* note 217,

> ("The 'Reasonableness' of a particular use of force must be judged from [the] perspective of [a] reasonable officer on the scene, and its calculus must embody an allowance for the fact that police officers are often forced to make split-second decisions about the amount of force necessary in a particular situation.").

221. *Id.*

use non-lethal force when encountering "passive resistance," but the force must be reasonable "based on the totality of the circumstances."[222] The less-lethal policy is specifically tailored for the use of a twelve gauge "less lethal shotgun" and "flexible projectile rounds."[223] This policy is used for "the de-escalation of potentially violent situations."[224] The deadly force policy outlines when an officer may discharge his or her firearm.[225]

2. Federal LEA Use of Force Policies

According to its website, the FBI requires "a reasonable belief that the subject of [deadly] force poses an imminent danger of death or serious physical injury to the agent or another person."[226] The FBI also encourages agents to give a verbal warning to comply before using deadly force.[227]

The CBP recently completed a review of its current UOF policy and made changes based on several recommendations from its UOF Policy Division, the Police Executive Research Forum, and the DHS Office of the Inspector General.[228] The CBP's new UOF handbook includes the objective reasonableness standards outlined in *Graham* and *Garner*.[229] The CBP has the same deadly force standard as the FBI.[230]

Whether stated explicitly or implicitly, all of the UOF policies or practices appear to use the *Graham* standard to determine the proper use of force for any given situation.[231]

B. A Model Armed Drone Use of Force Policy

Using the *Graham* standard as well as some of the internal rules used in current UOF policies, the following model policy incorporates specific rules based on the use of armed drones:

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222. *Id.*

223. BOS. POLICE DEP'T, RULE 303A - USE OF LESS-LETHAL FORCE, *supra* note 218.

224. *Id.*

225. BOS. POLICE DEP'T, RULE 303 - USE OF DEADLY FORCE, *supra* note 219.

226. *Frequently Asked Questions,* FBI, http://www.fbi.gov/about-us/faqs (last visited Mar. 16, 2014) (on file with the *McGeorge Law Review*).

227. *Id.*

228. U.S. CUSTOMS & BORDER PROTECTION USE OF FORCE REVIEWS, RECOMMENDATIONS, & NEXT STEPS, *Border Security*, CBP, *available at* http://www.cbp.gov/xp/cgov/border_security/bs/force_reviews.xml (last visited Mar. 16, 2014) (on file with the *McGeorge Law Review*).

229. U.S. CUSTOMS & BORDER PROTECTION, USE OF FORCE POLICY, GUIDELINES & PROCEDURES HANDBOOK 1–2 (May 2014), *available at* http://www.cbp.gov/sites/default/files/documents/UseofForcePolicyHandbook.pdf (on file with the *McGeorge Law Review*).

230. *Id.* at 3.

231. *See supra* Part VI.A.

I. Armed Drone Use of Force Policy

A. A LEA will follow all applicable FAA regulations as well as state and federal laws regarding the operation of drones.

B. When practical, an officer will notify the LEA supervisor that an armed drone has been deployed at a specific incident.

C. Unless clearly contrary to an objective measure of reasonableness, the LEA supervisor shall approve every request by an officer at the scene to use the non-lethal or lethal drone weapons against a suspect or suspects.

D. An officer who wishes to utilize a drone armed with non-lethal or lethal weapons as a use of force will make the decision under an objective reasonableness standard.[232] Non-inclusive circumstances considered in the reasonableness standard include: (1) "the severity of the crime at issue," (2) "whether the subject poses an immediate threat to the safety of the officers or others," and (3) "whether [the subject] is actively resisting arrest or attempting to evade arrest by flight."[233]

E. At no time will an officer controlling a drone act alone and use the drone to apply force on an individual, unless the drone operator is at the scene of the incident or, if not at the scene, the drone operator has received clear communication from an officer at the scene directing the operator to use the drone to apply force.

Because the FAA authorizes LEAs to use drones in their daily operations, the LEA risks losing its ability to operate drones if it fails to comply with applicable federal laws, regulations, or state laws.[234]

While there is nothing in the *Graham* standard that asks whether an officer notified or sought approval from a supervisor, some current LEA UOF policies require or suggest that an officer obtain permission prior to using certain less-lethal weapons.[235] Because these same less-lethal weapons are now mounted on the drone, it is likely wise to apply the same approval standard to minimize

232. Graham v. Connor, 490 U.S. 386, 396–97 (1989).

233. *See Graham*, 490 U.S. at 396 (stating the factors used in many UOF policies).

234. *See supra* text accompanying notes 67–69; Part III.B–C (noting the lack of federal regulation on armed drones and various state approaches to armed drones).

235. *See, e.g.*, L.A. CNTY. SHERIFF USE OF FORCE POLICY, *supra* note 209, at 40 (stating that chemical agents "may be authorized by the Watch Commander or, if applicable, the Incident Commander, or by a Sergeant). The policy also states that "[p]rior to the use of [a taser], whenever practical, Department personnel shall request a supervisor." *Id.* at 42. The officer who applied the "Precision Intervention Technique" in *Scott v. Harris* also requested and received permission from his supervisor prior to applying the maneuver. 550 U.S. 372, 375 (2007).

public outcry or excessive force claims. However, the policy provides flexibility by acknowledging that there will be times when an officer cannot practically obtain approval from a supervisor prior to using force via drone.

Since the *Graham* standard applies, it is only logical to include the actual language of the case within the drone policy. This ensures officers know what test they must comply with when using reasonable force. Specifically, the policy defines the circumstances where an officer utilizing a drone will meet the "on the scene" judgment of reasonable force that the *Graham* court requires.[236]

In some situations, an officer controlling an armed drone from a building two miles away may have a reasonable belief, judging by what the officer can see from the drone camera, that force is necessary despite the fact that no officer is on the scene.[237] The question remains whether a court will expand the "on the scene" reasonableness definition in the UOF analysis to include specific instances where an officer can perceive just enough from the drone camera to qualify as "on the scene" under the existing standard.[238] Until then, this policy will allow officers to use armed drones and still remain within the established UOF standard under *Graham*.[239]

VII. CONCLUSION

The FAA Act opened American skies to drones—it is only a matter of time before they become a common sight overhead.[240] As more LEAs obtain drones for everyday police use and the federal and state budgets continue to shrink,[241] interest in arming these drones with non-lethal and lethal weapons will grow.[242] It is probably constitutional for a LEA to use armed drones in daily operations,[243] but LEAs face an uphill climb to convince a skeptical public that using armed

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

237. *See supra* Part V.D. One could also question how useful armed drones may have been during situations where it was simply not feasible to have an officer on the scene. *See, e.g.*, Jim Crogan, *For 22 Murder Victims, LA Riots Leave Legacy of Justice Eluded*, FOXNEWS (Apr. 29, 2012), http://www.foxnews.com/us/2012/04/29/for-22-murder-victims-la-riots-leave-legacy-justice-eluded/ (on file with the *McGeorge Law Review*) (noting five days of riots and violence in Los Angeles requiring the National Guard to provide support to the police); Joseph B. Treaster, *Life-or-Death Words of the Day in a Battered City: 'I Had to Get Out'*, NY TIMES (Aug. 31, 2005), http://www.nytimes.com/2005/08/31/national/nationalspecial/31orleans.html?ref=hurricanekatrina&_r=0 (on file with the *McGeorge Law Review*) (noting armed looting during Hurricane Katrina and how police were "'almost completely involved in saving lives and not in guarding [New Orleans]'").

238. *See supra* Part V.D.

239. *See supra* notes 140–41.

240. *See* Kim, *supra* note 12, at 54 ("[T]he aviation industry expects that 30,000 [drones] may soon fill domestic skies conducting operations that were until now unthinkable or cost-prohibitive.").

241. *See* Chuang, *supra* note 9 (noting the need for cost-cutting measures in law enforcement agencies).

242. *See* Sexton, *supra* note 3 (stating an opinion of a Texas LEA that "drones armed with an array of non-lethal force options—including impact rounds, chemical munition rounds, and tasers—could save lives"); Chuang, *supra* note 9 (stating LEAs are considering drones as a "cost-cutting way to replace helicopters, and use technology to fight crime and save lives").

243. *See supra* Part III.

drones is a good idea.[244] As the *Graham v. Connor* standard states, whether an officer's actions are "objectively reasonable"—and therefore not excessive—"must be judged from the perspective of a reasonable officer on the scene."[245] Until the Supreme Court develops a different standard or modifies the "on the scene" standard to incorporate an officer's perspective from a drone camera, LEAs will need to develop a drone UOF policy that will not only meet the *Graham* standard, but also protect the public from abuse.[246]

244. *See supra* Part IV.

245. 490 U.S. 386, 396–97 (1989).

246. *See supra* Part VI.B.