

**Tasers: evaluating claims of excessive force**

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## **I. The M26 and X26 tasers**

The first tasers were developed and marketed to law enforcement agencies in the 1970s. Like the modern versions, they shot a pair of dart-like probes connected to the weapon by thin wires. They discharged a five-second-duration high-voltage, low-ampere current that was intended to incapacitate a suspect. The early versions, which featured seven watts of power, did not achieve wide acceptance in law enforcement agencies.

In the 1990s, Rick and Tom Smith started the company that is now known as Taser International. They purchased the existing taser patent and worked on an improved model. Their first product, marketed in 1994, was called the Air Taser.

In 1999, the company began marketing the first of the modern tasers, the M26 Advanced Taser. This 26-watt weapon is far more powerful than its predecessors. In 2003, Taser International began marketing the X26 Taser, which it promoted as having 5% more “stopping power” than the M26.<sup>2</sup>

According to Taser International, there is a critical difference between the earlier tasers, (which it calls first generation and second generation tasers), and the M26 and X26, (which it calls third generation and fourth generation respectively). The earlier tasers affected only the sensory nervous system and functioned solely as pain-compliance devices. Suspects who were extremely focused or insensitive or impervious to pain, such as persons on PCP or individuals in the midst of a psychosis, were less likely to become fully incapacitated when subjected to the lower-power tasers. In contrast, the M26 and X26 tasers achieve what the company has called electro-muscular disruption (EMD):

EMD weapons use a more powerful 18 to 26 Watt electrical signal to completely override the central nervous system and directly control the skeletal muscles. This EMD effect causes an uncontrollable contraction of the muscle tissue, allowing

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<sup>2</sup> Taser International, Instructor Certification Lesson Plan, version 12.0, at 19.

the M-Series to physically debilitate a target regardless of pain tolerance or mental focus.<sup>3</sup>

A press of the trigger propels the wires with the dart probes and produces a default five-second discharge. Subsequent trigger presses will produce additional five-second discharges as long as the probes remain connected to the suspect. If the trigger remains depressed, the taser will produce a continuous discharge, until the battery runs down.<sup>4</sup> Depending on the cartridge that is loaded, the wires will extend from fifteen to twenty-one feet, although Taser International says that firing from seven to fifteen feet away is the most effective.<sup>5</sup>

According to the company's literature, the electricity flows between the two probes. The larger the distance between the probes, the greater the electro-muscular disruptive effect.<sup>6</sup> When the taser is used as a contact stun gun, in what the company calls "drive stun mode," the distance between the electrical contacts is less than two inches. As a result, the taser functions only as a pain-compliance device when used as a contact stun gun.<sup>7</sup>

Both the M26 and the X26 feature a computer chip that records limited information about each discharge. The information is accessible, however, only if the law enforcement agency has and uses the software to download the information. The M26 records the time and date of each press of the trigger, but it does not record duration. Thus, one continuous 30-second shock would be recorded as a single discharge. If the trigger is depressed a second time while the taser is delivering the default 5-second discharge, the computer chip will record that second trigger

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<sup>3</sup> Taser International, Owner's Manual, from Taser Training CD version 4.1. Taser International has now abandoned the term "electro-muscular disruption" and instead refers to "neuro-muscular incapacitation." The company also discarded the term "conducted energy weapons" and now refers to tasers as "electronic control devices." Taser International, M26 and X26 Instructor Course, version 13, slide 21.

<sup>4</sup> Taser International, Instructor Certification Lesson Plan, version 12.0, at 58.

<sup>5</sup> *Id.* at 90. The company recently began selling a cartridge that extends the range to 35 feet.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 192.

pull, even though it does not affect the already-discharging taser.<sup>8</sup> The X26 records duration as well as the date and time.<sup>9</sup>

## II. The controversies over tasers

Taser International hawked the new M26 Advanced Taser as a nonlethal magic bullet that instantly and safely incapacitated suspects without physical struggle. The company's aggressive marketing has reaped tremendous success. In the last several years, thousands of law enforcement agencies have purchased M26 and X26 tasers. Over two thousand have equipped each officer with the device (which Taser International refers to as "full deployment").

As tasers have become more widely used, they have become controversial. Critics have accused the manufacturer of overstating its claims for safety.<sup>10</sup> Those concerns have gathered force as a steadily-increasing number of deaths—now more than 200—have occurred shortly after law enforcement officers have used tasers.<sup>11</sup>

A series of investigative reports by the Arizona Republic and the New York Times raised further questions about Taser International's safety claims, the reliability of the studies the company cites, and questionable marketing practices.<sup>12</sup> The Securities and Exchange Commission and the Arizona Attorney General launched inquiries about allegedly deceptive

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<sup>8</sup> *Id.* at 71.

<sup>9</sup> *Id.* at 119.

<sup>10</sup> ACLU of Northern California, "How the Lack of Taser Regulation Endangers Lives," September, 2005 (hereafter "Stun Gun Fallacy"); Amnesty International, "Excessive and lethal force? Amnesty International's concerns about deaths and ill-treatment involving police use of tasers," November 30, 2004, (hereafter "Amnesty International, 2004"), available at <http://web.amnesty.org/library/index/engamr511392004>; Amnesty International, "Amnesty's continuing concerns about taser use," March 28, 2006, (hereafter "Amnesty International, 2006"), available at <http://web.amnesty.org/library/Index/ENGAMR510302006>.

<sup>11</sup> Mark Silverstein and Mindy Barton, *Taser maker defends product even as bodies pile up*, Speakout, Rocky Mountain News, Aug. 19, 2006.

<sup>12</sup> Alex Berenson, *As police use of tasers rises, questions over safety increase*, New York Times, July 18, 2004; Robert Anglen, *Taser safety claim questioned; medical examiners connect stun gun to 5 deaths*, Arizona Republic, July 18, 2004; Alex Berenson, *Claims over tasers' safety are challenged*, New York Times, Nov. 26, 2004. Additional articles in the Arizona Republic's series are available at <http://www.azcentral.com/specials/taser/>.

statements. Taser International agreed in 2005 to tone down some of its “nonlethal” claims, and in 2006 it agreed to pay \$20 million to settle a stockholder’s lawsuit.<sup>13</sup>

Critics have also expressed concern that law enforcement officers resort to tasers too quickly, relying on them as a first resort against persons who pose no threat and in situations where their use is excessive and abusive.<sup>14</sup> Taser International has confirmed that in over one-third of the cases in which police officers have discharged tasers, the reported level of resistance is “verbal non-compliance.”<sup>15</sup> Critics have also raised concerns about the use of tasers on vulnerable populations, such as children, pregnant woman, and persons who are already handcuffed or otherwise restrained.<sup>16</sup>

For a long time, spokespersons for Taser International scoffed at the questions raised about the safety of tasers. In 2004, when the death count was less than 100, Taser International maintained that each of the deceased would have died anyway. Until relatively recently, the company’s training materials continued to proclaim confidently that tasers had never been implicated in any deaths, and they continue to maintain that they are safe and effective in virtually any situation requiring use of force.

Proponents of tasers argue that the weapons have reduced the number of injuries to both officers and suspects. They contend that tasers are appropriately used in the early stages of a potential confrontation, in order to incapacitate the suspect and prevent the situation from leading to escalated force that could result in injuries. They believe that tasers have saved hundreds of lives in situations where police would otherwise have used deadly force.

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<sup>13</sup> Taser International News Release, *TASER International Reaches Agreements to Settle Securities Class Action and Derivative Litigation*, Aug. 9, 2006.

<sup>14</sup> Amnesty International 2004, *supra* note 10.

<sup>15</sup> Advanced Taser M26 Field Report Analysis, May 1, 2003 (compiling information from 2590 reports).

<sup>16</sup> Amnesty 2004, *supra* note 10, at 22-29, 60-61; Stun Gun Fallacy, *supra* note 10.

### III. Physical effects, potential injuries, and in-custody deaths

#### A. Pain and physical injuries

The electric shock from an M26 or X26 produces strong involuntary muscle contractions that induce what Taser International has described as “temporary paralysis.”<sup>17</sup> The suspect will sometimes freeze in place with legs locked or will fall immediately to the ground. Although the experience is extremely painful, some subjects do not remember the pain, a phenomenon that Taser International calls “critical stress amnesia.”<sup>18</sup> After a standard five-second shock, the subject will be dazed for up to several minutes.<sup>19</sup>

In addition to injuries that may be sustained in a taser-induced fall, the muscular contractions themselves can cause serious physical injuries, including stress fractures to vertebrae or other bones.<sup>20</sup> A number of police officers have sued Taser International for injuries they sustained when they submitted to a taser shock during training exercises.<sup>21</sup>

Tasers can cause permanent scarring and electrical burns, especially when used in the “drive stun” mode.<sup>22</sup>

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<sup>17</sup> Advanced Taser M-Series On-line Owner’s Manual, at 1.

<sup>18</sup> Taser International, Instructor Certification Lesson Plan, version 12.0, at 39.

<sup>19</sup> Recovery time is “generally several minutes.” Advanced Taser M-Series On-line Owner’s Manual, at 13; *see also* Taser International, Instructor Certification Lesson Plan, version 12.0, at 39 (subject is dazed “for several seconds/minutes”).

<sup>20</sup> Taser International now acknowledges that its devices can cause injuries such as “hernias, ruptures, dislocations, tears, or other injuries to soft tissue, organs, muscles, tendons, ligaments, nerves, and joints.” It states that “[f]ractures to bones, including vertebrae, may occur. These injuries may be more likely to occur in people with pre-existing injuries or conditions such as pregnancy, osteoporosis, osteopenia, spinal injuries, diverticulitis, or in persons having previous muscle, disc, ligament, joint, or tendon damage.” Taser International, Product Warnings, August 28, 2006, at 4 (hereafter “TI Product Warnings”), available at <http://www.taser.com/safety/LG-INST-LEWARN-001%20REV%20K%20Law%20Enforcement%20Product%20Warnings.pdf>.

<sup>21</sup> Robert Anglen, “Police in 5 states sue Taser in past 2 weeks,” *The Arizona Republic*, August 20, 2005; Robert Anglen, “Officers Injury Tied to Taser,” *Arizona Republic*, December 26, 2004.

<sup>22</sup> TI Product Warnings, *supra* note 20, at 4.

There are also reports that tasers can prompt seizures,<sup>23</sup> blackouts,<sup>24</sup> and involuntary urination or defecation.<sup>25</sup> Taser International advises police officers who submit to voluntary shocks during training to drink and have a snack first if they have low blood sugar or are dehydrated. It also advises them to use the bathroom first.<sup>26</sup> There is some evidence that taser shocks may pose a special risk to patients taking certain psychiatric medications.<sup>27</sup> Tasers have also been said to be responsible for causing permanent nerve damage,<sup>28</sup> as well as a ruptured colon, hearing and vision problems, and certain auto-immune disorders.<sup>29</sup>

Additional reports assert that taser shocks can harm a fetus and cause pregnant women to miscarry.<sup>30</sup> Although Taser International advises that police should not use tasers on women

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<sup>23</sup> William J. Everett, League of Minnesota Cities Risk Management Memo, *Police Use of Conductive Energy Devices (Tasers)*, October, 2005, (hereafter “Risk Management Memo”), available at <http://www.lmnc.org/pdfs/LMCITMemos/Tasers.pdf>; Taser International, Instructor Certification Lesson Plan, version 11.0, at 35.

<sup>24</sup> Taser International, Instructor Certification Lesson Plan, version 11.0, page 35 (dehydration and low blood sugar combined with taser exposure).

<sup>25</sup> Victoria Police, Taser Technology Review & Interim Recommendations, September 2004, at 19, available at [http://www.cprc.org/docs/bcopcc\\_interim.pdf](http://www.cprc.org/docs/bcopcc_interim.pdf).

<sup>26</sup> “Students should relieve themselves prior to exposure in order to not have stress related urination. Also, students who are dehydrated or have low blood sugar should hydrate or eat a light snack prior to exposure.” Taser International, Instructor Certification Lesson Plan, version 11.0, at 36.

<sup>27</sup> *Coleman v. Wilson*, 912 F. Supp. 1282, 1321-23 & n.58 (E.D. Cal. 1995).

<sup>28</sup> Paula Woodward, *Colorado Man Has Permanent Nerve Damage from Taser*, KUSA-TV, May 5, 2005. Text found at <http://www.firstcoastnews.com/news/usworld/news-article.aspx?storyid=36713>, last viewed 09/05/2006.

<sup>29</sup> Robert Anglen, *Police in 5 states sue Taser in past 2 weeks*, The Arizona Republic, August 20, 2005; Robert Anglen, *Officers Injury Tied to Taser*, Arizona Republic, December 26, 2004. Multiple reports written by police officers discussing injuries they attribute to taser shocks can be found at [http://www.policemag.com/forum/topic.asp?topic\\_id=715](http://www.policemag.com/forum/topic.asp?topic_id=715). See also *Wylie v. Overby*, 2006 U.S. Dist. Lexis 29845, \*8 (E.D. Mich. Apr. 14, 2006) (plaintiff alleged that taser shocks to the head caused continuing headaches, sensitivity to light, and blurred visions that interfered with reading). In letters written to the ACLU of Colorado, individuals shocked by tasers have attributed additional medical problems to the taser experience, including uncontrolled defecation, vision problems, intermittent shaking, chest pains, severe headaches, and insomnia.

<sup>30</sup> See Risk Management Memo, *supra* note 23, at 9 (“Pregnancy contraindicates CED use because of the risk of miscarriage”); Lewis E. Mehl, *Electrical injury from taser and miscarriage*, *Acra Obstet Gynecol Scand*, vol. 71, 118-23 (1992) (“Ethical questions should be raised about criteria for use of Taser on women of childbearing age”); Amnesty International 2004, *supra* note 10, at 30-31, 60-61 (discussing jury awards to two plaintiffs alleging that taser shocks caused miscarriages); see also *Valdez v. Farmon*, 766 F.Supp.1529 (N.D. Cal. 1991) (prisoner alleged that taser shock caused miscarriage).

who are visibly pregnant, the only rationale acknowledged is the possible harm from muscle contractions and the secondary injuries from a fall.<sup>31</sup>

Taser International maintains that its weapons pose no risk to the heart, but there are experts who disagree.<sup>32</sup> Taser proponents cite various studies that conclude that tasers pose a low risk of adverse cardiac effects.<sup>33</sup> Critics point out that these studies consider only the risk to healthy populations and that most studies note the absence of evidence that tasers are safe when used on persons with underlying heart problems.<sup>34</sup> Studies released in 2006 provide additional ammunition for the taser critics.<sup>35</sup>

### **B. “Excited delirium,” asphyxia, and multiple shocks**

One author has argued that critics who focus too closely on total numbers of “taser-associated” deaths may be overemphasizing the possible role of the electroshock weapons. She explains that many of the fatalities can be explained as cases of restraint-associated or positional asphyxia, especially in the frequent cases in which the deceased exhibited symptoms of what has been called “excited delirium.”<sup>36</sup>

“Excited delirium,” sometimes called “Sudden In-Custody Death Syndrome,”<sup>37</sup> is a controversial term<sup>38</sup> that appears in the coroners’ reports of many taser-associated fatalities.<sup>39</sup> It

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<sup>31</sup> Taser International, Instructor Certification Lesson Plan, version 12.0, at 43.

<sup>32</sup> Stun Gun Fallacy, *supra* note 10, at 8; Amnesty International, 2004, *supra* note 10.

<sup>33</sup> See, e.g., Taser International, Deadly Rhetoric: How the ACLU of Northern California’s Fight Against Law Enforcement Control Tools Endangers Communities, Jan. 20, 2006, available at <http://www.taser.com/savinglives/documents/Deadly%20Rhetoric%20V12.pdf>.

<sup>34</sup> Amnesty International 2004, *supra* note 10, at 61-67; Stun Gun Fallacy, *supra* note 10, at 10-11; Amnesty International, 2006, *supra* note 10; ACLU of Northern California, ACLU of Northern California Answers to Taser International’s Attacks and Challenges, April 2006, available at [http://130.94.233.45/police/060928-aclunc\\_resp-ti\\_paper.pdf](http://130.94.233.45/police/060928-aclunc_resp-ti_paper.pdf).

<sup>35</sup> See Alex Berenson, *The Safety of Tasers Is Questioned Again*, New York Times, May 26, 2006; Kumaraswamy Nanthakumar et al., *Cardiac electrophysiological consequences of neuromuscular incapacitating device discharges*, 48 J Am Coll Cardiol. 798-804, Aug. 15, 2006, available at [http://www.acc.org/media/releases/highlights/2006/aug06/Stun\\_Gun\\_1.pdf](http://www.acc.org/media/releases/highlights/2006/aug06/Stun_Gun_1.pdf).

<sup>36</sup> Lynne Wilson, *Police Prone Restraint Methods and Taser-Related Deaths*, Police Misconduct and Civil Rights Law Report, Vol. 8. No. 1, at 229-40, January/February, 2005.

<sup>37</sup> Debra Robinson, Shelby Hunt, *Sudden In-Custody Death Syndrome*, Topics in Emergency Medicine, Vol. 27 No. 1, pp. 36-43 (2005), available at <http://www.charlydmiller.com/LIB08/2005JanMarchSICDS.pdf>.



refers to a set of symptoms that may be the product of mental illness or may follow heavy or prolonged use of stimulant drugs. The symptoms, as listed in a Taser International product warning, include “extreme agitation, bizarre behavior, inappropriate nudity, imperviousness to pain, paranoia, exhaustive exertion, ‘superhuman’ strength, hallucinations, sweating profusely, etc.”<sup>40</sup>

Even in cases in which death is attributed to restraint asphyxia, however, tasers may well play a contributing or exacerbating role. This may be more likely in cases in which officers administer repeated taser shocks to a subject who is agitated, has been struggling with officers, has taken large quantities of drugs, and/or is exhibiting the signs of excited delirium. All of these individuals already have an increased need for oxygen, and persons restrained in a face-down position may be unable to inhale the extra oxygen they need, especially if police officers place their weight on the suspect’s back. The effects of the taser’s electric shocks on the muscles and blood chemistry may increase the need for oxygen while, at the same time, suppressing the ability to breathe.<sup>41</sup> Long-duration or repeated shocks may exacerbate the problem, especially when successive shocks are administered before the individual has recovered fully from the previous ones.<sup>42</sup> Based on the foregoing concerns, a Canadian study released in final form in 2005 warned against multiple or long-duration taser discharges.<sup>43</sup>

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<sup>38</sup> Julia Glick, ‘*Excited delirium*’ cited in deaths, Associated Press, Sept. 25, 2006.

<sup>39</sup> Amnesty International 2004, *supra* note 10, at 43 & n.112.

<sup>40</sup> TI Product Warnings, *supra* note 20.

<sup>41</sup> See Wilson, *supra* note 36 at 234; Raymond Fish and Leslie Geddes, *Effects of Stun Guns and Tasers*, *Lancet*, Vol. 358, pp. 687-88, Sept. 1, 2001; British Columbia Office of the Police Complaint Commissioner, Taser Technology Review, Final Report, June 14, 2005, at 31-32, 38 (hereafter “Taser Technology Review”), available at <http://www.victoriapolice.ca/papers/taser/finalreport.pdf>.

<sup>42</sup> Police officers could compound the problem if, mistakenly interpreting a suspect’s natural reaction to oxygen deficiency as continued resistance, they either increase the pressure on the suspect’s back or resort to additional taser shocks. See Dept. of Justice, *Positional Asphyxia*, National Law Enforcement Technology Center Bulletin, June 1995; Taser Technology Review, *supra* note 41, at 38 (“Police may be misled by the fact the subject can still speak, indicating a clear airway, which does not necessarily mean they can breathe at an adequate rate.”).

<sup>43</sup> Taser Technology Review, *supra* note 41, at 31-32, 38. Similarly, a study conducted by the Department of Defense noted that “repeated or constant activation” would result in “sustained muscle contraction with little or no

Relying in part on the Canadian study, the International Association of Chiefs of Police concluded that multiple or continuous taser discharges could lead to the death of persons exhibiting the symptoms of excited delirium:

Persons experiencing severe cocaine, methamphetamine, or other forms of serious drug or alcohol intoxication are among those at highest risk of sudden death. Unfortunately, they are often the very individuals most likely to come into contact with police because of their uncontrolled and irrational behavior (e.g., erratic and frantic activity, screaming, disrobing in public, irrationality, aggressiveness, superior strength). **It is not difficult to postulate that the use of an ECW on such individuals, who are often already in a precarious physical state, could precipitate unexpected negative consequences, including death.**<sup>44</sup>

### C. New warnings from Taser International

On June 28, 2005, Taser International issued a training bulletin that, for the first time, warned that warning that “repeated, prolonged, and/or continuous TASER device exposure(s)” may contribute to a suspect’s death. It warned that the taser “may cause strong muscle contractions that may impair breathing and respiration.” It specifically advised officers to “minimize the uninterrupted duration and total number” of taser discharges. The training bulletin further advised that if multiple discharges fail to produce compliance, the officer should consider whether “transition to a different force option is warranted.”<sup>45</sup>

Media reports about the new training bulletin regarded the announcement as a major change.<sup>46</sup> Taser International has now removed the training bulletin from its web site, but its

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muscle recovery period.” It warned that the consequent risk of cardiac arrhythmia, impairment of respiration, or widespread metabolic muscle damage (rhabdomyolysis) “could be severe.” Human Effects Center of Excellence, Human Effectiveness and Risk Characterization of Electromuscular Incapacitation Devices, March 1, 2005, at 19, available at <http://www.theiacp.org/research/CuttingEdge/HECOEReport.pdf>.

<sup>44</sup> International Association of Chiefs of Police, Electronic Control Weapons Concepts and Issues Paper, August, 2005, at 4 (hereafter “ECW Concepts and Issues”) (emphasis added).

<sup>45</sup> Taser International Training Bulletin 12.0 –04, June 28, 2005. This Training Bulletin is no longer available on Taser International’s web site, but it can be found at <http://www.charlydmiller.com/LIB06/2005JuneTASERIntTrainBulletin.pdf>.

<sup>46</sup> Lateef Mungin, *Company: Taser can be lethal; Maker backtracks about effects of multiple shocks*, Atlanta Journal Constitution, July 31, 2005, available at [http://www.ajc.com/search/content/auto/epaper/editions/today/news\\_24cee7339084209f00b8.html](http://www.ajc.com/search/content/auto/epaper/editions/today/news_24cee7339084209f00b8.html) (visited 10-03-06).

current product warnings continue to advise that multiple or continuous discharges may pose risks, although they no longer state expressly that multiple or sustained discharges might contribute to a suspect's death.

#### **IV. Training**

Many law enforcement agencies rely solely on training materials produced by Taser International. These training materials may be the only source of information that police officers receive about the potential risks and the appropriate or inappropriate use of tasers.

In a report released in September, 2005, the Northern California ACLU questioned whether police departments can reasonably rely on the powerpoint presentations that Taser International produces to train police officers. Reviewing the two most recent editions of the training materials, the report concluded that they “exaggerate overall safety, encourage multiple uses of the weapon, downplay the risk of using Tasers on people under the influence of drugs, and misrepresent the few medical reviews that have been done on Tasers.”<sup>47</sup>

The latest version of the company's training materials, version 13, dated May, 2006, now advises more caution with regard to multiple shocks than previous versions.<sup>48</sup>

While this change partially addresses one criticism, the new warnings are not necessarily communicated to police officers. In its survey of 56 California police departments, the Northern California ACLU study found that only thirteen were training their officers with the then-most-recent version of the Taser International training materials.<sup>49</sup>

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<sup>47</sup> Stun Gun Fallacy, *supra* note 10, at 8. The ACLU reviewed versions 11 and 12 of the training materials. Version 11 was released in 2004. Version 12 is dated November, 2004.

<sup>48</sup> Although Taser International has now included at least some cautions about multiple discharges, the most recent training materials continue to repeat assertions that have been criticized as misrepresentations of medical studies and unsupported claims of safety.

<sup>49</sup> Stun Gun Fallacy, *supra* note 10, at 8.

Even if, despite the critics, it were reasonable for police departments to rely solely on Taser International's training materials, a department's failure to ensure that its officers have received the most recent training may be a basis for municipal liability. Older versions of the Taser International powerpoint presentations encourage officers to administer multiple taser shocks without fear of possible harm to the suspect and without regard to whether they are on drugs or exhibiting symptoms of "excited delirium." One slide shows that officers applied multiple shocks in 32% of field applications. Police officers are advised to "anticipate using additional cycles to subdue suspects,"<sup>50</sup> and to "use as many cycles as necessary" to gain compliance or allow other officers to restrain the suspect.<sup>51</sup> To extend the life of the device, training materials issued in early 2005 suggest limiting the number of back-to-back discharges to 10, but add that "this limitation does not apply to field use."<sup>52</sup>

A Colorado case illustrates the potential for liability if police officers rely on Taser International's now-outdated training materials. A Glendale police officer cited her taser training in the report she wrote to explain the multiple taser shocks she applied to Glenn Leyba, whose subsequent death the coroner attributed to "excited delirium" caused by ingesting large quantities of cocaine. The officer arrived to assist paramedics, who had been called to provide medical assistance. The paramedics found Mr. Leyba lying face-down on the floor, flailing about and unresponsive to questions and requests to turn over. As several officers and paramedics attempted to restrain Mr. Leyba, the officer discharged her taser either three or four times:

Based on my training, I believed that the taser was the safest (no documented

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<sup>50</sup> Taser International Instructor Certification Lesson Plan and Support Material, version 11.0, at 116, 152.

<sup>51</sup> Taser International Instructor Certification Lesson Plan, version 12, M/X 26 Instructor Review Questions, No. 14.

<sup>52</sup> Taser International Instructor Certification Lesson Plan, version 12, at 58. Similarly, officers trained in earlier years were taught that drive stuns should be delivered directly to the groin, and that officers should "drive the taser aggressively into the subject for best result." Taser International, Advanced Taser M26 Certification Lesson Plan, version 8.0, at 12. The most recent version now cautions that officers should use the drive stun to sensitive areas of the body only when officers "are defending themselves from violent attacks." Taser International, M26 and X26 instructor course, version 13, slide 225.

cases of permanent injury or death caused by taser use) and obvious level of necessary force I needed to gain control.<sup>53</sup>

Mr. Leyba died shortly afterwards. Although the actions of the officer may have been consistent with the training materials Taser International issued several years ago, the most recent training materials now caution officers against multiple discharges in such a situation.<sup>54</sup>

## **V. Law enforcement policies for tasers**

Evaluating potential claims of excessive force involving tasers should include a review of the law enforcement agency's policy. Three important issues are 1) where the agency places tasers on the continuum of force; 2) whether the policy prohibits or authorizes use of tasers on certain vulnerable populations; and 3) whether the policy prohibits or limits multiple or long-duration taser shocks.

### **A. Continuum of force**

The policies and training curricula of law enforcement agencies usually describe an escalating continuum of force options that officers may apply to overcome various levels of resistance. At one end may be officer presence and use of verbal commands; at the other is deadly force. There is no standard universally-adopted description of the various resistance levels, and law enforcement agencies differ about the appropriate location of specific tools or tactics.

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<sup>53</sup> Letter from ACLU of Colorado to Gerry Springer, Glendale City Attorney, March 11, 2004 (summarizing and quoting reports on file with Colorado ACLU).

<sup>54</sup> Taser International, M26 and X26 Instructor Course, version 13, slide 195.

A typical use-of-force continuum might look like this:

<u>Level of resistance</u>	<u>Authorized force</u>
Psychological intimidation	Officer presence
Verbal or nonverbal noncompliance	Verbal commands
Passive physical resistance	Touch control, handcuffs, pain compliance (use of pressure points)
Active resistance	Chemical agents (pepper spray), empty-hand tactics
Active aggression	Impact weapons
Aggravated aggression	Deadly force

A government survey found that police departments have authorized use of electroshock weapons anywhere from the second level, passive resistance, to the fourth level, active aggression.<sup>55</sup> Many departments regard tasers as a use of force that is equivalent to pepper spray.<sup>56</sup> Some departments authorize their officers to use tasers but do not provide any further guidance with regard to the weapon's appropriate placement in the use-of-force continuum.<sup>57</sup>

There is a definite trend to stop authorizing use of tasers to overcome passive resistance. Numerous police departments that formerly authorized such use have revised their policies to rescind that authorization.<sup>58</sup> Both the International Association of Chiefs of Police (IACP) and the Police Executive Research Forum (PERF) issued model taser policies in 2005 that state that tasers should not be used to overcome passive resistance.

<sup>55</sup> United States Government Accountability Office, *Taser Weapons: Use of Tasers by Selected Law Enforcement Agencies*, May, 2005, at 9, available at <http://www.gao.gov/new.items/d05464.pdf>; Stun Gun Fallacy, *supra* note 10, at 12-14.

<sup>56</sup> ECW Concepts and Issues, *supra* note 44, at 3. Although Taser International states that each police department must decide for itself where tasers should be placed on the use-of-force continuum, the training materials state that 86% of police departments place it at the level of pepper spray or below. Taser International, *Instructor Certification Lesson Plan*, version 12, at 143.

<sup>57</sup> *E.g.*, Stun Gun Fallacy, *supra* note 10, at 14 (discussing policy of police department of San Jose, California).

<sup>58</sup> Amnesty International 2004, *supra* note 10, at 12 n.36

PERF's model policy and training guidelines, issued in October, 2005, state that tasers should only be used against persons "who are actively resisting or exhibiting active aggression, or to prevent individuals from harming themselves or others."<sup>59</sup> The terms are defined in a companion document that defines seven levels of resistance:

1. psychological intimidation
2. verbal noncompliance
3. passive resistance
4. defensive resistance
5. actively resisting
6. active aggression
7. aggravated active aggression<sup>60</sup>

Consistent with the PERF guidelines, a number of law enforcement agencies have moved tasers toward the upper end of the continuum of force. For example, the Denver Police Department's use-of-force policy originally authorized officers to use tasers to overcome "defensive resistance." In response to concerns about taser safety and reports of abusive use of tasers in Colorado, Denver amended its policy. Now, tasers are not authorized unless the suspect displays "active aggression," defined in a manner that tracks the PERF definition.<sup>61</sup> Several Florida law enforcement agencies made similar changes.<sup>62</sup>

Whether more agencies will move tasers higher on the force continuum depends in part on the nature of the still-emerging information about the degree to which tasers pose a risk of

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<sup>59</sup> Police Executive Research Forum, Conducted Energy Device, Policy and Training Guidelines for Consideration, October 25, 2005, (hereafter "PERF Model Policy"), available at [http://www.policeforum.org/upload/PERF-CED-Guidelines-Updated-10-25-05%5B1%5D\\_715866088\\_1230200514040.pdf](http://www.policeforum.org/upload/PERF-CED-Guidelines-Updated-10-25-05%5B1%5D_715866088_1230200514040.pdf).

<sup>60</sup> Police Executive Research Forum (PERF), Conducted Energy Device (CED) Glossary of Terms, available at [http://www.policeforum.org/upload/PERF-CED-Glossary%20of%20Terms%5B1%5D\\_715866088\\_12302005140311.pdf](http://www.policeforum.org/upload/PERF-CED-Glossary%20of%20Terms%5B1%5D_715866088_12302005140311.pdf). PERF defines "actively resisting" as "physically evasive movements to defeat an officer's attempt at control, including bracing, tensing, pushing, or verbally signaling an intention to avoid or prevent being taken into or retained in custody." It defines "active aggression" as "a threat or overt act of an assault (through physical or verbal means), coupled with the present ability to carry out the threat or assault, which reasonably indicates that an assault or injury to any person is imminent." Aggravated active aggression is a "deadly force encounter."

<sup>61</sup> Brian D. Crecente, *Chief rewrites Taser rules; New policy allows use only in cases of active aggression*, Rocky Mountain News, Sept. 4, 2004.

<sup>62</sup> Pedro Ruz Gutierrez, *Taser use reined in by Policy Changes*, Orlando Sentinel, Jul. 15, 2004.

injury or death in situations where deadly force is not legally authorized. Michael Berkow, Deputy Chief of the Los Angeles Police Department, reportedly predicted that the tasers will ultimately end up as “only a specific alternative to lethal force.”<sup>63</sup>

## **B. Vulnerable populations**

The IACP has advocated that in addition to specifying when tasers may be used, law enforcement policies “should also be explicit as to when its use is inappropriate.”<sup>64</sup>

The available studies about the risks that tasers pose to health or safety often distinguish between healthy persons and certain more vulnerable populations.<sup>65</sup> Often the studies note an increased risk—or the lack of sufficient information to rule out such a risk—if tasers are used on pregnant women, children, elderly persons, persons with underlying heart problems, and persons who have ingested large quantities of stimulant drugs.

The PERF model policy states that tasers “should not generally be used against pregnant women, elderly persons, young children, and visibly frail persons unless exigent circumstances exist.”<sup>66</sup> The IACP model policy states that officers “should be aware of the greater potential for injury” when using tasers against “children, the elderly, persons of small stature irrespective of age, or those who the officer has reason to believe are pregnant, equipped with a pacemaker, or in obvious ill health.”<sup>67</sup> Most police departments, however, have not incorporated these recommendations into their taser policies.<sup>68</sup>

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<sup>63</sup> Canadian Press, *Victoria police chief says public should be part of Taser use discussion*, Sept. 14, 2006, available at <http://ca.news.yahoo.com/s/14092006/2/national-victoria-police-chief-says-public-part-taser-use-discussion.html> (last visited Sept. 20, 2006).

<sup>64</sup> International Association of Chiefs of Police, *Electro-Muscular Disruption Technology, A Nine-Step Strategy for Effective Deployment*, at 13 (undated, but released in April 2005), (hereinafter “IACP, EMD Technology”) available at <http://www.theiacp.org/research/CuttingEdge/EMDT9Steps.pdf>

<sup>65</sup> *Id.* at 5.

<sup>66</sup> PERF Model Policy, *supra* note 59, para. 7.

<sup>67</sup> IACP Model Policy, *Electronic Control Weapons*, Section IV.C.2 (hereafter “IACP Model Policy”).

<sup>68</sup> *Stun Gun Fallacy*, *supra* note 10, at 13 (reporting on a survey of California police department policies).



### **C. Repeated or successive discharges of the taser**

With increasing recognition that multiple or sustained discharges of tasers may pose special dangers, several organizations and reports have recommended policies that limit the duration of continuous taser discharges and the number of successive times that officers can apply the taser to a suspect. The PERF model policy states that officers should stop to re-evaluate if a single five-second discharge does not bring the situation under control.<sup>69</sup> The IACP model policy simply states that “the officer shall energize the subject the least number of times and no longer than necessary to accomplish the legitimate operational objective.”<sup>70</sup> The policy also requires officers to “specifically articulate” in their report the rationale for discharging a taser more than 3 times or for more than 15 seconds.<sup>71</sup> An ACLU survey of 54 California police departments reported that only four provided any warning or restriction on multiple taser shocks.<sup>72</sup>

### **VI. The legal standards for evaluating claims of excessive force**

The legal standard for evaluating whether law enforcement officers have used excessive force depends on the status of the plaintiff. For convicted prisoners, the standard derives from the Eighth Amendment’s ban of cruel and unusual punishment.<sup>73</sup> For pretrial detainees, the Due Process Clause controls.<sup>74</sup> The Fourth Amendment applies when a police officer uses force to detain or arrest a person who is at liberty.<sup>75</sup>

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<sup>69</sup> PERF Model Policy, *supra* note 59, para. 3.

<sup>70</sup> IACP Model Policy, Section IV.C.3.

<sup>71</sup> *Id.*, Section IV.E.2.

<sup>72</sup> Stun Gun Fallacy, *supra* note 10, at 12.

<sup>73</sup> *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 395. *Graham* left open the question whether the Fourth Amendment continues to apply between the time of arrest and the initial appearance before a judge. *Id.* at 395 n.10. Many lower courts have held that the Fourth Amendment applies after arrest until the initial appearance before a judge. *See, e.g.*, *Luck v. Rovenstine*, 168 F.3d 323, 326 (7th Cir. 1999); *Frohmader v. Wayne*, 958 F.2d 1024, 1026 (10<sup>th</sup> Cir. 1992).

**A. Eighth Amendment: Convicted prisoners**

In *Whitley v. Albers*,<sup>76</sup> the Supreme Court announced the legal standard for evaluating whether a prisoner shot during a prison disturbance had been subjected to excessive force that violated the Eighth Amendment. Adopting a test that Judge Friendly had employed years earlier in *Johnson v. Glick*,<sup>77</sup> the Court held that the critical question is “whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.”<sup>78</sup> Borrowing additional elements of Judge Friendly’s analysis, the Court identified relevant factors as including “the need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted.”<sup>79</sup> Analysis of those factors, the Court said, could provide “inferences” as to “whether the use of force could plausibly have been thought necessary, or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur.”<sup>80</sup> Additional relevant factors are the extent of the threat to the safety of staff or prisoners, and “any efforts made to temper the severity of a forceful response.”<sup>81</sup>

In *Hudson v. McMillian*,<sup>82</sup> the Court held that the *Whitley* standard is not limited to riots or other emergencies but applies in every case in which prison officials are accused of using excessive physical force.<sup>83</sup> The Court also held that the Eighth Amendment does not require a

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<sup>76</sup> 475 U.S. 312 (1986).

<sup>77</sup> 481 F.2d 1028 (2d Cir. 1973) (analyzing pretrial detainee’s claim of unjustified assault by a guard).

<sup>78</sup> 475 U.S. at 320-21, quoting *Johnson*, 481 F.2d at 1033.

<sup>79</sup> *Id.* at 321 (brackets in original), quoting *Johnson*, 481 F.2d at 1033.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> 503 U.S. 1 (1992).

<sup>83</sup> *Id.* at 6-7.

prisoner to demonstrate “significant injury.” Although the extent of the prisoner’s injury may be relevant, the absence of significant injury is not dispositive.<sup>84</sup>

**B. Fourth Amendment: Detention or arrest of persons at liberty**

In *Tennessee v. Garner*,<sup>85</sup> the Supreme Court held that the Fourth Amendment prohibits law enforcement officers from using deadly force to apprehend a nonviolent fleeing felon. Deadly force is prohibited “unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.”<sup>86</sup>

In *Graham v. Connor*,<sup>87</sup> the Supreme Court held that all claims that a law enforcement officer used excessive force in the process of making an arrest or a detention must be analyzed under the objective reasonableness standard of the Fourth Amendment. Courts must carefully balance the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing government interests at stake. The Court emphasized that the test of objective reasonableness “is not capable of precise definition or mechanical application,” thus requiring “careful attention to the facts and circumstances of each particular case.”<sup>88</sup> The Court said the analysis should consider the severity of the crime, whether the suspect posed an immediate threat to the safety of the officers or others; and whether the suspect was actively resisting arrest or attempting to evade arrest by flight. These three factors are clearly not intended as an exhaustive list, as the Court noted the need to consider “the totality of the circumstances.”<sup>89</sup>

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<sup>84</sup> The Court noted that “de minimis” uses of force are excluded from Eighth Amendment analysis as long as the use of force is not of a type “repugnant to the conscience of mankind.” *Id.* at 9-10.

<sup>85</sup> 471 U.S. 1 (1985).

<sup>86</sup> *Id.* at 3.

<sup>87</sup> 490 U.S. 386 (1989).

<sup>88</sup> *Id.* at 396.

<sup>89</sup> *Id.* citing *Tennessee v. Garner*, 471 U.S. at 8-9.

In *Graham*, the Supreme Court said that the analysis of reasonableness must take into account 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.”<sup>90</sup>

The Fourth Amendment analysis is objective; the officer’s subjective intent, motives or good faith are not relevant. “An officer’s evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer’s good intentions make an objectively unreasonable use of force constitutional.”<sup>91</sup>

### **C. Due Process Clause: Pretrial detainees**

The claims of pretrial detainees are governed by the substantive protections of the Due Process Clause, which “are at least as great as the Eighth Amendment protections available to a convicted prisoners.”<sup>92</sup> The Court has not decided a case that clearly explains whether the claims of pretrial detainees alleging excessive force should be analyzed under a more protective standard. Many courts have simply analyzed the excessive force claims of pretrial detainees under the Eighth Amendment standard.<sup>93</sup>

Some portions of the Court’s decision in *Graham v. Conner*, however, may provide an argument that the claims of pretrial detainees should be evaluated under a more plaintiff-friendly standard. Citing *Bell v. Wolfish*,<sup>94</sup> the Court in *Graham* said that “the Due Process clause protects a pretrial detainee from the use of excessive force that amounts to punishment.”<sup>95</sup>

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *County of Sacramento v. Lewis*, 523 U.S. 833, 848-50 (1998), quoting *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983).

<sup>93</sup> *E.g.*, *Valencia v. Wiggins*, 981 F.2d 1440, 1446 (5<sup>th</sup> Cir. 1993); *United States v. Walsh*, 194 F.3d 37, 48 (2d Cir. 1999); *Riley v. Dorton*, 115 F.3d 1159, 1167 (4th Cir. 1997).

<sup>94</sup> 441 U.S. 520 (1979).

<sup>95</sup> 490 U.S. at 395 n.10, citing *Bell v. Wolfish*, 441 U.S. 520, 535-39 (1979).

The Court's citation to *Bell v. Wolfish* provides an argument for plaintiffs' attorneys. In *Bell*, the Court explained how to analyze whether a particular measure amounts to unconstitutional punishment of a pretrial detainee:

Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]. Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment." Conversely, if a restriction or condition is not reasonably related to a legitimate goal -- if it is arbitrary or purposeless -- a court permissibly may infer that the purpose of the governmental action is punishment."<sup>96</sup>

Thus, *Graham* and *Bell* together suggest that pretrial detainees establish at least an inference of unconstitutional punishment when the use of force is arbitrary, purposeless, or sufficiently excessive that it is not reasonably related to a legitimate government interest.

*Graham* also suggests that after pretrial detainees establish excessive force that amounts to punishment, they should not also be required to make the additional showing that the force was "imposed maliciously and sadistically for the very purpose of causing harm."<sup>97</sup> The lower court in *Graham* had imposed that requirement in a case that *Graham* held must be analyzed under the Fourth Amendment. In explaining its disagreement with the lower court's analysis, the *Graham* Court said that the "malicious and sadistic" standard of *Johnson v. Glick* (and the Eighth Amendment) "puts in issue the subjective motivations of the individual officers."<sup>98</sup> In discussing the difference between the Fourth Amendment's objective standard and the "malicious and sadistic" prong of the Eighth Amendment standard, *Graham* noted that the terms "cruel" and "punishment" in the Eighth Amendment suggest in inquiry into state of mind, but the term "unreasonable" does not. The Court further noted that "the less protective Eighth

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<sup>96</sup> *Bell*, 441 U.S. at 538-39 (brackets in original; internal quotations and citations omitted).

<sup>97</sup> *Whitley*, 475 U.S. at 320-21.

<sup>98</sup> 490 U.S. at 397.

Amendment standard” applies ‘*only* after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.’”<sup>99</sup> Thus *Graham* suggests that pretrial detainees, whose prosecutions are not complete, can argue that they meet their burden by establishing unconstitutional punishment, without the additional burden of proving that the punishment was imposed “maliciously and sadistically.”

## **VII. Applying excessive force standards to the use of tasers**

Because *Graham v. Connor* emphasized that claims of excessive force must be evaluated according to the totality of the circumstances, the three specific factors mentioned in that decision are not exclusive. Courts have also considered factors that the Supreme Court identified as relevant to Eighth Amendment excessive force cases, such as the relationship between the need for force and the force actually used,<sup>100</sup> and they have identified additional relevant factors as well. The following discussion identifies some of those factors and how they have applied in cases discussing tasers, and, in some cases, other forms of less lethal force.

### **A. Degree or severity of the force applied**

With regard to less lethal weapons, an important factor is the degree or the severity of the force applied, which the Ninth Circuit has also called the “quantum” of force.<sup>101</sup> This factor clearly requires considering the number of taser shocks and the duration of those shocks. It also requires considering the unbearable and excruciating pain that tasers inflict.

Police officers who have submitted to taser shocks as part of their training have described the pain in graphic terms: “like a finger in a light socket many times over.” “It’s like getting punched 100 times in a row.” “It is the most profound pain I have ever felt.” “They call it the

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<sup>99</sup> *Graham*, 490 U.S. at 398, quoting *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977) (emphasis added).

<sup>100</sup> *E.g.*, *Draper v. Reynolds*, 369 F.3d 1270, 1277-78 (11<sup>th</sup> Cir. 2004).

<sup>101</sup> *Smith v. City of Hemet*, 394 F.3d 689, 701 (9<sup>th</sup> Cir. 2005) (en banc) (“it is necessary to assess the quantum of force used”); *Chew v. Gates*, 27 F.3d 1432, 1441 (9<sup>th</sup> Cir. 1994) (explaining that *Graham* factors must be analyzed “in relation to the amount of force used”).

longest five seconds of their life ... it's extreme pain, there's no question about it. No one would want to get hit by it a second time." "It just takes your legs out. It's like a jackhammer going Kaboom, Kaboom, Kaboom!"<sup>102</sup>

Cases considering taser-related claims of excessive force often do not discuss whether tasers inflict significant pain. Not surprisingly, the cases that rule in favor of plaintiffs seem more ready to acknowledge that tasers are extremely painful.<sup>103</sup> Cases that rule against plaintiffs have downplayed the significance or degree of pain.<sup>104</sup>

## **B. Whether tasers pose a risk of death or serious bodily injury**

### **1. Can tasers be considered deadly force?**

If the use of a taser in specific circumstances can be considered "deadly force," then it is analyzed under the more plaintiff-friendly legal standard of *Tennessee v. Garner*. The *Garner* Court did not hold that its rule is restricted to use of firearms, nor did it define "deadly force." In an *en banc* decision in 2005, the Ninth Circuit joined seven others in holding that for purposes of applying the rule of *Garner*, "deadly force" is force that "creates a substantial risk of causing death or serious bodily injury."<sup>105</sup> The court held that use of police dogs could amount to deadly

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<sup>102</sup> Amnesty International 2004, *supra* note 10, at 1, 5-6.

<sup>103</sup> *See, e.g.*, *DeSalvo v. City of Collinsville*, 2005 U.S. Dist. Lexis 23180, \*13 (S.D. Ill. Oct. 7, 2005) ("[a] taser is capable of inflicting a great deal of pain upon a person—shocking, burning, and even rendering numb its target"); *Preston v. Pavlushkin*, 2006 U.S. Dist. Lexis 14357, \*4 (D. Colo. Mar. 16, 2006) (video showed plaintiff "writhing in obvious pain"); *Hickey v. Reeder*, 12 F.3d 754, 757, 758 (8th Cir. 1993) ("a painful and frightening blow, which temporarily paralyzes the large muscles of the body, rendering the victim helpless"; "a painful and incapacitating shock"); *Maiorano v. Santiago*, 2005 U.S. Dist. Lexis 40879, at \*17 (M.D. Fla. May 19, 2005) (rejecting defendant officer's argument that a single discharge of a taser, as a matter of law, is "de minimis" force).

<sup>104</sup> *E.g.*, *Draper v. Reynolds* 369 F3d 1270, 1278 (11th Cir. 2004) (characterizing being tased as "unpleasant"); *Alford v. Osei-Kwasi*, 418 S.E. 2d.79, 85 (Ga. App.1992) ("minor" pain ). One case rejecting a plaintiff's claim included an alternative holding that the two-second taser shock was a de minimis injury that could not amount to a Fourth Amendment violation. *Stanley v. City of Baytown*, 2005 WL 2757370, \*6 (S.D. Tex. Oct. 25, 2005); *see also Bronson v. Mitchell*, 1995 U.S. Dist. Lexis 21651, \*12 (N.D. Miss. 1995) (questioning whether a single taser shock implicates the Fourth Amendment).

<sup>105</sup> *Smith v. City of Hemet*, 394 F.3d 689, 706 (9<sup>th</sup> Cir. 2005) (*en banc*). The standard is adapted from the Model Penal Code, which also defines "serious bodily injury" as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." Model Penal Code § 210.0(3). The Code does not define "substantial risk."

force, and several courts have held that certain restraint techniques meet the deadly force standard.<sup>106</sup>

Plaintiffs have the best chance of invoking the deadly force standard in cases where the specific circumstances pose an elevated risk that tasers will cause serious injury or death. This could include cases where tasers are applied to vulnerable areas of the body, such as the head or eyes. It might include claims on behalf of pregnant women who assert an elevated risk that the taser will cause a miscarriage. Another possibility is cases where officers use tasers against suspects who are standing in places where the taser-induced collapse poses a substantial risk of serious bodily injury.<sup>107</sup> Sustained or multiple taser discharges might amount to deadly force when applied in combination with face-down restraint to an agitated suspect who is displaying symptoms of “excited delirium.”

## **2. The risk of significant injury under *Graham***

Even when the deadly force standard does not apply, a relevant factor in the *Graham* equation is “whether the use of force poses a risk of permanent or significant injury.”<sup>108</sup> In some early cases, courts expressed concern about the possible health or safety risks posed by the first generation of tasers.

### **a. Early cases’ discussion of risk of injury**

In *Mitchenfelder v. Sumner*,<sup>109</sup> a Nevada prisoner sought an injunction to stop prison authorities from using tasers to compel prisoners to submit to strip searches. The district court

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<sup>106</sup> *Id.* at 706 (police dog); *Gutierrez v. City of San Antonio*, 139 F.3d 441, 446-47 (5<sup>th</sup> Cir. 1998) (hog-tying can be deadly force); *Cruz v. City of Laramie*, 239 F.3d 1183, 1188 (10<sup>th</sup> Cir. 2001) (recognizing that hog-tying a suspect with diminished capacity is “likely to result in . . . significant risk to the individual’s health or well-being”). *See also* *Deorle v. Rutherford*, 272 F.3d 1272, 1279 (9<sup>th</sup> Cir. 2001) (holding that cloth-encased lead-filled rounds were “obviously enough to cause grave physical injury”).

<sup>107</sup> *See* *Amnesty International*, 2004, *supra* note 10, pages 29-30 (describing case of man tasered while standing in a tree and subsequently paralyzed from the fall).

<sup>108</sup> *Headwaters Forest Defense v. County of Humboldt*, 240 F.3d 1185, 1199 (9<sup>th</sup> Cir. 2001), *vacated* 534 U.S. 801 (2001), *aff’d on remand*, 276 F.3d 1125 (2002).

<sup>109</sup> 860 F.2d 328 (9<sup>th</sup> Cir. 1988),



denied the injunction, and the prisoner appealed. The Ninth Circuit noted that there was very little information in the record about the potential adverse effects of using tasers on humans.<sup>110</sup> The district court had said “it seems safe to assume” that prison authorities received adequate input from experienced and knowledgeable persons before authorizing taser use. In a footnote, the Ninth Circuit said that “[s]uch assumptions can never be made safely.”<sup>111</sup> The court then cited earlier cases from New York and Georgia that acknowledged concerns that tasers could be deadly.<sup>112</sup>

The Ninth Circuit first determined that the tasers were used not for punishment but for a legitimate purpose: to compel compliance with a reasonable security measure. The permissible purpose, however, was not dispositive. The court recalled an earlier decision considering prisoners’ challenge to the use of tear gas, which the court characterized as “a demonstrably dangerous and painful substance.” The court said it had approved “limited use” of tear gas “when used to contain disturbances that threatened an equal or greater harm.” Implicit in its earlier holding in the tear gas case, the court reasoned, were three principles: First, tasers cannot be used as punishment. Second, that they must be used only “in furtherance of a legitimate prison interest.” Third, they must be used “only when absolutely necessary.”<sup>113</sup>

The *Michenfelder* court noted that “long-term effects of tasers are currently unknown.” It affirmed the denial of relief because the prisoner had not produced enough evidence of tasers’ dangers. The court left open the possibility that research might uncover “evidence of adverse

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<sup>110</sup> The Ninth Circuit stated that the district court had, as evidence, “the manufacturer’s literature regarding testing on animals, which the court credited.” *Michenfelder*, 860 F.2d at 336.

<sup>111</sup> *Id.* at 335 n.4.

<sup>112</sup> The Ninth Circuit cited a New York case and quoted it in a parenthetical: “although the [taser] was introduced in 1971, there has been great concern about the impact on people with heart problems and its use has been outlawed in this State.” *Id.*, quoting *People v. Sullivan*, 500 N.Y.S. 2d 644, 647 (1986). The Ninth Circuit’s footnote then cited a Georgia case, and quoted it as saying: “Apparently, at the time of the incident at issue, taser guns were not considered by prison officials to constitute deadly force. They have, however, since been classified as such at the [Georgia State] prison.” *Id.*, quoting *McCranie v. State*, 322 S.E.2d 360, 361 n.1 (Ga. App. 1984).

<sup>113</sup> 860 F.3d at 335.

long-term effects that would call into question the use of tasers.”<sup>114</sup> In a later case, the Ninth Circuit characterized *Michenfelder* as “upholding the use of taser gun where plaintiff had failed to establish long-term health risks, but leaving open the question whether the use of tasers would be unconstitutional in the event that further research should ‘uncover evidence of adverse long-term effects.’”<sup>115</sup>

A few years later, in *Coleman v. Wilson*,<sup>116</sup> the court relied on expert testimony and concluded that “use of tasers on inmates on psychotropic medication causes physical harm.”<sup>117</sup> The court further concluded that use of tasers causes “serious and substantial harm” to even mentally ill inmates who are not taking psychotropic medication, and that this harm “can be both immediate and long lasting.”<sup>118</sup> In another California prison case, the court noted that concerns about “significant health risks” had led some prisons to ban tasers.<sup>119</sup>

#### **b. Recent and future cases**

Although tasers have become more powerful, the recent court cases usually include little or no discussion of any possible risk of injury to health or safety. Some cases dismiss the risk or appear to have accepted, without question, the content of promotional materials.<sup>120</sup>

Even when plaintiffs are not able to present evidence that use of tasers poses a general risk of injury to health or safety, they may be able to demonstrate that the use of tasers in a particular situation or in a particular manner poses such a risk. Even if the scenarios described above do not qualify as deadly force, they may nevertheless pose a sufficient risk of significant

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<sup>114</sup> *Id.* at 336.

<sup>115</sup> *Walker v. Sumner*, 917 F.2d 382, 388 n.4 (9<sup>th</sup> Cir. 1990).

<sup>116</sup> 912 F. Supp. 1282 (E.D. Cal. 1995).

<sup>117</sup> *Id.* at 1322 n.58.

<sup>118</sup> *Id.* at 1322.

<sup>119</sup> *Madrid v. Gomez*, 889 F. Supp. 1146, 1175 n.43 (N.D. Cal. 1995). The court also noted that a taser “inflicts significant pain” that a lieutenant compared to “being hit on the back with a ‘four-by-four’ by Arnold Schwarzenegger.” *Id.* at 1174-75.

<sup>120</sup> *Wylie v. Overby*, 2006 U.S. Dist. Lexis 29845, \*23 (E.D. Mich. Apr. 14, 2006) (stating that proper use of a Taser involves no “serious risk of lasting injury”)

injury to merit consideration in the *Graham* analysis. Plaintiffs have especially solid support for arguing that multiple or sustained taser shocks pose a risk of significant injury. In analyzing the nature or severity of the force applied, it is the *risk* of injury that is important, not whether that risk was realized in a particular case.<sup>121</sup>

### **C. Multiple or long-duration shocks**

The studies and product warnings regarding multiple taser shocks are relatively new, and it does not appear that any court decisions have considered evidence that a series of shocks may represent a qualitatively different level of force with an elevated risk of physical harm. Some courts have regarded multiple shocks as unimportant as long as they are administered while the suspect's resistance is continuing.<sup>122</sup> Even in cases where the initial taser shocks may be regarded as reasonable, the decision to administer subsequent shocks may be unreasonable, even if the initial shocks did not produce the desired compliance or incapacitation.<sup>123</sup>

### **D. Whether a warning was given**

In an alternative statement of its holding, the *Garner* decision requires that officers provide a warning, when feasible, before they may constitutionally use deadly force.<sup>124</sup> Similarly, whether the plaintiff received a warning is a factor to be considered

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<sup>121</sup> Cf. *Ryder v. City of Topeka*, 814 F.2d 1412, 1417 n.11 (10<sup>th</sup> Cir. 1987) (“the use of deadly force does not occur only when the suspect actually dies”); *Shillingford v. Holmes*, 634 F.2d 263, 266 (5<sup>th</sup> Cir. 1981) (“That the results of the attack on Shillingford's person were not crippling was merely fortuitous. That same blow might have caused blindness or other permanent injury.”).

<sup>122</sup> See, e.g., *Hinton v. City of Elwood*, 997 F.2d 774, 781 (10<sup>th</sup> Cir. 1993) (holding that officer's alleged repeated use of stun gun is not excessive force when the officer stopped once the plaintiff was handcuffed); *Nichols v. Davison*, 2005 WL 1950361, \*2 - \*3 (W.D. Okla. July 26, 2005) (police used reasonable force when they subjected an actively resisting suspect to “five or six strikes” of the taser after two bursts of pepper spray failed to stop him from struggling).

<sup>123</sup> See, e.g., *Russo v. City of Cincinnati*, 953 F.2d 1036, 1045 (6<sup>th</sup> Cir. 1992) (acknowledging that officer's subsequent firings of the Taser, after the first shock was ineffective, “present a closer question than his initial use of the Taser”).

<sup>124</sup> *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985).

in analyzing whether use of a less lethal weapon constitutes excessive force.<sup>125</sup> In several rulings in which plaintiffs prevailed, the court noted the officer's failure to give a prior warning.<sup>126</sup> Similarly, in cases holding for the defendant, a warning has been cited as a factor in the officer's favor.<sup>127</sup>

### **E. Defendant's opportunity for deliberation**

In light of *Graham*'s statement that the split-second judgments of police deserve deference, some courts have suggested that police deserve less deference when split-second judgments are not required.<sup>128</sup> Thus, plaintiffs can argue that courts should consider this factor in cases when law enforcement had ample opportunity to reflect before deciding when, whether, and what kind of force to apply. Potential examples are cell extractions in jails and prisons,<sup>129</sup> cases in which suspects are surrounded and cannot escape,<sup>130</sup> and cases involving protesters engaging in nonviolent trespass or other forms of passive civil disobedience.<sup>131</sup> In some cases, plaintiffs may be able to argue that what appears initially as a split-second decision should be analyzed from an earlier point in time, when the officers first arrived at the scene. In such cases,

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<sup>125</sup> See *Deorle v. Rutherford*, 272 F.3d 1272, 1283-84 (9<sup>th</sup> Cir. 2001). In Eighth Amendment cases, whether the plaintiff received a warning may be relevant to evaluating "any efforts made to temper the severity of a forceful response." *Whitley v. Albers*, 475 U.S. 312, 321 (1986).

<sup>126</sup> See *DeSalvo v. City of Collinsville*, 2005 U.S. Dist. Lexis 23180, \*16 (S.D. Ill. Oct. 2, 2005) ("little, if any, warning"); *Maiorano v. Santiago*, 2005 U.S. Dist. Lexis 40879, \*23 (M.D. Fla. May 19, 2005) (holding that under the circumstances alleged it was unreasonable "to use a taser against Plaintiff, without advance warning or a verbal command to desist"). The lack of warning has also figured in Eighth Amendment rulings in favor of prisoners. *E.g.* *Treats v. Morgan*, 308 F.3d 868, 873 (8<sup>th</sup> Cir. 2002) (pepper spray). *But see* *Caldwell v. Moore*, 968 F.2d 595, 597, 600 (6<sup>th</sup> Cir. 1992) (prison guards were not required to issue warning before using stun gun multiple times on prisoner who refused orders to stop kicking cell door).

<sup>127</sup> *E.g.* *Monday v. Oullette*, 118 F.3d 1099, 1104-05 (6<sup>th</sup> Cir. 1997) (pepper spray); *N.A. v. Inabinett*, 2006 U.S. Dist. Lexis 68003, \*22 (M.D. Ala. Sept. 20, 2006).

<sup>128</sup> *Headwaters Forest Defense v. County of Humboldt*, 240 F.3d 1185, 1203-04 (9<sup>th</sup> Cir. 2001); *Chew v. Gates*, 27 F.3d 1432, 1443 (9<sup>th</sup> Cir. 1994) (explaining that "[t]his was not an occasion on which the police were forced to make 'split-second judgments' in circumstances that were 'rapidly evolving.' There was time for deliberation and consultation with superiors").

<sup>129</sup> *Coleman v. Wilson*, 912 F. Supp. 1282, 1322 (E.D. Cal. 1995) (discussing prison policy requiring correctional officers to check with medical staff before using tasers on prisoners taking psychotropic medications).

<sup>130</sup> *Chew v. Gates*, 27 F.3d 1432, 1443 (9<sup>th</sup> Cir. 1994) (police dogs).

<sup>131</sup> *Headwaters Forest Defense v. County of Humboldt*, 240 F.3d 1185, 1203-04 (9<sup>th</sup> Cir. 2001) (pepper spray).

plaintiffs may be able to argue that the officers' objectively unreasonable approach to a potentially volatile situation may have created the emergency that prompts the use of force.<sup>132</sup>

#### **F. Whether the use of force complies with policies or safety warnings**

Applying a less lethal weapon in a manner that violates the manufacturer's safety recommendations is evidence of objectively unreasonable force and also informs the qualified immunity analysis.<sup>133</sup> Similarly, a policy that sets limits on officers' use of force or the treatment of prisoners in some cases may constitute fair notice of the constitutional standard.<sup>134</sup> Courts have also considered the policies of other law enforcement agencies when analyzing whether officers used excessive force or are entitled to qualified immunity.<sup>135</sup> One court held that a prison's policy on taser use was relevant evidence of the "evolving standards of decency" that inform the Eighth Amendment.<sup>136</sup> In a case involving repeated or long-duration taser shocks, plaintiffs may be able to rely on the warnings that Taser International began issuing in June, 2005.

#### **G. Continuum of force**

In *McKenzie v. City of Milpitas*,<sup>137</sup> the Ninth Circuit upheld a jury verdict against the City on a theory that the police department's policy authorized police to use tasers too soon--

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<sup>132</sup> Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 Colum. Hum. Rts. L. Rev. 261 (2003).

<sup>133</sup> *Headwaters Forest Defense v. County of Humboldt*, 276 F.3d 1125, 1130 (9<sup>th</sup> Cir. 2002) (after remand) (pepper spray).

<sup>134</sup> *Hope v. Pelzer*, 536 U.S. 730, 743-44 (2002) (hitching post).

<sup>135</sup> *Headwaters Forest Defense v. County of Humboldt*, 240 F.3d 1185, 1208 (9<sup>th</sup> Cir. 2001) (supervisors may have ordered use of pepper spray under circumstances they knew violated policies of California Department of Justice and California Highway Patrol); *Headwaters Forest Defense v. County of Humboldt*, 276 F.3d 1125, 1131 (after remand) ("regional and state-wide police practice and protocol clearly suggest that using pepper spray against nonviolent protesters is excessive").

<sup>136</sup> *Valdez v. Farmon*, 766 F.Supp.1529, 1537-38 & n.8 (N.D. Cal. 1991). *Cf. Jolivet v. Cook*, 1995 U.S. App. Lexis 3950, \*5 (10<sup>th</sup> Cir. 1995) (although defendants admitted violating prison policy on use of tasers, such a violation does not give rise to an Eighth Amendment violation). In *Caldwell v. Moore*, 968 F.2d 595, 597, 600 (6<sup>th</sup> Cir. 1992), the court approved a guard's use of a stun gun on a prisoner despite the absence of any training and the lack of any policy authorizing use of the weapon.

<sup>137</sup> 1992 U.S. App. Lexis 1786 (9<sup>th</sup> Cir. Feb. 7, 1992), discussed *infra* in Section VIII, discussing municipal liability.

immediately after voice commands failed to achieve compliance. In other cases, however, courts have held that police officers acted reasonably when they decline to attempt hands-on techniques and instead choose the taser as a first resort. In such cases, courts have suggested that the taser was a reasonable choice to avoid a physical conflict that might result in injuries to the suspect or the officer.<sup>138</sup>

In *Draper v. Reynolds*,<sup>139</sup> for example, a roadside stop of a truck driver for a burnt-out license plate light escalated into a verbal confrontation and subsequent discharge of a taser. The plaintiff truck driver became agitated and complained that the officer was harassing him.<sup>140</sup> The court characterized the plaintiff as “hostile, belligerent, and uncooperative.”<sup>141</sup> The officer characterized the plaintiff’s demeanor and belligerent verbal accusations as “threatening” and putting the officer “on the defensive.” The officer asked the plaintiff four times to go to the truck to retrieve documents for the officer’s inspection. As soon as the officer issued the order for a fifth time, he discharged a taser at the plaintiff’s chest.<sup>142</sup>

The Eleventh Circuit held that the officer’s discharge of the taser “was reasonably proportionate to the difficult, tense and uncertain situation” that he faced in this traffic stop. It explained that because the plaintiff refused to comply with verbal commands, the officer was not required to state first that the plaintiff was under arrest. The court added that the single use of

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<sup>138</sup> *E.g.*, *Alford v. Osei-Kwasi*, 418 S.E. 2d 79, 84 (Ga. App. 1992) (“If used properly it avoids the physical injuries associated with other means of force.”); *Caldwell v. Moore*, 968 F.2d 595, 602 (6<sup>th</sup> Cir. 1992) (“It is not unreasonable for the jail officials to conclude that the use of a stun gun is less dangerous for all involved than a hand to hand confrontation”); *Draper v. Reynolds* 369 F.3d 1270, 1278 (11<sup>th</sup> Cir. 2004) (officer’s single use of the taser “may well have prevented a physical struggle and serious harm”).

<sup>139</sup> 369 F.3d 1270 (11<sup>th</sup> Cir. 2004).

<sup>140</sup> The truck driver, who was African American, attempted to argue that he had been subjected to racial profiling. The court declined to consider whether the initial stop was a pretext, *id.* at 1275, and it also held that the plaintiff had failed to support his equal protection claim with evidence that white truck drivers received different treatment. *Id.* at 1278 n.14.

<sup>141</sup> *Id.* at 1278.

<sup>142</sup> *Id.* at 1273.

the taser “may well have prevented a physical struggle and serious harm” to either the plaintiff or the officer.<sup>143</sup>

#### **H. Plaintiff’s degree of threat**

Whether the plaintiff presented an immediate threat to the safety of officers or others is “the most important single element” of the factors identified in *Graham*.<sup>144</sup> Rulings for plaintiffs often state that the plaintiff presented little or no threat.<sup>145</sup> Some decisions portray plaintiffs as more vulnerable or less threatening because of their youth, small size, age, or gender.<sup>146</sup>

Pregnancy, however, has not worked in plaintiffs’ favor. An appellate court approved use of a taser on a prisoner who was seven and one-half months pregnant and refused orders to stop banging on her cell. The court noted with approval that the guard “used the Taser to minimize possible injuries to all concerned, including [the plaintiff] and her unborn child.”<sup>147</sup>

Courts have not been reluctant to uphold use of tasers against handcuffed prisoners, either because they resist being searched,<sup>148</sup> continue to pose a threat,<sup>149</sup> or because they are noncompliant with verbal commands.<sup>150</sup> One court held that a jailer used objectively reasonable

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<sup>143</sup> *Id.* at 1278; *see* *Devoe v. Rebant*, 2006 U.S. Dist. Lexis 5326, \*21-\*22 (E.D. Mich. 2006) (following *Draper*, and approving taser use on handcuffed suspect who disobeyed verbal commands to enter squad car, as physical force might have escalated into a struggle that caused injury). *See also* *Russo v. City of Cincinnati*, 953 F.2d 1036, 1048 (6<sup>th</sup> Cir. 1992) (noting that officer used taser “to stun and to disable temporarily rather than to inflict more serious or more permanent injury”).

<sup>144</sup> *Chew v. Gates*, 27 F.3d 1432, 1441 (9<sup>th</sup> Cir. 1994).

<sup>145</sup> *Preston v. Pavlushkin*, 2006 U.S. Dist. Lexis 14357, \*5 (D. Colo. Mar. 16, 2006) (Plaintiff “did not present any threat of physical violence. The device was used to shock him three times while he was on the ground and obviously incapacitated”); *Hickey v. Reeder*, 12 F.3d 754, 758 (8<sup>th</sup> Cir. 1993) (no physical threat); *Autin v. City of Baytown*, 2005 U.S. App. Lexis 29098, \*\*9 (5<sup>th</sup> Cir. Dec. 29, 2005) (plaintiff was “objectively unthreatening”).

<sup>146</sup> *E.g.*, *Maiorano v. Santiago*, 2005 U.S. Dist. Lexis 40879, \*17 (M.D. Fla. May 19, 2005) (high school student); *Autin v. City of Baytown*, 2005 U.S. App. Lexis 29098, \*\*7 (5<sup>th</sup> Cir. Dec. 29, 2005) (court emphasized that plaintiff was a fifty-nine year old woman and five foot two inches tall).

<sup>147</sup> *Alford v. Osei-Kwasi*, 418 S.E. 2d.79, 85 (Ga. App.1992).

<sup>148</sup> *Johnson v. City of Lincoln Park*, 434 F.Supp.2d 467, 469-71, 480 (E.D. Mich. 2006).

<sup>149</sup> *Moore v. Novak*, 146 F.3d 531, 534-35 (8<sup>th</sup> Cir. 1998).

<sup>150</sup> *Devoe v. Rebant*, 2006 U.S. Dist. Lexis 5326, \*21-\*22 (E.D. Mich. 2006).

force when she discharged a taser on a prisoner's neck while he was strapped in the jail's restraint chair.<sup>151</sup>

### **I. Availability of alternatives to the use of tasers**

In Fourth Amendment cases, the availability of alternative methods of capturing or subduing a suspect may be a factor.”<sup>152</sup> This factor worked against the plaintiff in a Michigan case in which the court granted summary judgment to the officers. Because the plaintiff had “twice broken from the officer’s grasp,” the court said police were justified in escalating to some form of non-lethal force. The court reviewed various options such as tackling the plaintiff, or using fists, batons, pepper spray, or tasers. The court concluded that tasers were less risky for the officer and posed “no serious risk of lasting injury to the subject.”<sup>153</sup>

### **J. Defendant’s effort to temper a forceful response**

The defendant’s effort to temper a forceful response is a factor in the Eighth Amendment analysis. In a pro se prisoner case, the court awarded summary judgment to prison guards who were accused of twice discharging a taser on a prisoner who asserted that he had already become compliant. In holding that the guards did not use excessive force, the court relied on the fact that the defendants employed two separate discharges of the taser “rather than a continuous trigger.” The court also cited the defendants’ “decision not to Taser Plaintiff a third time.”<sup>154</sup>

## **VIII. Municipal liability**

In *McKenzie v. City of Milpitas*,<sup>155</sup> two plaintiffs contended that police officers’ use of tasers against them constituted excessive force. They sued the City, arguing that its use-of-force

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<sup>151</sup> *McBride v. Clark*, 2006 U.S. Dist. Lexis 9143, \*64 (W.D. Mo. Mar. 8, 2006); *see also* *Carroll v. County of Trumbull*, 2006 U.S. Dist. Lexis 23009, \* 39 (N.D. Ohio Apr. 25, 2006) (plaintiff did not demonstrate that it violated clearly established law to shock him twice with a taser while he was already handcuffed behind his back and his legs were bound with a leather strap.)

<sup>152</sup> *Smith*, 394 F.3d 689, 703; *Chew v. Gates*, 27 F.3d at 1441 n.5.

<sup>153</sup> *Wylie v. Overby*, 2006 U.S. Dist. Lexis 29845, \*22 - \*24 (E.D. Mich. 2006).

<sup>154</sup> *Manier v. Cook*, 394 F. Supp. 2d 1282, 1288 (E.D. Wash. 2005).

<sup>155</sup> 738 F. Supp. 1293 (N.D. Cal. 1990).



policy placed the taser too low in the continuum of force. They contended that “using the taser after voice commands and before use of physical arrest techniques such as wrist locks, mace or batons, is improper and condones the use of constitutionally excessive force.”<sup>156</sup> They also alleged that the City’s training left officers “unaware of the dangers associated with prolonged continuation of the taser current, and fosters the practice of administering the taser current continuously until the desired result is achieved.”<sup>157</sup>

In denying the City’s motion for summary judgment, the district court noted factual disputes about whether the officers’ use of tasers was objectively reasonable in the circumstances. The district court further explained that the City’s policy authorized officers to resort to tasers immediately after verbal warnings had failed to achieve compliance.<sup>158</sup> It also noted that pursuant to the City’s policy, tasers were supplied to inexperienced officers;<sup>159</sup> officers could carry tasers on investigatory stops; officers were not required to holster their tasers;<sup>160</sup> and officers were not adequately trained about the potential health risks of using tasers.<sup>161</sup>

The plaintiffs won a jury verdict, and the Ninth Circuit affirmed in an unpublished opinion.<sup>162</sup> The court noted that the City’s written policy states that “the Taser may be used when . . . attempts to subdue the suspect by . . . verbalization . . . have been, or will likely be ineffective.”<sup>163</sup> The court concluded that “[t]he broad permissive language of the Milpitas policy, combined with the fact that it does not require officers to holster their tasers, makes it

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<sup>156</sup> *Id.* at 1297-98.

<sup>157</sup> *Id.* at 1297. One plaintiff was tased once and the other twice. *Id.* at 1296. The district court’s opinion provides no information about the duration of the taser discharges.

<sup>158</sup> *Id.* at 1301.

<sup>159</sup> According to the plaintiffs’ evidence, Milpitas was the only police department in California to allow patrol officers to use tasers. Other departments restricted use of tasers to supervisory staff. *Id.* at 1297.

<sup>160</sup> Plaintiffs argued that allowing officers to carry the taser unholstered leaves them only one free hand, thereby preventing officers from using physical arrest techniques and encouraging use of the taser. *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *McKenzie v. City of Milpitas*, 1992 U.S. App. Lexis 1786 (9<sup>th</sup> Cir. Feb. 7, 1992).

<sup>163</sup> *Id.* at \*7 (ellipses in original).

reasonably likely that Milpitas officers will resort to their tasers immediately after verbalization fails.”<sup>164</sup>

In a more recent case, the plaintiff survived summary judgment on two theories of municipal liability. First, the court concluded that the defendant officer’s 16 prior uses of a taser in a four-month period raised a question as to whether the City had “a policy or custom pertaining to taser usage that violated Plaintiff’s Fourth Amendment rights.”<sup>165</sup> The court also held that there was a material issue of fact whether a deliberately indifferent failure to train and supervise caused the excessive use of force, because an officer’s pattern of taser use was not necessarily known during officers’ supervisory reviews, thus allowing that “rogue taser usage could go virtually unchecked.”<sup>166</sup>

## **IX. Punishment vs. compliance; using tasers to overcome passive resistance**

Tasers have been especially controversial when law enforcement officers have used them to overcome nonthreatening persons who passively and nonviolently decline to comply with orders. There is universal agreement that electric shocks cannot legitimately be used to impose summary corporal punishment. Nevertheless, courts have distinguished the impermissible goal of punishment from a permissible goal of compelling compliance with legitimate orders. In addition, courts have also held that refusal to comply with some orders is not sufficiently serious to justify use of tasers or other less lethal force to compel compliance. As the following discussion demonstrates, the distinction between punishment and compliance is not always clear.

### **A. Using tasers to enforce compliance with lawful orders**

#### **1. Order to submit to strip search**

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<sup>164</sup> *Id.* at \*8.

<sup>165</sup> *Chaney v. City of Orlando*, 2005 U.S. Dist. Lexis 30580, \*56 (M.D. Fla. Dec. 2, 2005).

<sup>166</sup> *Id.* at \*58 - \*59.

In *Michenfelder v. Sumner*,<sup>167</sup> discussed earlier, the Ninth Circuit denied relief to a prisoner who challenged the use of tasers to enforce a Nevada prison policy requiring prisoners to submit to strip searches. The plaintiff was housed in a maximum security unit reserved for the state's 40 most dangerous prisoners. The strip searches were conducted every time a prisoner left or returned to the unit and every time a prisoner moved within the unit escorted by guards, such as for sick call, visits, or yard time. In describing the prisoner's allegations, the court said that correctional officers "have threatened and in some instances actually fired tasers to enforce compliance with the strip searches and have also used the tasers in other disciplinary situations in the prison."<sup>168</sup> The plaintiff alleged that he was threatened with a taser when he refused to submit to a strip search in the public hallway when he returned from the recreation yard. He further alleged that guards told him that another prisoner who had just returned from the recreation yard had been tasered twice because he insisted that he be strip searched in his cell instead of the hallway.

The *Michenfelder* court started with the premise that administering electric shocks as punishment would violate the Eighth Amendment.<sup>169</sup> In this case, however, the court said that the taser "was used to enforce compliance with a search that had a reasonable security purpose, not as punishment."<sup>170</sup> The court said that "the legitimate intended result of a shooting is incapacitation of a dangerous person, not the infliction of pain."<sup>171</sup>

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<sup>167</sup> 860 F.2d 328 (9<sup>th</sup> Cir. 1988).

<sup>168</sup> *Id.* at 330.

<sup>169</sup> *Id.* at 335, citing the Supreme Court's discussion of the "Tucker telephone" in Arkansas prisons in *Hutto v. Finney*, 427 U.S. 678, 682 (1978).

<sup>170</sup> 860 F.2d at 335. In a later case, a pregnant female prisoner alleged that she was tasered for refusing an order to submit to a strip search with a male officer present. The court held that the jury could find that use of a taser to enforce an illegitimate order violated the Eighth Amendment. *Valdez v. Farmon*, 766 F.Supp.1529, 1535 n.6 (N.D. Cal. 1991).

<sup>171</sup> 860 F.2d at 335. The court did not discuss or explain why a prisoner who passively declines an order to strip becomes a "dangerous person" in need of "incapacitation." Nor did it explain how the prison's legitimate need to conduct a strip search is furthered by the "incapacitation" of a prisoner who has passively resisted.

## 2. Order to clean prisoner's cell

While *Michenfelder* upheld the use of tasers on a prisoner who refuses to submit to a strip search, in *Hickey v. Reeder*,<sup>172</sup> the Eighth Circuit held that correctional officers violated the Eighth Amendment when they discharged a stun gun on a prisoner who had simply refused a direct order to clean his cell. Relying on the testimony of the defendant correctional officers, the court concluded that “the stun gun was used on Hickey to cause enough pain and harm to force him to sweep his cell, and to make an example of him.”<sup>173</sup>

Responding to the defendants' contention that they can use summary force to compel compliance with any direct order, the court responded that “[t]he law does not authorize the day-to-day policing of prisons by stun gun.”<sup>174</sup> The court distinguished cases, including *Michenfelder*, where the use of physical force is motivated by a concern for the safety of prisoners or correctional officers or the security of the institution. The court concluded, “as a matter of law, that use of a stun gun to enforce the order to sweep was both an exaggerated response to Hickey's misconduct and a summary corporal punishment that violated Hickey's Eighth Amendment right to be free of cruel and unusual punishment.”<sup>175</sup>

## 3. Additional orders

The Eighth Circuit followed *Hickey* in a 2002 case.<sup>176</sup> A correctional officer twice ordered a prisoner to take his copy of a form he had signed, and the prisoner refused. The officer then squirted the prisoner with pepper spray. In affirming the district court's denial of qualified immunity, the court explained that a correctional officer can violate the Eighth Amendment by

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<sup>172</sup> 12 F.3d 754 (8<sup>th</sup> Cir. 1993).

<sup>173</sup> *Id.* at 758.

<sup>174</sup> *Id.* at 758-59.

<sup>175</sup> *Id.* at 759. *See also* *Preston v. Pavlushkin*, 2006 U.S. Dist. Lexis 14357 (D. Colo. Mar. 16, 2006) (Relying on *Hickey* and denying summary judgment to jail guards who tasered a prisoner four times until he complied with an order to pick up the food tray he had thrown).

<sup>176</sup> *Treats v. Morgan*, 308 F.3d 868 (8th Cir. 2002).

spraying OC spray on a prisoner who may have questioned the officer's actions but otherwise poses no threat to safety or prison security.<sup>177</sup> The court further explained that it was "clearly established that force may be justified to make an inmate comply with a lawful prison regulation or order, but only if the inmate's noncompliance also poses a threat to other persons or to prison security."<sup>178</sup>

### **B. Distinguishing punishment from compelling compliance**

In analyzing what constitutes impermissible corporal punishment, some courts have noted a distinction between physical pain or some other physical deprivation that is imposed as a penalty for past misconduct, and pain or other deprivation is imposed in an effort to coerce present or future actions.<sup>179</sup>

Thus, in *Ort v. White*,<sup>180</sup> the Eleventh Circuit held that a prisoner assigned to a work crew on an Alabama prison farm was not subjected to cruel and unusual punishment when he was deprived of water while refusing to work. All he needed to do to obtain water was resume his assigned work. Comparing this coercive rather than punitive deprivation of water to civil contempt sanctions, the court said the prisoner "essentially had the keys to the water keg in his own pocket."<sup>181</sup> The court stated that its result would have been different if, after the work crew returned to the prison, the prisoner been deprived of water as a penalty for refusing to work.<sup>182</sup>

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<sup>177</sup> *Id.* at 875.

<sup>178</sup> *Id.* In *Caldwell v. Moore*, 968 F.2d 595, 597 (6<sup>th</sup> Cir. 1992), the court held that prison guards did not violate the Eighth Amendment when they used a stun gun on a prisoner who refused orders to stop yelling and kicking his cell door. In response to the argument that the prisoner posed no threat to himself or prison security, the court said that "[i]nmates cannot be permitted to decide which orders they will obey, and when they will obey them." *Id.* at 601, quoting *Soto v. Dickey*, 744 F.2d 1260, 1267 (7<sup>th</sup> Cir. 1984).

<sup>179</sup> *See, e.g., Ort v. White*, 813 F.2d 318, 322 (11<sup>th</sup> Cir. 1987) (distinguishing between punishment "in the strict sense" and "coercive measures undertaken to obtain compliance with a reasonable prison rule or regulation."); *Michenfelder v. Sumner*, 860 F.2d 328, 335 (9<sup>th</sup> Cir. 1988) (distinguishing between administering taser shocks as punishment for misconduct and used a taser "to enforce compliance with a search that had a reasonable security purpose, not as punishment").

<sup>180</sup> 813 F.2d 318 (11<sup>th</sup> Cir. 1987).

<sup>181</sup> *Id.* at 326.

<sup>182</sup> *Id.* at 326.

The Supreme Court noted this distinction in *Hope v. Pelzer*.<sup>183</sup> In that case, the Court considered an Alabama prisoner’s claim that he was subjected to cruel and unusual punishment when guards transported him from his work site back to the prison and handcuffed him to a “hitching post,” where he was forced to stand shirtless for hours in the hot sun.<sup>184</sup> In denying qualified immunity to the prison guards, the Court held that the Eleventh Circuit’s decision in *Ort* provided fair warning that the Eighth Amendment prohibits “physical abuse directed at [a] prisoner after he terminates his resistance to authority.”<sup>185</sup> The Court noted that the prisoner was “not restrained at the worksite until he was willing to return to work. Rather, he was removed back to the prison and placed under conditions that threatened his health.” This was not a case, the Court explained, in which the prisoner could end his ordeal by agreeing to end his resistance. This was not a case in which he effectively had “the keys to the handcuffs that attached him to the hitching post.”<sup>186</sup>

### **C. Fourth Amendment cases on pain compliance**

The distinction discussed in *Ort* and *Hope* appears in Fourth Amendment cases discussing when and whether police may permissibly inflict pain to force passive nonviolent protesters to comply with lawful orders. In *Forrester v. City of San Diego*,<sup>187</sup> the plaintiffs asserted that police officers used excessive force when arresting peaceful but passively noncompliant anti-choice demonstrators who blocked the entrance to an abortion clinic. Instead of dragging or carrying noncompliant arrestees from the clinic entrance, police intentionally

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<sup>183</sup> 536 U.S. 730 (2002).

<sup>184</sup> *Id.* at 734-35, 743-44.

<sup>185</sup> *Id.* at 743.

<sup>186</sup> 536 U.S. at 744. The Court’s did not hold that prison officials could constitutionally employ the hitching post as a valid coercive measure so long as prisoners could be released when they agreed to comply with orders. The Court relied on the distinction in *Ort* to demonstrate that prior case law made apparent the impropriety of the *punitive* use of the device.

<sup>187</sup> 25 F.3d 804 (9<sup>th</sup> Cir. 1994),

applied pain by using Orcutt Police Nonchakus (OPNs) and painful pressure-point holds.<sup>188</sup> The officers forced the protesters to move by tightening OPNs around their wrists until they complied with orders to stand up and walk to the waiting police vehicles. The jury ruled for defendants, and the Ninth Circuit affirmed in a 2-1 decision.

The court rejected the dissent's argument that the pain-compliance techniques were the equivalent of applying lighted cigarettes to the protesters' skin:

“Unlike the use of a lighted cigarette, which would create immediate and searing pain, the discomfort produced by the OPNs was gradual in nature. . . . [T]he police first applied a loose grip and then progressively tightened their hold until the demonstrators stood and ceased resistance. The moment the demonstrators complied, the police released the OPNs.”<sup>189</sup>

Thus, in *Forrester*, the force that was applied, and the accompanying pain inflicted, increased only gradually, and the protesters had the power to end the pain immediately by complying with police orders.

The Ninth Circuit distinguished *Forrester* in a later case where police applied OC spray as a pain-compliance technique to force environmentalist protesters to comply with police orders to release themselves from lock-down devices called “black bears.”<sup>190</sup> Police used Q-tips to apply pepper spray directly to protesters' eyes and also sprayed them directly in the face from a few inches away.<sup>191</sup> Unlike the pain-compliance technique in *Forrester*, the use of pepper spray caused “‘immediate and searing pain’ that could not be moderated by the officers at their discretion or terminated by them the

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<sup>188</sup> *Id.* at 805. The Court explained that OPNs are “two sticks of wood connected at one end by a cord, used to grip a demonstrator's wrist.” *Id.*

<sup>189</sup> *Id.* at 808 n.5.

<sup>190</sup> *Headwaters Forest Defense v. County of Humboldt*, 240 F.3d 1185, 1199-1201 (9<sup>th</sup> Cir. 2001). Without protesters' voluntary compliance, police had to forcibly remove the “black bears” by using a hand-held electric grinder that can cut through steel. *Id.* at 1191.

<sup>191</sup> *Id.* at 1192-95.

moment the protesters complied with their demands.”<sup>192</sup>

#### **D. Analyzing tasers as a pain-compliance technique**

How would courts apply these decisions to a case in which law enforcement officers use tasers to overcome passive resistance or passive noncompliance to orders? There is nothing gradual about the tasers. The pain they inflict is not only “immediate” and “searing,” but is probably more intense and overwhelming than the pain imposed by OC spray. On the other hand, the recovery period with tasers is normally short. In contrast, the pain inflicted by pepper spray lasts longer, until there is an opportunity to flush the chemical from the face.<sup>193</sup>

When tasers are used as a pain-compliance technique, the default five-second discharge means that subjects do not have the “keys to the handcuffs.” They cannot terminate the pain immediately by deciding to comply with orders. To the extent that the taser prevents the subjects from exercising voluntary control over their muscles, they will be *unable* to comply with orders.<sup>194</sup> They may also be unable to communicate their *willingness* to comply.

If the tasers are used in drive stun mode, however, they don’t cause the subjects to lose control of their muscles. In addition, police can terminate the shock before the full five seconds elapses, either by flicking a switch or, in drive stun mode, by removing the taser from the subject’s body. Even so, using direct-contact stun guns to prompt compliance by means of searing pain (and accompanying electrical burns) seems closer to the use of lighted cigarettes that the *Forrester* court seemed to assume was impermissible.

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<sup>192</sup> *Id.* at 1200. The court concluded that the use of OC spray as a pain compliance technique to arrest nonviolent demonstrators “can only be deemed reasonable force if the countervailing governmental interests at stake were particularly strong.” *Id.* at 1205.

<sup>193</sup> “Persons exposed to an ECW [an electroshock weapon] will typically recover in seconds or minutes, as compared to a recovery time of almost one hour for pepper spray.” ECW Concepts and Issues, *supra* note 44, at 3.

<sup>194</sup> Persons subjected to a taser shock “may not be able to respond to commands during or immediately following exposure.” IACP Model Policy, *supra* note 67, Section IV.C.4.