Florida Law Review

Volume 62 | Issue 3 Article 5

July 2010

Don't Tase Me Bro!: A Comprehensive Analysis of the Laws Governing Taser Use by Law Enforcement

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NOTES

DON'T TASE ME BRO!: A COMPREHENSIVE ANALYSIS OF THE LAWS GOVERNING TASER USE BY LAW ENFORCEMENT

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I. INTRODUCTION

Financially destitute and homeless, a man began to sob after receiving a speeding ticket.[1] When the man refused to sign the ticket, the ticketing officer arrested the man.[2] The officer placed the man in handcuffs and

* J.D. anticipated 2010, University of Florida Levin College of Law. This Note is dedicated to Patricia Fabian. I would like to thank both Patricia and Kate for all their patience, love, and support. I would also like to thank the members of the *Florida Law Review* for all their hard work and support. It has been an honor and a pleasure to serve as an editor on the *Review*. My colleagues are truly inspiring.

1. Buckley v. Haddock, 292 F. App'x 791, 792 (11th Cir. 2008).
2. *Id.*

began leading him to the patrol car.[3] As the two walked towards the patrol car, the man went limp and fell to the ground in despair.[4] The man continued to sob and remained limp as the officer tried to lift him to his feet.[5] The officer warned the man that if he didn't get up, he would be Tasered.[6] When the man did not comply, the officer Tasered the man three times.[7] During each Taser shock, the man convulsed and writhed on the ground in pain.[8] When the Tasering stopped, the man still could not bring himself to his feet.[9] After another officer arrived on the scene, the two officers easily lifted the suspect off the ground and placed him in a patrol car.[10]

Another man, suspected of physically abusing his estranged wife, was verbally confronted by police.[11] Moments into the verbal confrontation, the man turned and ran.[12] The officers gave chase and attempted to stop the man by Tasering him. The suspect resisted the shock and continued to flee.[13] Eventually the officers caught up to the suspect and Tasered him as they tried to bring him under control.[14]

The first man was arrested for speeding and sat on the ground crying in despair; the other man was suspected of a violent crime and fled police. Can you guess which Tasering was ruled reasonable by a federal court? If you knew that Tasering the distraught speeder was ruled reasonable[15] and that Tasering the domestic abuse suspect was not,[16] then it should not come as a surprise to learn that a federal district court in Arizona ruled that it was reasonable to Taser a sleeping man five or six times.[17]

Images of officers Tasering suspects can be graphic and difficult to watch. Such images can spark outrage and protests—particularly when the Tasering seems grossly disproportionate to the culpability of the suspect.[18]

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3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 792–93.
8. *Id.* at 800.
9. *Id.* at 793.
10. *Id.*
11. Roberts v. Manigold, 240 F. App'x 675, 675–76 (6th Cir. 2007).
12. *Id.* at 676.
13. *Id.*
14. *Id.*
15. Buckley v. Haddock, 292 F. App'x 791, 792 (11th Cir. 2008).
16. *Roberts*, 240 F. App'x at 678.
17. Campos v. City of Glendale, No. CV-060610-PHX-DCG, 2007 WL 4468722, at *1–2, 6 (D. Ariz. Dec. 14, 2007).
18. Jessica DaSilva, *Protest Attracts Hundreds*, THE INDEPENDENT FLORIDA ALLIGATOR, Sept. 19, 2007, *available at* http://www.alligator.org/articles/2007/09/19/news/campus/protest.txt; Martin Espinoza, *Rally Targets Stun-Gun Deaths*, PRESS DEMOCRAT, Dec. 27, 2008, *available at* http://www.pressdemocrat.com/article/20081227/NEWS/812270379/1350?Title=Rally_targets_stu

And when law enforcement officers don't face penalties for such disproportionate uses of force, the public is left to wonder: how could that be possible? By design, the law governing an officer's use of force is nebulous.[19] This lack of specificity allows courts to grant law enforcement officers a great deal of latitude when deciding how much and what type of force to use.[20]

Officers can escape liability for excessive force if a court deems the use of force reasonable under the Fourth Amendment.[21] However, the lack of specificity in federal excessive force jurisprudence makes it difficult to determine ahead of time what type and how much force a court would likely consider reasonable.[22] Thus, the jurisprudence provides officers little guidance about when to use Tasers against suspects and how to comply with the Fourth Amendment.[23]

Part II of this Note examines the safety and effectiveness of Taser use by highlighting key studies on the topic. Part III of this Note explains federal excessive force jurisprudence. Part IV looks at excessive force cases to determine how courts have applied the law to specific fact patterns. Part IV concludes that courts do not heavily restrict Taser use by law enforcement—sometimes even allowing officers to Taser passively resisting or vulnerable suspects. Part V surveys state and local laws governing Taser use by law enforcement. Finally, Part VI concludes that laws governing Taser use by law enforcement can be improved by providing officers more guidance about when Taser use is appropriate and by crafting laws that provide citizens more protection.[24]

II. SAFETY OF TASER USE BY LAW ENFORCEMENT

A. *Taser Technology*

Taser devices use compressed nitrogen to fire two needle-like probes into a target up to thirty-five feet away.[25] The probes deliver up to 50,000 volts of electricity through two insulated wires that remain connected to the

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n_gun_deaths.

19. Graham v. Connor, 490 U.S. 386, 396 (1989) (quoting Bell v. Wolfish, 441 U.S. 520, 559 (1979) ("[T]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application.") (internal quotation marks omitted)).

20. *See infra* Part IV.

21. *See, e.g.*, *Graham*, 490 U.S. at 395–96; Tennessee v. Garner, 471 U.S. 1, 7–8 (1985).

22. *See infra* Part III.B.

23. *Id.*

24. *See infra* Part VI.

25. Taser Int'l, Inc., TASER M26, http://www.Taser.com/products/law/Pages/TASERM26.aspx (last visited Mar. 22, 2010) [hereinafter TASER M26]; Taser Int'l, Inc., TASER X26, http://www.Taser.com/products/military/Pages/TASERX26.aspx (last visited Mar. 22, 2010) [hereinafter TASER X26].

Taser device.[26] The electric shock causes involuntary muscle contractions that incapacitate the targeted person.[27]

The electric shock can travel through two inches of clothing, so the probes do not need to be embedded into a person's skin to incapacitate him or her.[28] When the probes do penetrate the skin, the probes may become embedded as deep as half an inch.[29] The electrical shock lasts for about five seconds,[30] and people typically recover after ten seconds.[31]

B. *Taser Safety*

Research shows that the large majority of Taser incidents result in mild or no injuries to the suspect.[32] In fact, some law enforcement agencies report that using Tasers leads to decreases in suspect injuries, officer injuries, and firearm usage.[33] At the very least, Tasers reduce suspect and officer injury rates relative to hand control techniques.[34] And the reduction

26. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-464, TASER WEAPONS: USE OF TASERS BY SELECTED LAW ENFORCEMENT AGENCIES 6 (MAY 2005) [hereinafter USGAO REPORT]. The Taser has a voltage that is more than 400 times larger than a typical American home power outlet, which delivers only 120 volts. *See, e.g.*, ElectricalOutlet.org, Worldwide Electrical Outlet List, http://electricaloutlet.org/ (last visited Mar. 22, 2010).

27. Taser Int'l, Inc., Neuromuscular Incapacitation (NMI), http://www.Taser.com/research/technology/Pages/NeuromuscularIncapacitation.aspx (last visited Mar. 22, 2010).

28. TASER M26, *supra* note 25; TASER X26, *supra* note 25.

29. USGAO REPORT, *supra* note 26, at 6–7.

30. *Id.* at 6.

31. *Id.* at 7.

32. William P. Bozeman et al., *Safety and Injury Profile of Conducted Electrical Weapons Used by Law Enforcement Officers Against Criminal Suspects*, ANNALS OF EMERGENCY MED. 5–6 (2008). In a study of Taser use by six law enforcement agencies against 1201 criminal suspects, the Taser use resulted in mild or no injuries 99.75% of the time. *Id.* at 5. Of the mild injuries, most (83%), were skin punctures from the metal Taser probes. *Id.* at 6.

33. *Id.* at 6; *see also* Shaun H. Kedir, *Stunning Trends in Shocking Crimes: A Comprehensive Analysis of Taser Weapons*, 20 J.L. & HEALTH 357, 379–80 (2007); Taser International Inc., Statistics and White Papers, http://www.Taser.com/RESEARCH/STATISTICS/Pages/default.aspx (last visited Mar. 22, 2010) (linking to various police agency reports indicating reduced injury rates with Taser use).

34. Michael R. Smith et al., *The Impact of Conducted Energy Devices and Other Types of Force and Resistance on Officer and Suspect Injuries*, 30 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 423, 435–37 (2007).

Hand control techniques involve the use of bare hands to guide, hold, or restrain a suspect. George Godoy, *Police Oral Boards and the Use of Force Continuum*, POLICE TEST, http://www.policetest.info/FORCE_CONTINUUM_POLICE_USE_OF_FORCE.htm (last visited Mar. 9, 2010).

Hand control techniques may be "soft" or "hard." Soft hand control techniques include applying force to pressure points and using take-down techniques that have a minimal chance of injury. *Id.*; *see also* Smith, *supra*, at 429, 434. Hard hand control techniques include kicks, punches, or other striking techniques that have a moderate chance of injury. Godoy, *supra*; *see also* Smith, *supra*, at 429, 434.

in injury rates compares favorably with respect to other force techniques such as pepper spray.[35]

Tasers, however, are not without their risks. There are significant risks of minor injuries from Taser probes that become embedded in a suspect's skin[36] and from falls that occur after a suspect is incapacitated.[37]

More significant, however, are reports of deaths following Taser usage. A study by American Civil Liberties Union of Northern California (ACLU-NC) reported that between 1999 and 2005 there were 148 deaths in the United States and Canada following Taser use by law enforcement.[38] Amnesty International reviewed seventy-four of those cases and found that although coroners usually attributed the cause of death to factors such as drug intoxication or heart disease, at least in five cases, the coroners found that Taser use was a contributing cause of death.[39] Amnesty International noted that most of the suspects who died after being Tasered exhibited risk factors associated with heart failure such as high concentrations of drugs or heart disease.[40] Some suspects died following a violent struggle with police, and some were restrained using techniques that severely restrict breathing such as "hogties" or "chokeholds."[41]

Amnesty International's findings raise concerns that Taser use combined with other factors could exacerbate the possibility of asphyxiation or cardiac arrest in some suspects.[42] Even worse, in more than half the cases, the deceased suspects were subjected to multiple Taser shocks.[43] Amnesty International noted that because the vast majority of Taser incidents involve only one shock and no deaths, instances of suspect deaths involve a disproportionate number of multiple shock incidents.[44]

Although some studies indicate that Tasers can be safely used on healthy people,[45] there is a dearth of studies that address the risk of

35. Bozeman, *supra* note 32, at 6.

36. *Id.*

37. Smith, *supra* note 34, at 428 (reporting a study by the Seattle Police Department that found suspects were injured by falls in 13% of Taser uses).

38. AM. CIVIL LIBERTIES UNION OF N. CAL., STUN GUN FALLACY: HOW THE LACK OF TASER REGULATION ENDANGERS LIVES 3 (2005) [hereinafter ACLU, TASER STUDY].

39. AMNESTY INT'L, EXCESSIVE AND LETHAL FORCE?: AMNESTY INTERNATIONAL'S CONCERNS ABOUT DEATHS AND ILL TREATMENT INVOLVING POLICY USE OF TASERS 42 (2004) [hereinafter AMNESTY INT'L].

40. *Id.* at 43.

41. *Id.* at 43, 56.

42. *Id.* at 53–54, 56–57.

43. *Id.* at 45. Amnesty noted that forty-one of seventy-four deaths involved multiple Taser shocks to the suspect. *Id.* at 45 n.116. The number of incidents involving multiple Taser shocks may actually have been higher because in twenty-eight of the cases, there was no information regarding how many times the suspect was shocked. *Id.*

44. *Id.* at 46.

45. Jeffrey D. Ho et al., *Echocardiographic Evaluation of a TASER-X26 Application in the Ideal Human Cardiac Axis*, 15 ACAD. EMERGENCY MED. 838, 843 (2008) (reporting that exposing a

Tasering vulnerable individuals,[46] and some experts question the safety of Tasering vulnerable individuals.[47] Thus, although Tasers can be used safely in most instances, there are still significant health and safety concerns associated with Taser use. For example, Tasering vulnerable suspects such as the elderly, those with heart problems, minors, restrained suspects, or those who are high on drugs may increase their risk of heart failure or asphyxiation. And shocking suspects multiple times may also increase a suspect's risk of serious health problems. All of the foregoing factors should be accounted for when crafting laws and policies that govern Taser use by law enforcement and when considering excessive force claims based on Taser use.

III. CHALLENGING TASER USE BY LAW ENFORCEMENT: EXCESSIVE FORCE CLAIMS

Excessive force claims typically arise as federal civil suits under 42 U.S.C. § 1983.[48] Section 1983 gives a cause of action to someone who has been deprived of his or her constitutional rights by someone acting under the color of law.[49] The particular constitutional provision enforced depends on the context in which the alleged excessive force occurred.[50] If the alleged excessive force occurred during an arrest or investigatory stop by law enforcement, the § 1983 claim is properly analyzed using the reasonableness standard of the Fourth Amendment.[51] That is, the facts of the case are evaluated to determine whether the officer's use of force, if

healthy individual to a ten–second Taser shock did not result in dangerous heart-beat conditions); *see also* ACLU, TASER STUDY, *supra* note 38, at 4 (noting that independent Taser studies have been limited to conducting studies on the effects of Tasers on healthy people); AMNESTY INT'L, *supra* note 39, at 61 (reporting that Taser International contends the electrical output of a Taser is far below that necessary to induce severe heart conditions).

46. ACLU, TASER STUDY, *supra* note 38, at 4 (noting that existing Taser studies do not address the effects on vulnerable classes of people).

47. AMNESTY INT'L, *supra* note 39, at 61–62.

48. *See* Rachel A. Harmon, *When is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1126 (2008); *see also* Scott v. Harris, 550 U.S. 372, 375–76 (2007); Graham v. Connor, 490 U.S. 386, 390 (1989); Tennessee v. Garner, 471 U.S. 1, 5 (1985).

49. 42 U.S.C. § 1983 (2006).

50. *See Graham*, 490 U.S. at 395. In *Graham*, the Supreme Court explicitly held that the Fourth Amendment protects against the use of excessive force during an arrest or investigatory stop by police. *Id.* In footnote 10 of its opinion, however, the Court noted "[i]t is clear . . . that the Due Process Clause protects a pretrial detainee from the use of excessive force," and "[a]fter conviction, the Eighth Amendment 'serves as the primary source of substantive protection.'" *Id.* at 395 n.10 (quoting Whitley v. Albers, 475 U.S. 312, 327 (1986)).

51. *Id.* at 395. The Fourth Amendment protects citizens against "unreasonable searches and seizures." U.S. CONST amend. IV. As applied to excessive force claims, "[a] 'seizure' triggering the Fourth Amendment's protections occurs only when government actors have, 'by means of physical force or show of authority, . . . in some way restrained the liberty of a citizen.'" *Graham*, 490 U.S. at 395 n.10 (quoting Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968)).

any, was reasonable under the circumstances.[52]

When an individual brings a § 1983 claim against a law enforcement officer, the officer may assert qualified immunity as an affirmative defense.[53] If the court grants the officer qualified immunity, the officer is immune from suit, and the plaintiff's claim is essentially defeated.[54] Because qualified immunity is an immunity from suit, government officials have incentive to assert the defense early in litigation—before the suit goes to trial.[55] Thus, the qualified immunity analysis will often provide a starting point for § 1983 claims. In cases where the plaintiff alleges that officers used excessive force during an arrest or investigatory stop, the next step would be to determine whether the officer's use of force was reasonable under the Fourth Amendment. Part II.A discusses the details of the qualified immunity analysis, and Part II.B discusses the Fourth Amendment reasonableness analysis.

A. *Qualified Immunity Analysis*

The Supreme Court has established a two-part test to determine whether a government official is entitled to qualified immunity.[56] The first part asks "whether a constitutional right would have been violated on the facts alleged."[57] The second part asks "whether the right was clearly established."[58] In *Pearson v. Callahan*, the Court held that the two parts need not be addressed in order, and lower courts have the discretion to decide which of the two parts to analyze first.[59] *Pearson* overturned the controversial "order of battle" rule established in *Saucier v. Katz* in which the Court previously held that the two parts of the qualified immunity

52. *See Graham*, 490 U.S. at 396 ("The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene . . . .").

53. *See* ERWIN CHEMIRINSKY, FEDERAL JURISDICTION, 509–10, 514 (4th ed. 2003); s*ee also* Scott v. Harris, 550 U.S. 372, 375–76 (2007); Saucier v. Katz, 533 U.S. 194, 197, 200–01 (2001).

54. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). Qualified immunity is a judicially-created doctrine that protects government officials from suit as long as a reasonable official would not have been on notice that the conduct in question was clearly unlawful. *See, e.g.*, *Saucier*, 533 U.S. at 202; Anderson v. Creighton, 483 U.S. 635, 638–39 (1987). By only granting partial immunity, rather than absolute immunity, the doctrine recognizes that in some situations "an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

In *Harlow*, the Supreme Court noted that absolute immunity is reserved for government "officials whose special functions or constitutional status requires complete protection from suit." *Id.* at 807. Among those officials entitled to absolute immunity are legislators, judges, prosecutors, and executive officers engaged in judicial functions. *Id.*

55. *Saucier*, 533 U.S. at 200–01; *Mitchell*, 472 U.S. at 526.

56. *Saucier*, 533 U.S. at 200–01.

57. *Id.* at 200.

58. *Id.* at 201.

59. 129 S. Ct. 808, 818 (2009).

analysis had to be answered in order.[60]

The policy behind the qualified immunity defense is that in cases where a government official is required to make discretionary decisions, the public interest is best served if the government official can act without fearing the consequences of a lawsuit.[61] A lawsuit would subject the government official to the distractions of a trial. And the mere threat of a lawsuit may inhibit the official's discretionary actions and deter people from entering public service.[62] To serve the policy of insulating government officials from litigation, the defense of qualified immunity acts as "an *immunity from suit* rather than a mere defense to liability."[63] If the case is permitted to go to trial, the policy behind the defense is defeated, and the defense is "effectively lost."[64] To further protect government officials from the burdens of trial, a district court's order denying qualified immunity is immediately appealable.[65] Thus, it is common for an appeals court to decide questions of qualified immunity because the government official will almost always appeal a decision denying qualified immunity.[66]

If a court were to start by addressing the first prong of the qualified immunity analysis, "whether a constitutional right would have been violated on the facts alleged,"[67] the court would appear to be adjudicating the plaintiff's claim on the merits.[68] The Supreme Court, however, has made it clear that questions of qualified immunity are distinct from the plaintiff's claim on the merits.[69] Qualified immunity is a right to be free from the burdens of trial—a right that is distinct from the constitutional right asserted in the plaintiff's claim.[70] If a court deciding a question of qualified immunity determines that a government official violated the plaintiff's constitutional rights, the consequence is that the official may not be entitled to qualified immunity. The final determination on the merits of whether the plaintiff's rights were violated would still be left to the fact finder.

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60. *Saucier*, 533 U.S. at 201.

61. Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982).

62. *Id.*

63. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

64. *Id.*

65. *Id.* at 526–27.

66. For example, each circuit court case mentioned in this Note is an appeal of a summary judgment motion on the issue of qualified immunity. *See, e.g.*, Brown v. City of Golden Valley, 574 F.3d 491, 496–97 (8th Cir. 2009); Buckley v. Haddock, 292 F. App'x 791, 792–93 (11th Cir. 2008); Moretta v. Abbott, 280 F. App'x 823, 824 (11th Cir. 2008); Casey v. City of Fed. Heights, 509 F.3d 1278, 1281 (10th Cir. 2007); Roberts v. Manigold, 240 F. App'x 675, 675 (6th Cir. 2007); Draper v. Reynolds, 369 F.3d 1270, 1274 (11th Cir. 2004).

67. Saucier v. Katz, 533 U.S. 194, 200 (2001).

68. *Id.* at 203.

69. *Mitchell*, 472 U.S. at 527–28.

70. *Id.*

Furthermore, the qualified immunity defense is typically asserted in a motion for summary judgment,[71] and a court reviewing the motion must view the facts in a light most favorable to the plaintiff.[72] Thus, a court's ruling on the constitutional violation as part of the qualified immunity analysis is not based on the final determination of facts by the fact finder. Again, the final ruling on the merits of plaintiff's claim would be left to the fact finder.[73]

With regard to the second prong of the qualified immunity analysis, "whether the right was clearly established,"[74] the focus is not on whether prior case law has held the exact conduct in question to be unconstitutional.[75] Rather, the focus is on whether prior case law would put a reasonable official on notice that the conduct violated a constitutional right.[76] Thus, in the context of a § 1983 excessive force claim, even if a court determines that law enforcement officers violated the plaintiff's Fourth Amendment rights by using excessive force, the officers are nonetheless immune from suit if the officers made a reasonable mistake as to what the law requires.[77]

In many situations, courts prefer to start with the second prong of the qualified immunity analysis.[78] In fact, the *Saucier* "order of battle" rule was highly criticized.[79] By forcing courts to first consider whether an officer's conduct violated the plaintiff's constitutional rights, courts must either create a new constitutional right under the facts alleged or determine that no such right exists.[80] This violates the "long-honored principle that a court should decide a constitutional question only when there is no other basis for resolving the dispute."[81] Further, unnecessarily deciding a constitutional question may be considered a waste of judicial resources.[82]

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71. *Id.* at 526.

72. *Id.* at 528.

73. For example, in *Michaels v. City of Vermillion*, the district court resolved a question of qualified immunity in favor of the plaintiff where there were substantial discrepancies between the plaintiff's and the officer's version of the facts. 539 F. Supp. 2d 975, 979 (N.D. Ohio 2008). The plaintiff alleged that the officer Tasered him approximately twenty-five times while the plaintiff was handcuffed and passively sitting in the back of a police car. *Id*. The officer, on the other hand, maintained that the plaintiff was only Tasered a few times, and that the plaintiff was actively resisting arrest. *Id.*

74. Saucier v. Katz, 533 U.S. 194, 201 (2001).

75. *See, e.g.*, Hope v. Pelzer, 536 U.S. 730, 739 (2002); *Saucier*, 533 U.S. at 205–06; Anderson v. Creighton, 483 U.S. 635, 640 (1987).

76. *Hope*, 536 U.S. at 739; *Saucier*, 533 U.S. at 205–06; *Anderson*, 483 U.S. at 640.

77. *Saucier*, 533 U.S. at 205.

78. *See* Pearson v. Callahan, 129 S. Ct. 808, 817–18 (2009); Pierre N. Leval, *Judging Under the Constitution: Dicta about Dicta*, 81 N.Y.U. L. REV. 1249, 1275–81 (2006).

79. *See supra* note 78.

80. Leval, *supra* note 78, at 1276.

81. Leval, *supra* note 78, at 1277.

82. Leval, *supra* note 78, at 1277–78; s*ee also* Michael J. Hooi, *Qualified Immunity: When is*

The constitutional question could be avoided and judicial resources conserved if courts were allowed to move directly to the second question of whether the plaintiff's rights were clearly established.[83]

On the other hand, there are also strong arguments in favor of answering the qualified immunity questions sequentially. Requiring courts to first consider whether an officer's conduct violated the Constitution helps to ensure that repeated unconstitutional conduct will not escape judicial review simply because there is no prior case law that clearly establishes the conduct as unconstitutional.[84] Also, judicial efficiency might actually be improved when courts carefully consider the facts of each case and rule on whether a constitutional right was violated.[85] A more developed body of case law gives officers a better idea on how to comport their actions with the Constitution.[86] And potential plaintiffs are better equipped to assess the chances of success in court and are less likely to file suit if the chances of success are low.[87] Finally, perhaps the strongest argument in favor of the sequential analysis is that it helps ensure a § 1983 plaintiff has his day in court. Courts must consider the facts of each case and rule on whether the plaintiff's rights were violated.[88] The analysis for determining whether the plaintiff's rights were violated is the subject of the next section.

B. *Fourth Amendment Analysis of Excessive Force Claims*

The Fourth Amendment protects citizens against unreasonable searches and seizures by government officials.[89] Generally, a "seizure" triggering Fourth Amendment protection occurs when law enforcement officers use even minimal force.[90] Thus, in a § 1983 action alleging excessive force, the issue is whether an officer's use of force was "reasonable" under the

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a Loss Ultimately a Win?, 60 FLA. L. REV. 979, 987 (2008).

83. Leval, *supra* note 78, at 1281. The lone inquiry of whether the right was clearly established was actually the original formulation of the test. *See* Mitchell v. Forsyth, 472 U.S. 511, 528 (1985) ("All [an appellate court] need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions."). The first prong of the test, whether the official's conduct violated a constitutional right, was not added by the Supreme Court until 1991 in *Siegert v. Gilley*. 500 U.S. 226, 232 (1991).

84. Leval, *supra* note 78, at 1280.

85. Hooi, *supra* note 82, at 987–88.

86. Hooi, *supra* note 82, at 987.

87. Hooi, *supra* note 82, at 987–88.

88. Hooi, *supra* note 82, at 988.

89. U.S. CONST. amend. IV.

90. *See* Graham v. Connor, 490 U.S. 386, 395 n.10 (1989) (quoting Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968) ("A 'seizure' triggering the Fourth Amendment's protections occurs only when government actors have, 'by means of physical force or show of authority, . . . in some way restrained the liberty of a citizen'")); Tennessee v. Garner, 471 U.S. 1, 7 (1985) (citing United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975) ("Whenever an officer restrains the freedom of a person to walk away, he has seized that person.")).

Fourth Amendment.[91] The foundation of the Fourth Amendment reasonableness determination is a balancing test that weighs "'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake."[92]

The Supreme Court first applied the balancing test to a § 1983 excessive force claim in *Tennessee v. Garner*.[93] In *Garner*, police shot and killed a fifteen-year-old, unarmed burglary suspect as he fled the scene.[94] When applying the Fourth Amendment balancing test, the Court first identified the interests at stake for both the plaintiff and the government.[95] The Court noted that a suspect has a "fundamental interest in his own life," and "[t]he intrusiveness of a seizure by means of deadly force is unmatched."[96] The Court balanced this interest against the government's interest in "effective law enforcement."[97] On balance, the Court concluded that using deadly force to prevent the escape of a non-dangerous suspect was constitutionally unreasonable.[98]

In coming to its conclusion the Court carefully considered the facts and circumstances surrounding the shooting. In particular, the *Garner* Court placed heavy emphasis on the non-dangerous nature of the suspect.[99] The Court hypothesized that if the suspect had threatened the officers with a weapon or committed a crime with the potential to inflict serious physical harm, the use of deadly force to prevent escape might have been justified.[100] When determining whether the suspect posed a threat, the Court considered factors such as the suspect's age and physical characteristics;[101] the severity of the underlying crime;[102] and whether the suspect was armed.[103]

Although *Garner* analyzed the suspect's § 1983 excessive force claim under the Fourth Amendment, the Court did not provide specific guidance about when the Fourth Amendment standard applies to excessive force claims.[104] As a result, after *Garner*, lower courts continued to apply a

91. *Graham*, 490 U.S. at 396 ("The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene . . . .").

92. *Id.* (quoting *Garner*, 471 U.S. at 8).

93. *Garner*, 471 U.S. at 7–8.

94. *Id.* at 3–4, 4 n.2.

95. *Id.* at 9.

96. *Id.*

97. *Id.*

98. *Id.* at 11.

99. *Id.* at 10–11, 20–21.

100. *Id.* at 11.

101. *Id.* at 21 ("Officer Hymon could not reasonably have believed that Garner–young, slight, and unarmed–posed any threat.").

102. *Id.* ("While we agree that burglary is a serious crime, we cannot agree that it is so dangerous as automatically to justify the use of deadly force.").

103. *Id.*

104. *See* Graham v. Connor, 490 U.S. 386, 395 (1989). In *Graham*, the Court specifically

generic substantive due process test "indiscriminately to all excessive force claims lodged against law enforcement."[105] This prompted the Supreme Court in *Graham v. Connor*, to make "explicit what was implicit in *Garner*'s analysis . . . that *all* claims that law enforcement officers have used excessive force . . . in the course of an arrest, investigatory stop, or other 'seizure' . . . should be analyzed under the Fourth Amendment."[106]

The *Graham* Court reaffirmed the balancing test used in *Garner* and expounded on the fact-sensitive nature of its application.[107] The Court held that proper application of the balancing test "requires careful attention to the facts and circumstances of each particular case," and that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene . . . ."[108] In the Court's view, a factual analysis is necessary because it is impossible to precisely define a reasonableness standard that can be mechanically applied in every case.[109]

Lower courts have widely embraced the *Graham* approach when deciding § 1983 excessive force claims,[110] employing the Supreme Court's balancing test and list of relevant circumstances.[111] And courts have adopted the officer's point of view when evaluating the reasonableness of an officer's actions.[112] The Supreme Court's § 1983 excessive force jurisprudence, however, is not without its critics. As Professor Rachel Harmon points out, the balancing test does not provide law enforcement officers with clear guidance on how to comport their conduct with the Constitution.[113] The test leaves basic questions unanswered: when may an officer use force, and what type and how much force is appropriate?[114]

Ideally, a test for evaluating the reasonableness of a particular use of force would provide officers guidance without having to wait for courts to

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noted that it was making explicit what had only been implicit in *Garner*. *Id.*

105. *Id.* at 393.

106. *Id.* at 395.

107. *Id.* at 396.

108. *Id.* When discussing the appropriate perspective for evaluating the reasonableness of an officer's use of force, the Court also noted that the test must account for the fact that "officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Id.* at 396–97.

109. *Id.* at 396.

110. *See, e.g.*, Buckley v. Haddock, 292 F. App'x 791, 793–94 (11th Cir. 2008); Roberts v. Manigold, 240 F. App'x 675, 677 (6th Cir. 2007); Casey v. City of Fed. Heights, 509 F.3d 1278, 1281 (10th Cir. 2007); Brooks v. City of Seattle, No. C06-1681RAJ, 2008 WL 2433717, at *3 (W.D. Wash. June 12, 2008); Michaels v. City of Vermillion, 539 F. Supp. 2d 975, 985–86 (N.D. Ohio 2008); *see also* Harmon, *supra* note 48, at 1129–30.

111. *See supra* note 110.

112. *Id.*

113. Harmon, *supra* note 48, at 1127, 1130.

114. *Id.*

decide whether a course of action is constitutional.[115] It is unlikely that officers faced with "tense, uncertain, and rapidly evolving"[116] situations can quickly and accurately perform the prescribed balancing test calculus before making a decision on how much and what type of force to use. Furthermore, the balancing test contains two inherent sources of uncertainty that make it difficult for officers to evaluate the reasonableness of a particular use of force before they are faced with such tense situations.

The first source of uncertainty stems from the fact-sensitive nature of the test: Reasonable individuals may interpret the same set of facts differently, leading to different conclusions about whether a particular use of force was reasonable. For example, in *Scott v. Harris*,[117] the Supreme Court held that it was reasonable for an officer to run a speeding suspect off the road[118] where the suspect led officers on "a Hollywood-style car chase of the most frightening sort."[119] When viewing the same video evidence as the majority, however, the dissent had a completely different view of the facts.[120] The dissent noted that the video did not clearly establish the suspect had run any red lights.[121] And the dissent suggested that the civilian cars in the video could have safely pulled to the side of the road in response to the oncoming police sirens rather than having been forced to the side of the road as the majority concluded.[122]

The second source of uncertainty arises because the Supreme Court does not limit or weight the facts and circumstances that a court may consider in the balancing test analysis.[123] This leaves courts and law enforcement officers with little guidance about how to determine the relevance of a particular fact or circumstance.[124] Because the balancing test itself does not provide officers much guidance, they must rely on a rigorous, fact-based analysis of existing case law to determine the constitutionality of a course of action. This approach, however, is problematic for officers faced with a novel set of circumstances not previously addressed by the courts. Furthermore, officers may not be able to rely on the courts if decisions are split on the constitutionality of a course of action.

At least one certainty is that § 1983 excessive force claims arising out of an arrest or investigatory stop are properly analyzed under the Fourth

115. *Id.* at 1142–43.
116. Graham v. Connor, 490 U.S. 386, 396–97 (1989).
117. 550 U.S. 372 (2007).
118. *Id.* at 375–76.
119. *Id.* at 380.
120. *Id.* at 390–92 (Stevens, J., dissenting).
121. *Id.* at 391–92.
122. *Id.* at 390–91.
123. *See* Harmon, *supra* note 48, at 1130.
124. *Id.*

Amendment.[125] The analysis balances the plaintiff's interest in being free from unreasonable searches and seizures against the government interests at stake.[126] The analysis requires courts to consider all the relevant facts and circumstances of the case.[127] And the analysis is evaluated from the perspective of a reasonable officer on the scene.[128] Although the balancing test has been widely adopted by lower courts,[129] it does not provide officers with specific guidance on when or what type of force is reasonable under the Fourth Amendment.[130]

The next Part looks at a number of § 1983 excessive force cases where officers Tasered a suspect during an arrest or investigatory stop. By closely examining the facts and circumstances of each case, Part III develops a set of general rules about when a court is likely to find an officer's Taser use reasonable. A clear understanding of the laws governing Taser use by law enforcement will provide a basis for critiquing and suggesting improvements to those laws.

IV. POLICE USE OF TASERS DURING ARREST OR INVESTIGATORY STOP

A. *Tasering an Actively Resisting Suspect*

In *Neal-Lomax v. Las Vegas Metropolitan Police Department*,[131] the district court ruled that it was reasonable for a police officer to Taser William Lomax seven times because Lomax resisted the officer's attempts to place him in an ambulance.[132] The incident resulted in Lomax's death.[133]

The incident arose when security guards found Lomax high on PCP and pacing in circles around an apartment complex parking lot.[134] The guards reported that Lomax appeared dazed and confused, and that he was unresponsive to questions. One of the security guards asked Lomax if he wanted medical attention, and Lomax responded that he did; the guards called for medical assistance.[135]

While the security guards were waiting for medical assistance, Officer Rader of the Las Vegas Police Department arrived on the scene.[136] Officer Rader recognized Lomax from a previous encounter where Lomax was

125. *See* Graham v. Connor, 490 U.S. 386, 395 (1989).
126. *Id.* at 396.
127. *Id.*
128. *Id.* at 396–97.
129. *See* Harmon, *supra* note 48, at 1130.
130. *Id.* at 1127.
131. 574 F. Supp. 2d 1170 (D. Nev. 2008).
132. *Id.* at 1178–81, 1186.
133. *Id.* at 1181.
134. *Id.* at 1178.
135. *Id.*
136. *Id.*

high on PCP and combative.[137] One of the security guards took Lomax's pulse and found that his heart was racing.[138] The security guards attempted to place Lomax in handcuffs, but Lomax resisted.[139] Officer Rader warned Lomax that if he did not comply, he would be Tasered.[140] Lomax continued to resist, and Officer Rader applied the Taser directly to Lomax's neck in a drive-stun mode, a method in which the Taser is aggressively driven into the target area.[141] Officer Rader applied the Taser a second time before the security guards were able to handcuff Lomax.[142]

When medical personnel arrived, they found Lomax pinned to the ground with a knee on his back.[143] The medical personnel asked the security guard to remove his knee so that Lomax could breathe more freely.[144] Officer Rader and the security guards tried to strap Lomax to a gurney to load him into an ambulance, but Lomax continued to struggle.[145] Officer Rader Tasered Lomax five more times before he and the security guards were able to strap Lomax to the gurney and load him into the ambulance.[146] After each Taser use, Lomax became compliant, but he would begin struggling again seconds afterwards.

In the ambulance, Lomax stopped breathing, and he later died at the hospital.[147] The county coroner concluded that the cause of death was cardiac arrest, and that the Taser was a contributing factor.[148] According to the coroner, the combination of PCP, being restrained, and Taser shocks restricted Lomax's breathing until "he finally was depleted and went into cardiac arrest."[149]

Officer Rader completed a training course on Taser use before he was allowed to carry a Taser.[150] The course discouraged Tasering vulnerable or high-risk individuals such as pregnant women, the elderly, or people in handcuffs.[151] The training program taught that Tasers become a pain compliance tool when used to subdue someone high on PCP, and that pain compliance has a limited effectiveness in that situation.[152] When an

137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* at 1179.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at 1180.
148. *Id.*
149. *Id.* at 1180–81.
150. *Id.* at 1176.
151. *Id.* at 1176–77.
152. *Id.* at 1177. The training program stated, "Persons whom are highly focused, under the influence of drugs/alcohol or mentally disturbed are prone to what is called 'mind-body

individual is resistant to pain compliance, the program suggested that the Taser can be most effective when used in a drive-stun mode.[153]

After considering all of the facts and circumstances, the court held that Officer Rader's Taser use was reasonable.[154] The court noted that Lomax was vigorously resisting, and the Taser was effective in getting Lomax to comply—if only for a short time.[155] Also, Officer Rader used the Taser in a manner consistent with his training,[156] and he repeatedly warned Lomax that if he didn't comply, he would be Tasered.[157] Finally, the court concluded that the Taser allowed Lomax access to medical attention, and it helped ensure the safety of the people Lomax was struggling against.[158] Thus, Officer Rader's actions were reasonable because he used trained law enforcement techniques, and he ultimately helped ensure the safety of all parties involved.

The district court's reasoning is debatable in several respects. Officer Rader's Taser use did not best serve the government's interest in effective law enforcement.[159] Although Officer Rader warned Lomax several times before Tasering him, Lomax was unresponsive and under the influence of powerful drugs.[160] Thus, the warnings may have been useless in mitigating the risks of the situation. Further, even though Officer Rader was eventually able to restrain Lomax, it took seven Taser shocks–illustrating that the Taser was not entirely effective or by any means efficient law enforcement.

The district court also suggested that the Taser helped secure the safety of all parties involved.[161] Lomax's death, however, casts serious doubt on the conclusion that the Taser helped secure Lomax's safety. Officer Rader knew that Lomax had a history of drug use and that he was probably high at the time.[162] Officer Rader also knew that Lomax had a high heart rate and required medical attention.[163] Further, Officer Rader had been trained to avoid using a Taser on high-risk individuals.[164] Given these

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disconnection.' If this is the case, then the [Taser] becomes a pain compliance tool and has limited threat reduction potential." *Id.* The program further taught that for people high on PCP "pain compliance DOES NOT WORK!" *Id.*

153. *Id.*

154. *Id.* at 1186.

155. *Id.*

156. *Id.*

157. *Id.* at 1185.

158. *Id.* at 1186.

159. *See* Tennessee v. Garner, 471 U.S. 1, 9 (1985) (holding that the Fourth Amendment balancing test weighs the suspect's interests against the government's interest in effective law enforcement).

160. Neal-Lomax v. Las Vegas Metro. Police Dep't, 574 F. Supp. 2d 1170, 1178–80 (2008).

161. *Id.* at 1185–86.

162. *Id.* at 1178, 1185.

163. *Id.* at 1178.

164. *Id.* at 1177.

circumstances, it is doubtful that a reasonable officer could have concluded that Tasering Lomax seven times was in Lomax's best interest.

Finally, the court may have overemphasized the threat that Lomax posed to those around him. There is little doubt that Lomax put those assisting him at risk by struggling so violently.[165] However, he was not actively engaging the parties involved. Instead, Lomax was dazed, confused, and simply reacting to the situation around him.[166]

After stripping away some of the district court's weaker arguments, we are left only with the fact that Lomax was actively resisting an officer's attempts to restrain him. Thus, it seems active resistance alone might entitle an officer to qualified immunity—even where the officer Tasered a handcuffed, vulnerable individual who later died.

Indeed, in the qualified immunity analysis, active resistance by the arrestee weighs heavily in the officer's favor. Although *Lomax* presents an extreme example, other courts have also ruled that active resistance entitles an officer to qualified immunity where the officer Tasered a vulnerable individual or an individual who was in custody at the time.[167]

In *Edwards v. City of Martins Ferry*,[168] a district court ruled that it was reasonable for an officer to Taser an eighty-two year old man with Alzheimer's disease because the man continued to struggle after the officer pinned him face down on the hood of a police car.[169]

The incident arose when Edwards was on his daily walk and an officer confronted him in response to reports that Edwards had relieved himself behind a bush in a nearby park.[170] When Edwards ignored the officer's command to stop, the officer grabbed Edwards by the arm.[171] Edwards jerked his arm away and raised his hands in a defensive posture.[172] The officer grabbed Edwards and slammed him on the hood of the police car.[173] The officer advised Mr. Edwards that he was under arrest, and when Mr. Edwards continued to struggle, the officer Tasered him.[174] After being Tasered, Mr. Edwards became compliant, and the officer was easily able to

165. *Id.* at 1185–86.

166. *Id.* at 1178.

167. *See, e.g.*, Edwards v. City of Martins Ferry, 554 F. Supp. 2d 797, 807–08 (S.D. Ohio 2008); Johnson v. City of Lincoln Park, 434 F. Supp. 2d 467, 479–80 (E.D. Mich. 2006).

168. 554 F. Supp. 2d 797 (S.D. Ohio 2008).

169. *Id.* at 800, 808.

170. *Id.* at 800.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 801. The facts stated that Mr. Edwards put his arms in the air like a "football goalpost." *Id.* at 800. The officer claimed that he believed this gesture meant that Edwards was assuming a boxing stance and squaring off with him. *Id.* at 800 n.2. The court sided with the officer and held that the officer could reasonably believe that Edwards posed a threat and was squaring off with the officer. *Id.* at 806–07.

handcuff him.[175] Mr. Edwards did not suffer any injuries as a result of the incident.[176]

The district court held that the officer's use of force was reasonable because the officer could not simply ignore complaints that Edwards had urinated in a public park and allow Edwards to walk away because of his advanced age and deteriorated mental state.[177] The court found no support for the proposition that a more lenient standard should apply to suspects who suffer from a mental impairment.[178] Further, the court reasoned, Edwards was uncooperative, and he resisted arrest.[179]

In *Johnson v. City of Lincoln Park*,[180] police Tasered a fourteen-year-old ninth grader who was handcuffed and surrounded by four police officers yet still violently resisting arrest.[181] Prior to being Tasered, the student, Hollis Smith, was violently resisting arrest by punching, kicking, and biting police.[182] After being Tasered, however, Smith became compliant.[183] Smith suffered only minor injuries as a result of the Tasering.[184] The district court held that the officer's Taser use was reasonable under the Fourth Amendment.[185]

Although violent active resistance may justify Tasering a restrained suspect, nonviolent active resistance may not.[186] In *Roberts v. Manigold*, police responded to reports that Nelson Roberts had physically abused his estranged wife.[187] At the request of police, Roberts voluntarily returned to his wife's house to file a statement.[188] Upon arriving at the house, Roberts was met by three officers.[189] Roberts felt threatened by the officers, so he turned and ran.[190] One of the officers, who was a former running back at the University of Michigan, ran down Roberts and easily pinned him.[191] A second officer caught up to the pair and repeatedly Tasered Roberts while

175. *Id.* at 801.
176. *Id.* at 806.
177. *Id.*
178. *Id.* at 807.
179. *Id.* at 805.
180. 434 F. Supp. 2d 467 (E.D. Mich. 2006).
181. *Id.* at 469–71.
182. *Id.* at 470.
183. *Id.* at 471.
184. *Id.* Smith testified that he had not been hurt by the Taser, and that it "tickled." *Id.* at 471 n.8.
185. *Id.* at 480.
186. Roberts v. Manigold, 240 F. App'x 675, 677–78 (6th Cir. 2007); *see also* Michaels v. City of Vermillion, 539 F. Supp. 2d 975, 985–86 (2008).
187. 240 F. App'x at 675–76.
188. *Id.* at 676.
189. *Id.*
190. *Id.*
191. *Id.*

he was pinned on the ground.[192] The Sixth Circuit held that it was unreasonable to repeatedly Taser a suspect who was already restrained.[193]

In *Lomax*, *Edwards*, and *Johnson*, the plaintiffs were restrained at the time they were Tasered—either by handcuffs or by being held face down on the hood of a police car. And in each case, the plaintiffs were from a vulnerable class of persons—an individual high on PCP who required medical attention, an elderly man suffering from Alzheimer's disease, and a minor. It is questionable whether any of the plaintiffs posed a threat to police or others.[194] Thus, active resistance outweighed other factors such as suspect vulnerability and whether the suspect was already in police custody. This indicates that active resistance weighs heavily in the Fourth Amendment reasonableness analysis.

In both *Edwards* and *Johnson*, the plaintiffs became cooperative after being Tasered only once. Thus, Tasering the suspect served the government's interest in effective law enforcement.[195] And while the district courts in *Edwards* and *Johnson* may have factored this into the reasonableness calculus, *Lomax* shows that that active resistance might justify Tasering a suspect even if it does not serve the government's interest in effective law enforcement.[196]

Although courts may consider the degree of active resistance, vigorous active resistance is not necessary to justify an officer's Taser use as reasonable.[197] For example, in *Campos v. City of Glendale*,[198] the district court ruled that it was reasonable for police to Taser an unconscious man, who was lying face down on a bed, because the man pulled his arms away as the officers tried to handcuff him.[199]

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192. *Id.*

193. *Id.* at 678.

194. Edwards was accused of only a minor crime, and Lomax was not accused of any crime at all. Edwards was elderly and had a debilitating mental condition, and Lomax was dazed, confused, and required medical assistance. Thus, both Edwards and Lomax were not accused of any dangerous underlying crime, and both had significant mental or physical impairments. Finally, both Lomax and Edwards had already been restrained by police at the time they were Tasered. Thus, it is unlikely that either Edwards or Lomax posed a threat to officers. Although Smith was violently resisting police, he was also handcuffed and surrounded by four police officers when he was Tasered.

195. Tennessee v. Garner, 471 U.S. 1, 9 (1985).

196. Neal-Lomax v. Las Vegas Metro. Police Dep't, 574 F. Supp. 2d 1170, 1185–86 (D. Nev. 2008).

197. *See generally* Edwards v. City of Martins Ferry, 554 F. Supp. 2d 797 (S.D. Ohio 2008) (holding that Tasering an eighty-two-year-old man was not excessive under the Fourth Amendment); Campos v. City of Glendale, No. CV-06-610-PHX-DGC, 2007 WL 4468722 (D. Ariz. Dec. 14, 2007) (holding that Tasering an unconscious man was not excessive under the Fourth Amendment).

198. No. CV-06-610-PHX-DGC, 2007 WL 4468722 (D. Ariz. Dec. 14, 2007).

199. *Id.* at *4.

The incident arose when officers were responding to reports of gunfire and entered the suspect's home and found him sleeping in a back bedroom.[200] When the suspect, Jose Campos, did not respond to verbal commands, the officers pulled the covers down, rolled Campos over, and tried to handcuff him.[201] Officers were able to handcuff Campos's right arm, but Campos pulled away, and the officers were unable to handcuff his left arm.[202] At no point did Campos open his eyes or respond to officers' verbal commands.[203] The officers Tasered Campos five or six times before they were able to handcuff him.[204]

The district court held that Tasering Campos was reasonable because Campos was resisting officers, and he may have posed a threat to the officers' safety.[205] The court noted that the officers were responding to reports of gunfire, and they had not yet found a gun. Thus, a reasonable officer may have believed that Campos posed a threat.[206]

Once again, it is questionable whether the court correctly concluded that Campos posed a threat. By the time the officers Tasered Campos, he was in plain sight, and the officers had him surrounded.[207] Also, Campos had not opened his eyes or responded to officers, and he was merely pulling away from officers rather than violently resisting or engaging the officers.[208] Despite these facts, the district court ruled that it was reasonable to Taser a suspect who was actively resisting arrest without aggression or violence.[209] Thus, a low degree of active resistance such as pulling away from officers may justify Tasering a suspect.[210]

B. *Tasering a Passively Resisting Suspect*

Although active resistance may overcome a number of other factors when determining whether it was reasonable to Taser a suspect, the line is

200. *Id.* at *1.

201. *Id.* at *2.

202. *Id.*

203. *Id.* Campos later told the officers that he did not respond to the officers' commands because he was sleeping and had been drinking that night. He also testified that he was unaware of the officers' presence until after he had been Tasered and was lying face down on the floor of his room. *Id.*

204. *Id.*

205. *Id.* at *3–4.

206. *Id.* at *3.

207. *Id.* at *2.

208. *Id.*

209. *Id.* at *3.

210. *Edwards* also supports this proposition. Edwards v. City of Martins Ferry, 554 F. Supp. 2d 797, 805–06 (S.D. Ohio 2008). Edwards, like Campos, was merely trying to pull away from the officer when he was Tasered. *Id.* at 800. And considering that Edwards was elderly and being held face down on a police cruiser, *Id.* at 800–01, Edwards probably could not have overpowered the officer or put up a particularly violent fight. *But see* Roberts v. Manigold, 240 F. App'x 675, 678 (6th Cir. 2007) (holding that non-violent active resistance did not justify Tasering a suspect who was already restrained).

not as clear when an individual passively resists officers. Like active resistance, passive resistance alone may justify police Tasering a suspect during an arrest or investigatory stop.[211] But unlike active resistance, passive resistance may not overcome other factors such as whether the plaintiff is in a vulnerable class of persons,[212] whether the plaintiff is already restrained by police,[213] or whether the use of force was disproportionate to the underlying crime.[214]

In *Buckley v. Haddock*,[215] the Eleventh Circuit held that it was reasonable to Taser a handcuffed arrestee three times as the arrestee sat motionless on the side of the road during a routine traffic stop.[216] Deputy Rackard pulled the suspect over for speeding.[217] The stop occurred at night along a two-lane highway[218] that Deputy Rackard described as "desolate."[219] The suspect, Jesse Buckley, was homeless and destitute. Buckley was distraught about receiving the ticket, and he refused to sign it.[220]

Deputy Rackard decided to arrest Buckley, and Buckley did not resist when the Deputy Rackard placed him in handcuffs.[221] As Deputy Rackard walked Buckley to the police cruiser, Buckley dropped to the ground and began sobbing.[222] Deputy Rackard warned Buckley several times that he would be Tasered if he didn't get up.[223] Buckley remained on the ground, and he sat limp, motionless, and sobbing.[224] Then Deputy Rackard Tasered Buckley three times. [225] After each Taser use, Deputy Rackard warned Buckley that if he didn't stand up, he would be Tasered again. While being Tasered, Buckley writhed on the ground in pain but did not get up.[226]

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211. Buckley v. Haddock, 292 F. App'x 791, 794–95 (11th Cir. 2008).

212. *See, e.g.*, Brooks v. City of Seattle, No. C06-1681RAJ, 2008 WL 2433717 (W.D. Wash. June 12, 2008) (holding that the use of a Taser on a nonviolent pregnant woman constituted the use of excessive force).

213. Brown v. City of Golden Valley, 574 F.3d 491, 496–97 (8th Cir. 2009); *Roberts*, 240 F. App'x 675, 676 (6th Cir. 2007); *Brooks*, 2008 WL 2433717, at *5; Michaels v. City of Vermillion, 539 F. Supp. 2d 975, 985 (N.D. Ohio 2008).

214. Casey v. City of Fed. Heights, 509 F.3d 1278, 1281–82 (10th Cir. 2007); *Brooks*, 2008 WL 2433717, at *5; *Brown*, 574 F.3d at 496–97.

215. 292 F. App'x 791 (11th Cir. 2008).

216. *Id.* at 794.

217. *Id.* at 792.

218. *Id.*

219. *Id.* at 799 (Martin, J., dissenting).

220. *Id.* at 792 (majority opinion).

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at 792–93.

226. *Id.* at 800 (Martin, J., dissenting).

At all times, Buckley and Deputy Rackard maintained a safe distance from the highway.[227] Between Taser uses, Deputy Rackard would turn his back on Buckley and return to his police cruiser to report his status over the radio.[228] Each time, Buckley was left unattended for a significant period, yet Buckley remained motionless. Eventually another officer arrived, and the two officers easily lifted Buckley and placed him in a patrol car.[229]

The court ruled that Deputy Rackard's Taser use was reasonable because by remaining on the side of the highway, Buckley posed a risk to himself, Deputy Rackard, and passing motorists.[230] Also, the court reasoned that that the government's interest in effective law enforcement was served by using a Taser rather than wasting precious police resources calling for backup.[231] The court noted that Buckley's injuries were not substantial,[232] and that a Taser is a moderate, non-lethal force.[233]

Here, as in *Lomax*, the court's reasoning is questionable on some points. It is questionable whether Buckley posed a threat to any of the parties involved. Deputy Rackard described the road as "desolate" and "out in the middle of no where."[234] And neither Deputy Rackard nor Buckley moved closer to the road during the incident.[235] Also, Buckley was handcuffed at the time, passively resisting, and not the least bit aggressive towards Deputy Rackard.[236] Buckley did not even attempt to flee when Deputy Rackard turned his back and left Buckley alone on the side of the road.[237]

Deputy Rackard's Taser use did not serve the government's interest in effective law enforcement.[238] The Taser did not even allow Deputy Rackard to get Buckley into the police cruiser.[239] Tasering Buckley may have amounted to pain compliance, and Tasers are ineffective pain compliance tools.[240] A Taser shock incapacitates the target, and the target is temporarily unable to comply with an officer's demands.[241] Thus, successive Taser shocks may actually frustrate an officer's attempt to secure suspect compliance.

227. *Id.* at 802.
228. *Id.* at 800–01.
229. *Id.* at 793 (majority opinion); *Id.* at 801 (Martin, J., dissenting).
230. *Id.* at 794–95 (majority opinion).
231. *Id.* at 795–96.
232. *Id.* at 796.
233. *Id.*
234. *Id.* at 799.
235. *Id.* at 802 (Martin, J., dissenting).
236. *Id.*
237. *Id.*
238. *Id.* at 804.
239. *Id.*
240. *Id.* at 803.
241. *Id.*

Deputy Rackard's safer, non-violent alternative was to call for backup.[242] And calling for backup would not have been a waste of police resources because it was already police policy to call for backup any time a Taser was deployed.[243] Thus, the same amount of officers and resources were required whether or not a Taser was used.

If Tasering Buckley did not serve the government's interest in effective law enforcement, and if it did not prevent imminent harm to the parties involved, then we are left to conclude that passive non-compliance was enough to justify Tasering Buckley.[244] It is important to keep in mind that passive resistance appears to be the minimum that would justify Tasering a suspect. Other factors may swing the Fourth Amendment balancing test in plaintiff's favor.

For example, in *Casey v. City of Federal Heights*,[245] the Tenth Circuit found that Tasering a passively resisting suspect was unreasonable because the officer's use of force was disproportionate to the underlying crime and because the officer Tasered the suspect without warning.[246]

In *Casey*, the suspect, Edward Casey, walked out of a courthouse holding his own court records despite being told by a clerk not to take the court records.[247] Casey went to his truck to get his wallet so that he could pay the cashier.[248] While walking back to the courthouse, however, Casey was stopped by a police officer.[249] The officer demanded that Casey hand him the court records.[250] Casey held out his open briefcase with the records visible, but the officer refused to take them, so Casey walked past the officer toward the courthouse.[251] Then, without warning or explanation, the officer tackled Casey;[252] Casey did not fight back.[253]

At that point, a second officer arrived on the scene and immediately Tasered Casey multiple times—again, without warning or explanation.[254] The Court ruled that Tasering Casey was unreasonable because it was

242. *Id.* at 805.

243. *Id.*

244. *See also* Campos v. City of Glendale, No. CV-06-610-PHX-DGC, 2007 WL 4468722, at *1 (D. Ariz. Dec. 14, 2007).

245. 509 F.3d 1278 (10th Cir. 2007).

246. *Id.* at 1285–86.

247. *Id.* at 1279–80.

248. *Id.* Removing the records may have amounted to a misdemeanor under state law, but Casey eventually pleaded guilty to a lesser charge of "obstructing government operations." *Id.* at 1281.

249. *Id.* at 1280.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.* at 1285.

254. *Id.* at 1280, 1285.

disproportionate to the underlying crime and because the officers did not give Casey clear warning that he was under arrest or that he was going to be Tasered.[255]

Similarly, in *Brown v. City of Golden Valley*,[256] the Eighth Circuit ruled that it was unreasonable for officers to Taser a passenger who refused to exit the car after officers stopped the car for speeding.[257] The plaintiff, Sandra Brown, became terrified after officers arrested the driver, her husband.[258] According to Brown, the officers were acting aggressive, and they never told her why her husband was arrested.[259] In her frightened state, Brown called 911.[260] One of the officers yanked open the passenger side door and shouted at Brown to take off her seat belt and hang up the phone.[261] Brown replied that she was scared and wanted to stay on the line with the 911 operator. Then, without warning, the officer Tasered Brown.[262]

The court ruled that the officer used excessive force by Tasering Brown.[263] The court reasoned that Tasering Brown was disproportionate to the underlying crime—a minor traffic violation.[264] Further, the court noted that Brown was already surrounded by four officers; that she was not attempting to flee; and that she posed at most a minimal safety threat.[265]

Brown was passively resisting the officer by disobeying the officer's demand that she exit the vehicle. In *Buckley*, passive resistance was enough to justify Tasering the suspect. Brown, however, unlike Buckley, was in police custody at the time she was Tasered. Brown was strapped into a car by a seatbelt, surrounded by officers, and had no intention of fleeing. Thus, other factors outweighed Brown's passive resistance: a disproportionate use of force, a lack of warning, and a secure police custody of the plaintiff.

The district court in *Michaels v. City of Vermillion*[266] also ruled that it was unreasonable to Taser a passively-resisting suspect who was already in custody.[267] The suspect, seventeen-year-old Matthew Michaels, was arrested after his mother refused to sign a juvenile complaint relating to a vandalism charge against Michaels.[268] Initially, Michaels strenuously

255. *Id.* at 1282.
256. 574 F.3d 491 (8th Cir. 2009).
257. *Id.* at 494, 496.
258. *Id.* at 494.
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.* at 496.
264. *Id.* at 496–97.
265. *Id.* at 497–98.
266. 539 F. Supp. 2d 975 (N.D. Ohio 2008).
267. *Id.* at 985.
268. *Id.* at 977.

resisted arrest by bracing himself against the doorframe of the police car.[269] This prompted the officer to Taser Michaels to get him into the car.[270] However, the officer continued to Taser Michaels even after he was handcuffed and placed in the back of the police car.[271] The court ruled that Tasering Michaels after he was in the back of the police car was gratuitous and unreasonable because Michaels was already in custody, he was not accused of a severe crime, and he did not pose a significant threat to the officers or anyone else.[272]

The district court in *Brooks v. City of Seattle*[273] considered the suspect's vulnerability when determining whether it was reasonable to Taser a pregnant woman.[274] Police stopped the plaintiff, Malaika Brooks, for speeding.[275] The officer attempted to arrest Brooks after she refused to sign the ticket.[276] The officer asked Brooks to exit the vehicle, and she refused. When the officer attempted to drag Brooks out of the car, she resisted by tightly grabbing the steering wheel.[277] The officer threatened Brooks with a Taser, and Brooks replied that she was seven months pregnant.[278] One officer reached over Brooks, turned off her car, and removed the keys; another officer Tasered Brooks three times.[279] The court held that it was unreasonable to Taser Brooks because: the force was disproportionate to the minor infraction; she was seven months pregnant; she did not pose a threat; and she was firmly in police control.[280]

In sum, *Buckley* shows that passive resistance alone may justify Tasering a suspect during an arrest or investigatory stop. With passive resistance, however, factors such as proportionality between the force used and the underlying crime, the vulnerability of the suspect, or whether the

269. *Id.* at 978.

270. *Id.*

271. *Id.* at 979. There were factual disputes regarding whether the plaintiff continued to resist arrest after being placed in the police car, and how many times the officer Tasered Michaels after he had been placed into the car. *Id.* The officer claimed that Michaels continued to struggle and kick the officer in the shins, even after being placed in the car. The officer also claimed that he tased Michaels only "several times" after he had been placed in the back of the car. *Id*. Michaels asserted that he stopped resisting after being placed in the car, and that the officer Tasered him approximately twenty-five times after he had been placed into the car. *Id.* On summary judgment, the court adopted the set of facts most favorable to the plaintiff. *Id.* at 985.

272. *Id.* at 985–86. Specifically, the court held that a jury could find the officer's conduct rose to a constitutional violation under the facts alleged by plaintiff. *Id.* at 985.

273. No. C06-1681RAJ, 2008 WL 2433717 (W.D. Wash. June 12, 2008).

274. *Id.* at *5.

275. *Id.* at *1.

276. *Id.*

277. *Id.*

278. *Id.* at *2.

279. *Id.*

280. *Id.* at *5–6; *see also* Moretta v. Abbott, 280 F. App'x 823, 824 (11th Cir. 2008) (denying officers qualified immunity for Tasering a six-year-old child who was holding a half-inch piece of glass but who was surrounded by two police officers and not threatening anyone).

suspect is under police control may swing the balancing test in favor of the suspect.

In the case of passive resistance, there are also factors that may weigh in the officer's favor when deciding whether an officer's use of force is reasonable. For example, in *Lowe v. City of Seattle*,[281] a district court held that it was reasonable to Taser a passively-resisting suspect who was under the influence of drugs, suspected of committing assault, and preparing to flee the scene in her truck.[282]

Passive resistance combined with aggressive behavior may also justify Tasering a suspect.[283] In *Draper v. Reynolds*,[284] the officer stopped the suspect, Stacey Draper, because the tag on his truck was not properly illuminated.[285] Draper complained loudly about being pulled over, and he ignored the officer's repeated requests that he hand over his proof of insurance, bill of landing, and log book.[286] During the encounter, Draper was "belligerent, gestured animatedly, continuously paced, appeared very excited, and spoke loudly."[287] At some point, the officer Tasered Draper and arrested him.[288] The court held that a single Taser use did not constitute excessive force where the suspect was hostile, belligerent, and uncooperative.[289]

To summarize, active resistance will almost always justify Tasering a suspect—even when the suspect is already restrained, poses a minimal threat, or when the suspect is from a vulnerable class of persons. Passive resistance alone may also justify Tasering a suspect. Unlike active resistance, however, with passive resistance some factors may tip the balancing test in favor of the suspect; for example, a non-threatening, restrained, or vulnerable suspect. And in the case of passive resistance, there may also be factors that tip the balancing test in favor of the officer—such as when the suspect poses a threat or is verbally combative.

Although the above rules are simply stated, analyzing the reasonableness of an officer's use of force is a complicated and murky process. The rules were formulated by closely examining the facts and circumstances of each case. Indeed, it is the fact-sensitive nature of the Fourth Amendment balancing test that confounds the excessive force

281. No. CV07-0784-JCC, 2008 WL 4083150 (W.D. Wash. Aug. 29, 2008).

282. *Id.* at *5–6.

283. Draper v. Reynolds, 369 F.3d 1270, 1278 (11th Cir. 2004); *see also* Wright v. Deghetto, No. 5:06CV-133-R, 2008 WL 199890, at *7 (W.D. Ky. Jan. 23, 2008) (holding that it was reasonable for officers to Taser a suspect who was verbally combative and who mildly resisted officers' attempts to handcuff him).

284. 369 F.3d 1270 (11th Cir. 2004).

285. *Id.* at 1272.

286. *Id.* at 1273.

287. *Id.*

288. *Id.* at 1273–74.

289. *Id.* at 1278.

analysis. Although the analysis allows courts to consider all of the relevant facts and circumstances, the analysis can lead to inconsistent rulings, and it does not provide clear guidance to law enforcement agencies about when they can lawfully use Tasers.

V. STATE AND LOCAL RULES REGARDING TASER USE

A. *Police Policies Regarding Taser Use*

In 2005, the United States Government Accountability Office (USGAO) analyzed the Taser-related policies and procedures of the seven state and local law enforcement agencies that purchased and used the largest number of Tasers for the longest period of time.[290] The survey found that none of the agencies had separate use-of-force policies governing Taser use.[291] Instead, all of the agencies included Tasers in their existing use-of-force policies.[292] The agencies based all of their use-of-force policies on the use-of-force continuum developed by the Federal Law Enforcement Training Center (FLETC).[293]

The FLETC use-of-force continuum provides guidance to officers about what level of force is appropriate based on a suspect's actions.[294] Officers classify a suspect's actions according to five potential threat levels (from least to most threatening): (1) compliant; (2) passive resistance; (3) active resistance; (4) assaultive (physical injury); or (5) assaultive (serious physical injury / death).[295] The officer responds with a level of force that is equal to or less than the suspect's threat level.[296] The five corresponding officer force levels are (from least to most forceful): (1) cooperative controls; (2) contact controls; (3) compliance techniques; (4) defensive tactics; and (5) deadly force.[297] For example, if the subject is compliant, the officer should respond with cooperative controls such as voice commands.[298] On the other hand, if the officer perceives a risk of serious physical injury or death, the officer may respond with deadly force.

The agencies surveyed by the USGAO each placed Tasers at one of three levels on the continuum.[299] Two agencies allowed officers to use

290. USGAO REPORT, *supra* note 26, at 2. The agencies surveyed were the Austin, Texas, Police Department; the Ohio Highway Patrol; the Orange County, Florida Sheriff's Department; the Phoenix, Arizona Police Department; the Sacramento, California Police Department; the Sacramento, California Sheriff's Department; and the San Jose, California Police Department. *Id.*

291. *Id.* at 7.

292. *Id.*

293. *Id.*

294. *Id.* at 7–8.

295. *Id.* at 8.

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.* at 9.

Tasers when they perceived a suspect's actions as potentially harmful—i.e. assaultive (level four threat).[300] Four agencies allowed officers to use Tasers when the suspect was actively resisting but not attacking the officer (level three threat).[301] Only one agency allowed officers to Taser passively resisting suspects (level two threat).[302]

A survey by the American Civil Liberties Union of Northern California (ACLU-NC) yielded results similar to those of the USGAO survey.[303] ACLU-NC studied the Taser use policies of fifty-four law enforcement agencies in central and northern California.[304] The study found that California law enforcement agencies permit Taser use "under a wide range of circumstances."[305] Most commonly, the agencies permitted Taser use when the subject was violent or potentially violent.[306]

The ACLU-NC survey found that only four agencies had policies that warned against or prohibited Tasering a suspect multiple times.[307] Only ten agencies (19%) had policies regulating Taser use against passively resisting suspects.[308] Only fourteen agencies (26%) regulated Taser use against suspects who were handcuffed or restrained.[309] And regarding vulnerable suspects, nineteen agencies (35%) regulated Taser use against the elderly; ten agencies (19%) regulated Taser use against juveniles; and twenty-three agencies (43%) regulated Taser use against pregnant women.[310]

Both the USGAO and ACLU-NC studies show that there are no universal policies governing Taser use by law enforcement. And there are few policies that protect passively resisting, vulnerable, or restrained suspects.

B. *State Laws Regulating Taser Use by Law Enforcement*

New Jersey is the only state to ban Taser use by anyone—including law enforcement.[311] Florida and Georgia are the only states with statutes that

300. *Id.*; *see also* ACLU, TASER STUDY, *supra* note 38, at 12. At this threat level, the agencies also allow the officers to use such tactics as night sticks and batons. USGAO REPORT, *supra* note 26, at 9.

301. USGAO REPORT, *supra* note 26, at 9.

302. USGAO REPORT, *supra* note 26, at 9.

303. ACLU, TASER STUDY, *supra* note 38, at 12.

304. *Id.* at 1. The ACLU-NC surveyed a total of seventy-nine police departments in central and northern California and found that fifty-six used Tasers. *Id.* Of the fifty-six that employed Tasers, fifty-four provided their Taser use policies to the ACLU-NC. *Id.*

305. *Id.* at 12.

306. *Id.* Violent corresponds to physical injury (level four of the FLETC use-of-force continuum), and potentially violent corresponds to active resistance (level three of the FLETC use-of-force continuum).

307. *Id.*

308. *Id.* at 12–13.

309. *Id.* at 14.

310. *Id.* at 13.

311. N.J. STAT. ANN. § 2C:39-3(h) (2009).

specifically regulate Taser use by law enforcement.[312] The Georgia statute provides that Tasers will "be used for law enforcement purposes in a manner consistent with established standards and with federal and state constitutional provisions."[313] Thus, Georgia essentially adopts the federal standard.

The Florida statute provides that law enforcement officers may only Taser a suspect during "an arrest or a custodial situation during which the person who is the subject of the arrest or custody escalates resistance to the officer from passive physical resistance to active physical resistance."[314] Further, the Florida statute specifies that the actively resisting suspect must either have the "apparent ability to physically threaten the officer or others" or be "preparing or attempting to flee or escape."[315] Thus, the Florida statute requires that the suspect be actively resisting, and that the suspect must either: (1) have the apparent ability to physically threaten the officer or others; or (2) be attempting to flee.

The Florida statute regulates Taser use in a manner that is consistent with the FLETC use-of-force continuum. By limiting Taser use to actively resisting suspects, the Florida statute effectively places Taser use on level three of the FLETC use-of-force continuum. This helps provide guidance to law enforcement officers because officers are already familiar with the FLETC use-of-force continuum. The statute also helps ensure proportionality between the suspect's actions and the officer's use of force. Finally, the standard is within the bounds of what is considered reasonable under the Fourth Amendment.[316]

VI. IMPROVING THE LAWS GOVERNING TASER USE BY LAW ENFORCEMENT

To determine whether a police officer's use of force is reasonable, the Supreme Court asks lower courts to perform a cumbersome balancing test that weighs the suspect's interests against the government's interests with careful attention to the facts and circumstances of each case.[317] The consequence is that the Supreme Court's § 1983 excessive force jurisprudence provides little guidance to officers in the field about when and what type of force is appropriate during an arrest or investigatory stop.[318] Law enforcement officers must conduct a rigorous fact-based analysis of prior case law to determine whether a particular use of force is

312. FLA. STAT. § 943.1717(1)(a)–(b) (2006); GA. CODE ANN. § 35-8-26 (2009).

313. GA. CODE ANN. § 35-8-26 (2009).

314. FLA. STAT. § 943.1717(1) (2009).

315. *Id.* § 943.1717(1)(a)–(b).

316. *See supra* Part IV (discussing that active resistance will almost always justify police use of a Taser as reasonable, while the line for passive resistance is not so clear).

317. *See supra* Part III.B.

318. *Id.*

reasonable.[319] One problem with this approach is that it becomes exceedingly difficult for law enforcement officers to draft excessive force policies that comply with the Fourth Amendment. A second problem is that when faced with a novel set of circumstances, an officer may never be completely certain whether his use of force is reasonable.

After conducting the necessary factual analysis of § 1983 case law, we can formulate some general rules for determining when Tasering a suspect is considered reasonable.[320] Generally, even a low degree of active resistance, such as pulling away from an officer's grasp, will justify Tasering a suspect.[321] Active resistance may justify Tasering a suspect even when the suspect is already restrained or when the suspect is from a vulnerable class of persons.[322]

Passive resistance may also justify Tasering a suspect.[323] Unlike active resistance, however, Tasering a passively resisting suspect may not be reasonable when the suspect is already restrained,[324] from a vulnerable class of persons,[325] or when the force is disproportionate to the underlying crime.[326]

These general rules provide officers with a great deal of latitude to control suspects who physically resist or refuse to comply with an officer's demands. Given the safety concerns with Tasers, however, it is prudent to question whether the rules adequately protect suspects. Although Taser use by law enforcement may result in an overall decrease in suspect injuries,[327] suspects could be given more protection without compromising Taser effectiveness.

It may also be important to consider proportionality when crafting laws and policies that govern Taser use by law enforcement. When officers use force that is disproportionate to the threat, it can spark fear, anger, and

319. *See supra* Part IV.

320. *Id.*

321. Edwards v. City of Martins Ferry, 554 F. Supp. 2d 797, 806–07 (2008); Campos v. City of Glendale, No. CV-06-610-PHX-DGC, 2007 WL 4468722, at *3–4 (D. Ariz. Dec. 14, 2007). *But see* Roberts v. Manigold, 240 F. App'x 675, 678 (6th Cir. 2007).

322. *Edwards*, 554 F. Supp. 2d at 807–08; Johnson v. City of Lincoln Park, 434 F. Supp. 2d 467, 478–80 (E.D. Mich. 2006).

323. Buckley v. Haddock, 292 F. App'x 791, 794 (11th Cir. 2008).

324. *Roberts*, 240 F. App'x at 676, 678; Brooks v. City of Seattle, No. C06-1681RAJ, 2008 WL 2433717, at *5 (W.D. Wash. June 12, 2008); Brown v. City of Golden Valley, 574 F.3d 491, 495–96 (8th Cir. 2009); Michaels v. City of Vermillion, 539 F. Supp. 2d 975, 977, 987 (N.D. Ohio 2008).

325. *Brooks*, 2008 WL 2433717, at *5–6.

326. Casey v. City of Fed. Heights, 509 F.3d 1278, 1281–82 (10th Cir. 2007); *Brooks*, 2008 WL 2433717, at *5; *Brown*, 574 F.3d at 496–97.

327. Emma Jenkinson, Clare Neeson & Anthony Bleetman, *The Relative Risk of Police Use-of-force Options: Evaluating the Potential for Deployment of Electronic Weaponry*, 13 J. CLINICAL FORENSIC MED. 229, 237 (2006).

even protests[328] that degrade law enforcement's relationship with the community. It runs contrary to many people's expectations about what constitutes reasonable force to allow officers to Taser passively-resisting suspects who pose no threat to the officer or others.

Ideally, laws governing Taser use should provide suspects more protection and provide officers specific guidance about when and how Tasers may be used. The federal judiciary could accomplish these goals by including clear, bright-line rules as part of the holding for each case. Bright-line rules would solve the specificity problem of current excessive force jurisprudence and create a national standard governing Taser use by law enforcement. It is unlikely, however, that such bright-line rules are forthcoming, given that the Supreme Court has said, "[T]he test of reasonableness under the Fourth Amendment is not capable of precise definition."[329]

This void in federal law creates a window of opportunity for states to create their own laws governing Taser use by law enforcement. Because current federal laws do not heavily restrict Taser use by law enforcement, states are free to adopt more restrictive standards while still staying within the boundaries of the Fourth Amendment. Although this would not lead to uniform national standards, it would allow the states to fulfill their classic roles as laboratories for experimentation to determine what works and what does not.

Florida was the first state to enact a statute that specifies when law enforcement officers can Taser a suspect. Florida law limits Taser use to situations where the suspect is ether actively resisting and fleeing or actively resisting and has the apparent ability to harm the officer.[330] By limiting Taser use to situations where the suspect is actively resisting, Florida law helps to ensure that the officer's force is proportional to the threat posed.

The law does not, however, account for situations where a passively-resisting suspect poses an apparent threat to officers or others. For example, imagine a situation where a diminutive officer confronts a large suspect who has a long history of violent crimes. Further, imagine that the officer informs the suspect that he is under arrest, and the suspect walks towards the officer, points, and exclaims, "There is no way I'm going back to jail!" In this hypothetical, the suspect has not actively resisted the officer, yet the suspect clearly poses a threat. In this situation, using a Taser to subdue the suspect could very well be warranted. Thus, a better rule would be that officers may only use a Taser when: (1) the suspect is

328. DaSilva, *supra* note 18; Espinoza, *supra* note 18.

329. Graham v. Connor, 490 U.S. 386, 396 (1989) (quoting Bell v. Wolfish, 441 U.S. 520, 559 (1979)).

330. FLA. STAT. § 943.1717(1)(a)–(b) (2006).

actively resisting; or (2) the suspect is passively resisting but has the apparent ability to physically threaten the officer or others.

A law governing Taser use should also contain specific provisions that protect suspects. For example, a provision that limits the number of times a suspect can be Tasered would play an important role in protecting suspects from excessive Taser use by law enforcement. Cases of fatalities following Taser use involve a disproportionate number of multiple shock incidents.[331] And if a suspect has not complied after being shocked three or four times, it is unlikely that Tasering could be considered effective law enforcement.[332] Thus, a provision that limits the number of times a suspect can be Tasered would protect suspects without substantially hindering law enforcement officers.

It would also be advisable to include a provision that prohibits officers from Tasering vulnerable suspects such as the elderly, minors below a certain age, pregnant women, or those with known or apparent health risks such as drug intoxication or heart disease. And, if after Tasering a suspect police determined that the suspect belongs to an at-risk category, a medical evaluation should be provided.[333] Finally, a law governing Taser use should include a provision that requires all officers equipped with Tasers to complete a Taser-use training course. [334]

VII. CONCLUSION

The Supreme Court's excessive force jurisprudence sets a flexible, nonspecific standard for determining whether a law enforcement officer's use of force is reasonable. This standard allows officers broad discretion for determining what level of force is appropriate during an arrest or investigatory stop. Consequentially, it is unclear when Tasering a suspect is reasonable under the Fourth Amendment.

The United States needs specific laws governing Taser use by law enforcement. These laws should be designed to protect citizens by limiting multiple Taser shocks and prohibiting officers from Tasering vulnerable individuals.

331. AMNESTY INT'L, *supra* note 39, at 46.

332. Tennessee v. Garner, 471 U.S. 1, 9 (1985) (noting that the government has an interest in effective law enforcement).

333. *See* Kedir, *supra* note 33, at 382.

334. *Id.* at 383; FLA. STAT. § 943.1717(2)–(5) (2006).