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**Civil Liability for Use of Tasers, stunguns,
and other electronic control devices
–Part I: 4th Amendment claims for excessive force**

There has been an expanding use of electronic control devices, particularly Tasers*, by law enforcement agencies in recent years. The availability of such devices provides officers with useful alternatives to the use of deadly and nondeadly force in a wide variety of circumstances, enabling them to more carefully tailor their response to what is appropriate to particular situations.

The use of any technology by law enforcement, however, is followed by a need to carefully assess the legal ramifications of its adoption. In this, the first of a series of articles, we will take a look at the question of possible civil liability for excessive force arising from the use of such devices. A link is also provided to a menu of specimen policies on the subject. Future articles will examine claims for accidental or negligent use of such devices, as well as their use in situations involving detainees, juveniles, and disabled or disturbed persons, as well as products liability claims, and legal issues concerning training.

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1. Some Specimen Policies & Useful Resources.

While policies that departments adopt on the use of Tasers, stunguns, and other electronic control devices must be carefully tailored to comply with applicable federal, state, and local law, looking at policies developed and adopted by other departments, and by model policies presented by professional organizations and

others concerned with law enforcement can be a useful part of the process of developing your own policies. This should be done, of course, in connection with consultation with your department's legal counsel, as well as with management personnel aware of daily practical considerations. Click [here](#) to get to a menu of specimen policies adopted by a number of municipalities, as well as two model policies, and a number of useful resources and websites.

2. What use of force is excessive?

In [Graham v. Conner](#), 490 U.S. 386 (1989), the U.S. Supreme Court held that all claims that law enforcement officials have used excessive force - deadly or not - in the course of an arrest, investigatory stop, or other "seizure" of a free person are properly analyzed under the [Fourth Amendment's](#) "objective reasonableness" standard.

The right to make an arrest or investigatory stop, the Court commented, necessarily carries with it "the right to use some degree of physical coercion or threat thereof to effect it." All the law requires is that it be a reasonable amount of force.

Such reasonableness has to be judged in light of the facts and circumstances confronting the officer, rather than on the basis of their underlying "motivation" or intent. The reasonableness of each particular use of force has to be judged, the Court stated, from the perspective of a reasonable officer on the scene, and must make an allowance for the fact that police officers often have to make "split-second" decisions about the amount of force that is necessary. This must be based on the facts that the officer knows at that time, or reasonably believes that he knows, rather than looking back at the circumstances with hindsight or on the basis of information later discovered but not then known.

3. Intentional Use of Tasers and Stunguns—Fourth Amendment Cases

The intentional use of Tasers, stunguns, and other electronic control devices to stop or otherwise control a suspect is a seizure for Fourth Amendment purposes. As such, it is subject to the Fourth Amendment's requirement that all searches and seizures be "reasonable." The issue of what is reasonable under the circumstances is very much a factual inquiry. It is therefore very useful to look with some detail at the facts of a number of the cases in which the courts have ruled on whether the use of such devices was reasonable.

In [Draper v. Reynolds](#), #03-14745, 369 F.3d 1270 (11th Cir. 2004), a Georgia deputy sheriff stopped a truck on the highway after allegedly observing a tag light which was not appropriately lighted at night.

Approaching the passenger side of the truck's cab on foot, and shining his flashlight at the truck, he encountered a driver who claimed that he was blinded by the flashlight, and who rolled down the passenger window. The driver later asserted that he "politely asked" the deputy to stop shining the flashlight at him.

The motorist's version of the encounter was that the deputy then said something like "god dammit, you don't worry about what I'm doing over here," and responded to a similar request not to shine the flashlight again by replying, "I told you to get your fucking ass over here two times." The driver then allegedly told the deputy to get his "god darn flashlight" out of his eyes.

In contrast, the deputy claimed that he only "quickly blinked" the flashlight twice in an attempt to let the driver know where he was standing, and for the driver to be able to meet him where he stood, and that the driver reacted belligerently.

The deputy unholstered his Taser gun which he kept in his hand through the remainder of the encounter, and the motorist got out of the truck and walked to the back. As captured by a video camera, the driver immediately began shouting and complaining about the deputy shining the flashlight in his face. The deputy "calmly asked" for the driver's license, but the driver continued to complain about the prior use of the flashlight, and insisted that he had done "nothing wrong." The motorist was allegedly "belligerent, gestured animatedly, continuously paced, appeared very excited, and spoke loudly."

The deputy repeatedly asked the driver to stop yelling and also asked to see his log book, bill of lading, driver's license, and insurance. The driver accused the deputy of harassing him. While the driver produced his license, he allegedly failed to respond to other requests for the other items, and told the officer "How 'bout you just go ahead and take me to fucking jail, then, man, you know, because I'm not going to kiss your damn ass because you're a police officer."

The motorist allegedly failed to retrieve the documents after a fourth and fifth response, and continued to yell. The officer then discharged his Taser gun at the driver's chest, and instructed a back-up officer who had just arrived to handcuff the driver.

The driver filed a federal civil rights lawsuit against the officer, claiming that he improperly stopped him, falsely arrested him, and used excessive force against him. A federal trial court granted summary judgment to the defendant on the federal claims, remanding remaining state law claims to state court.

Upholding this result, a federal appeals court found that the deputy had probable cause to stop the driver for the tag light violation, and that the driver's actions gave the officer probable cause to arrest him for obstructing an officer in the performance of his duty.

Most importantly, the appeals court found that the use of the Taser gun to accomplish the arrest was "reasonably proportionate to the difficult, tense and uncertain situation" that the deputy faced, and was not excessive. Because the driver had repeatedly refused to comply with the deputy's verbal commands, "starting with a verbal arrest command" was not required.

More importantly, a verbal arrest command accompanied by attempted physical handcuffing, in these particular factual circumstances, may well have, or would likely have, escalated a tense and difficult situation into a serious physical struggle in which either [the driver] or [the deputy] would be seriously hurt.

This meant that there was a reasonable need for some use of force in this arrest. While being struck by a Taser gun is an "unpleasant experience," the appeals court commented, the amount of force used, a single use of the Taser gun causing a one-time shocking, was "reasonably proportionate" to the need for force, and did not cause any serious injury. Indeed, it may have prevented a physical confrontation and injuries. Further, the videotape of the incident clearly showed that not long after the motorist was stunned by the Taser, he was coherent, standing up, and handcuffed.

Similarly, in Hinton v. City of Elwood, Kansas, 997 F.2d 774 (10th Cir. 1993), a federal appeals court held that use of stun gun to subdue man who was resisting arrest by kicking and biting was an appropriate use of force. See also Moore v. Novak, 146 F.3d 531 (8th Cir. 1998), in which the use of a stun gun on a resisting and handcuffed arrestee was found not to be unreasonable. Use of such devices against belligerent and/or resisting suspects can cut that resistance short, and prevent the escalation of the incident into one which ends up with the death of or serious injury to the suspect, the officer, or both, and which can temporarily immobilize the suspect before a direct one-on-one physical confrontation takes place.

In Russo v. Cincinnati, 953 F.2d 1036 (6th Cir. 1992), a federal appeals court found that an officer who used his Taser several times on a suspect bearing two knives, including after he was arguably no longer posing an "immediate" threat to anyone, was entitled to qualified immunity from liability. The court noted that the defendant officer "deployed the Taser" specifically in order to prevent the need for the use of deadly force, a laudable objective. They were confronting a suspect who they believed was potentially homicidal, and was definitely armed and non-

compliant. In short, the use of non-lethal force against an "armed and volatile" opponent cannot reasonably be called an excessive use of force.

In Lifton v. City of Vacaville, No. 02-15450, 72 Fed. Appx. 647, 2003 U.S. App. Lexis 16286 (9th Cir. Unpub. 2003), the mother of a man shot and killed by police was awarded \$850,000 for the fatal shooting. But the trial court found that the officers, in previously trying to surround the man, yell at him, and utilize a Taser to attempt to disable him did not violate his clearly established Fourth Amendment rights.

In Calusinski v. Kruger, #93-2126, 24 F.3d 931 (7th Cir. 1994), officers dispatched to the scene of a volatile domestic disturbance were found not to have used excessive force in deploying hand-held stun guns against a non-complaint husband who refused to stop resisting after he was told he was under arrest, and even continued to resist and kick the officers after being pushed to the ground. Officers used their stun devices somewhere between three and seven times before being able to transport him to a police station.

A more recent case, Carroll v. County of Trumbull, #4:05-CV-1854, 2006 U.S. Dist. Lexis 2309, 2006 WL 1134206 (N.D. Ohio), granted qualified immunity to an officer who used a Taser on a handcuffed arrestee involved in a domestic disturbance who allegedly started kicking the back of the front seat of a police car and yelling. The arrestee was pulled out of the vehicle by officers and was thrashing about and resisting after officers removed the handcuffs from the front of his body in order to recuff him behind his back. When the cuffs were removed, the arrestee lifted his left arm and thrashed about again, so the officer decided to taser him to get him to cooperate without having the arrestee or an officer injured.

The court found that the arrestee failed to show that he was not resisting at the time of the use of the Taser, and also failed to show either that the officer acted unreasonably, or that the officer's actions violated any clearly established constitutional right.

Summary judgment was also granted to an officer who used a Taser device on an arrestee who was fleeing and attempting to evade arrest, after pushing the officer's arm. The officer advised him he was under arrest, and allegedly warned him several times that he needed to stop or a Taser would be used. The arrestee failed to dispute this, so the court found that the officer's use of force was reasonable. U.S. ex rel. Thompson v. Village of Spring Valley, N.Y. 2006 WL 1889912 (S.D.N.Y.).

In Willkomm v. Mayer, 2006 U.S. Dist. Lexis 11489, 2006 WL 582044 (W.D.

Wis), the court granted summary judgment to officers who used a Taser 3 times on an arrestee, **including** twice while he was handcuffed. The suspect was arrested after one of the officers believed he observed him throwing beer cans from a moving vehicle late at night. The arrestee also admitted that he had been drinking. The Taser was used against him the first time because he resisted being handcuffed, the second time because, even though handcuffed, he would not comply with officers' orders to move his legs into the police vehicle, and the third time because he had moved his handcuffed hands, catching them on his feet. The officers removed him from their car, and the Taser was then used against him when he resisted officers' efforts to reposition his handcuffs. The court found that all three of these uses of the Taser were reasonable, given the arrestee's continued non-compliance.

A resisting arrestee, who allegedly continued to resist even when handcuffed, was also involved in [Devoe v. Rebant](#), #05-71863, 2006 U.S. Dist. 5326, 2006 WL 334297 (E.D. Mich.). The suspect was arrested after acting in a hostile manner, ignoring a request to "come here," refusing to provide identification, and yelling at one of the officers. He continued to fail to comply with the officers' commands after being handcuffed, they claimed, and would not enter their patrol car when requested to do so.

One of the officers, therefore, administered a short stun with his Taser to the arrestee's lower right back. After that, the arrestee complied and got into the police vehicle. Noting that trying in a more direct physical way to force the arrestee into the vehicle might have resulted in an altercation, with possible injury to either the arrestee, an officer, or both, the court found that this use of the Taser was reasonable, and did not cause a serious injury of any kind. In the alternative, the court ruled, if the use of the Taser were to be found unreasonable, it still would not violate any clearly established constitutional right under these circumstances, and the officers were therefore entitled to qualified immunity in any event.

In [Wylie v. Overby](#), 05-CV-01013, 2006 U.S. Dist. Lexis 67936, 2006 WL 1007643 (E.D. Mich.), summary judgment was granted for the use of a Taser to stop a man seeking to escape arrest on two warrants. One of the deputies allegedly knew of the suspect's history of engaging in violent behavior. The arrestee was injured by Taser darts, one of which struck the top of his head, and which had to be removed at a hospital. Among other things, the court found that the plaintiff, who had pled guilty to criminal charges of assaulting an officer and resisting arrest was barred by that plea from arguing in his federal civil rights lawsuit that he did not resist arrest.

The court went on to find that, under the circumstances, in which the suspect twice broke away from an officer's grasp, and was escaping, the use of a Taser was

not excessive. The Taser had the advantages of not requiring close proximity to the suspect and of not creating any serious risk of lasting injury to the suspect. The court noted that the use of personal force, a baton, or a chemical spray might require the officer to get closer to the suspect, resulting in a risk of the officer being injured.

"It is entirely clear to this court that, from the perspective of a reasonable objective officer, an assaultive subject trying to escape who suddenly turns and raises his hands to shoulder height could as easily be assuming an aggressive posture in preparation for fighting as trying to indicate a surrender. The most [the arrestee] could argue at trial is that he had changed his mind about escaping. He cannot reasonably argue that any officer who saw him in action must be held to have known what he was thinking."

Cases in which the use of a Taser or stungun are more likely to be found to be an excessive use of force include those in which a suspect, rather than resisting the officer, is allegedly being cooperative, or at least is not actively resisting.

In [Schmittling v. City of Belleville](#), No. 05-CV-572, 2006 U.S. Dist. Lexis 28594, 2006 WL 1308577 (S.D. Ill.), for instance, a motorist approached by police while waiting for roadside assistance claims that he merely asked for medical help, but was told that he was going "to jail." When he put his wrists together to facilitate being handcuffed, he claimed, one of the officers said he was a "smart ass," and then Tasered him. Incapacitated by the Taser, he then failed to comply with the further orders to place his hands behind his back, and was shot with a Taser again. Two other shots with the Taser allegedly followed, and the motorist claimed that this caused him to lose control over his bodily functions, suffer injuries to his head, and lose consciousness, as well as suffering burns to his body. The federal trial court declined to dismiss the motorist's excessive force claims, since, if his version of the incident was true, the use of the Taser four times in response to his attempts to cooperate was an excessive use of force.

Similarly, in [Autin v. City of Baytown](#), 05-202145, 174 Fed. Appx. 183, 2005 WL 3556677, 2005 U.S. App. Lexis 29098 (5th Cir.), an officer allegedly Tasered a woman from behind when she approached the door of a house with a brick in her hand. She had just previously attempted to get the officer to help get someone to come to the door of the house, after receiving no response to her knocks. The house was her brother's residence, and she feared that he might be seriously ill.

In denying summary judgment to the officer on her excessive force claim, the court noted that the plaintiff had not been resisting arrest at that time, and was not warned. The shot from the Taser was her first indication that the officer wanted

her to stop what she was doing, and could be found to be excessive. She suffered a severe laceration from hitting her head on a pole during the incident. The case was later settled.

What about the mere display of a Taser device without its actual use? In [Policky v. City of Seward](#), 2006 WL 1426506 (D. Neb. 2006), the court ruled that merely drawing and pointing a Taser, when the person failed to submit to the officer's authority, did not constitute a "seizure" for purposes of the Fourth Amendment, and therefore was not a constitutional violation. The court noted that similar results had been reached in a case involving the display of a gun loaded with bullets, and reasoned that if that was not a constitutional violation, the mere display of a Taser could not be either.

Disputed factual issues about the interpretation of events, of course, may prevent a resolution of whether or not the use of an electronic control device was excessive under the circumstances. In [Fletcher v. Schwend](#), 3:05-CV-2138, 2006 U.S. Dist. Lexis 46912, 2006 WL 1867890 (N.D. Tex.), for instance, the officer interpreted the narcotics suspect's gestures as indicating that he was posing a serious threat of harm, justifying the use of the Taser. The suspect had undisputedly raised his hands with his fingers spread apart, but the officer argued that he interpreted this as doing so in a threatening manner justifying the use of force, while the suspect argued that he was making a "gesture of surrender." Further proceedings were needed to resolve whether the officer acted in an objectively reasonable manner.

* Nomenclature: Various writers refer to the instrument as a CED or CEW (Conducted Energy Device or Weapon), or an ECD or ECW (Electronic Control Device or Weapon), or an EMD weapon (Electro-Muscular Disruption), or an electroshock weapon or stun-gun. Like Xerox ® and Kleenex ®, T.A.S.E.R. ® (Thomas A. Swift Electric Rifle) is now the popular name for all hand-held, electric-discharging muscle immobilizers, even though a single manufacturer dominates the world market [Nasdaq: TASR]. For simplicity, AELE refers to all conducted energy weapons as "Tasers".

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