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**Civil Liability for Use of Tasers, stunguns,  
and other electronic control devices  
Part III:  
Use Against Detainees and Disabled or Disturbed Persons.**

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In prior articles in this series, we examined possible civil liability for excessive force arising from the use of electronic control devices, particularly Tasers\*, by law enforcement agencies, focusing on Fourth Amendment claims as well as cases involving the use of such devices against juveniles, and claims of inadequate training.

In this article, the focus is on claims arising from their use in situations involving detainees, and against disabled or disturbed persons. A list of some useful references at the conclusion of the article contains material that may be relevant to all of the articles in this series.

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**1. Use Against Detainees**

While the use of Tasers and other electronic control devices by law enforcement officers to seize persons not in custody is governed, as is all such uses of force, by the objective reasonableness standard of the Fourth Amendment, different rules of law apply when force is being used against detainees—whether against pre-trial detainees or convicted prisoners in custody.

Pre-trial detainees have not yet been convicted of a crime, and therefore cannot be punished without first having a trial (receiving due process), and being

convicted. Use of force against them is therefore governed by the Fifth or Fourteenth Amendment's prohibition of punishment without due process of law. Convicted prisoners, on the other hand, are subject to punishment, since they have already received "due process," and the use of force against them is limited by the Eighth Amendment's prohibition on "cruel and unusual punishment."

In [Hudson v. McMillian](#), No. 90-6531, 503 U.S. 1 (1992), the Supreme Court held that "whenever prison officials stand accused of using excessive physical force, the core inquiry is ...whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically to cause harm." The Court further stated that "when prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency are always violated." (The Court also rejected the argument that a "significant injury" must be shown in order to establish that excessive force was used).

In most instances, the courts have regarded the Fourteenth Amendment due process standard and the Eighth Amendment standard on the use of force against pre-trial detainees and convicted prisoners respectively as very similar, if not identical. Factors examined include the need for the use of force, the nature and extent of the injury, and the extent of the danger then existing toward the staff members and other prisoners. For purposes of the immediate discussion, while reference may be made to the legal standard applied by the court, no major distinction is made.

Applying the 8<sup>th</sup> Amendment standard, a federal trial court in [Hernandez v. Terhune](#), No. C-00-0848, 2000 U.S. Dist. Lexis 18080, 2000 WL 1847645 (N.D. Cal. 2000), ruled that a Taser device could reasonably be used to quell prisoner disorders and compel prisoner obedience, but could not be used simply for the purpose of punishing a prisoner. In this case, however, the prisoner failed to allege the circumstances under which the Taser was used, and what his conduct was that the officer was responding to, so the court dismissed his claim with leave to amend, if he could be more specific.

Similarly, in [Shelton v. Angelone](#), #7:99CV0075, 183 F. Supp. 2d 830 (W.D. Va. 2002), a court stated that an evidentiary showing that correctional officers beat and shocked a handcuffed and leg-shackled prisoner repeatedly, without justification, if believed by a jury, would support a conclusion that force was used "maliciously and sadistically" in violation of the Eighth Amendment. Under such circumstances, the trial judge stated, no proof of permanent physical effect was required for liability, since the alleged actions would be "repugnant to the conscience of mankind." He therefore denied a motion by the defendants for summary judgment.

The mere fact that an electronic control device is used, standing alone, does not, by itself, show a violation of the Eighth Amendment. Instead, the key question is the manner and purpose for which it is used. In [Williams v. Schueler](#), #04-C-65, 2006 U.S. Dist. Lexis 86769, 2006 WL 3469597 (E.D. Wis. Nov. 29, 2006), what was at issue was the use of an Ultron stun gun against a prisoner, and the court stated that the device could properly be used for the purpose of maintaining or restoring discipline, but not for the purpose of punishing or inflicting pain on a prisoner. In that case, there was a factual dispute as to whether, as a defendant officer stated, he only used the device on the prisoner to restore discipline, or whether, as the prisoner claimed, two officers held his arms down while the defendant officer shocked him over and over again, smiling and laughing while doing so and after he was finished.

In [Preston v. Pavlushkin](#), #03-cv-00617, 2006 U.S. Dist. Lexis 14357, 2006 WL 686481 (D. Colo. March 16, 2006), a federal trial court denied summary judgment for the defendant officers in a lawsuit brought against them by a prisoner who allegedly did not then present any threat of physical violence, but was instead incapacitated and on the ground. The plaintiff claimed that they then used an electronic control device to shock him three times, when the only issue was his failure to comply with their orders to pick up a food tray he had thrown down and to clean up the mess he had made. See, on the other hand [Drummer v. Luttrell](#), #99-2887, 75 F. Supp. 2d 796 (W.D. Tenn. 1999) (prison personnel may use physical force, including Taser devices, to compel inmates to obey them in a case which involved a female inmate's refusal to submit, during a strip search, to orders to squat and cough, and to turn around and be handcuffed).

Compelling compliance with orders necessary for institutional security and safety will justify the use of physical force, including Tasers, stun guns, and other electronic control devices. In [Parker v. Asher](#), #cv-N-88-218, 701 F. Supp. 192 (D. Nev. 1988), the court rejected an argument that electronic control devices are necessarily unconstitutional, finding that their use is fine when used for the purpose of enforcing compliance with an order to move to a different prison wing which "had a reasonable security purpose. The legitimate intended result of a shooting is incapacitation of a dangerous person," rather than the unnecessary, malicious, or sadistic infliction of pain. See also [Jolivet v. Cook](#), #94-4069, 48 F.3d 1232 (Table) (10<sup>th</sup> Cir. 1995), full text unreported opinion at 1995 U.S. App. Lexis 3950, in which a federal appeals court upheld a trial court's determination that officers in a correctional facility used Tasers properly in a good faith attempt to maintain and restore discipline when the plaintiff inmate refused to comply with orders to submit to being handcuffed when he was being moved from his cell.

Similarly, in [Michenfelder v. Sumner](#), #86-1549, 860 F.2d 328 (9<sup>th</sup> Cir. 1988), a federal appeals court rejected an argument that the use of an electronic control

device constituted cruel and unusual punishment in the context of an alleged policy of allowing officers to use such devices against inmates who resist submission to strip searches. In accord was the court's decision in [Walker v. Sumner](#), #92-15297, 8 F.3d 33 (Table) (9<sup>th</sup> Cir. 1993) full unreported opinion at 1993 U.S. App. Lexis 26517, upholding the threat to use a Taser for the goal of compelling compliance with a search being conducted for a reasonable security purpose. The prisoner in that case was refusing to submit to an AIDS test, which was found to be reasonable and for legitimate purposes. The court noted that Nevada's Department of Prison authorities believe the Taser is the preferred method for controlling prisoners because it is the "least confrontational" when compared to the use of physical restraint, billy clubs, mace, or stun guns. By disabling the inmate, it prevents further violence. The court held that the Taser gun is not per se unconstitutional.

In [Price v. Busbee](#), 2006 U.S. Dist. Lexis 8159, 2006 WL 435670 (M.D. Ga. Feb. 21, 2006), a court granted summary judgment to an officer who used a threat of use of a Taser device to calm down a disruptive pre-trial detainee in a jail holding cell. The officer took a Taser device and shone the red beam against the detainee's chest, after which he calmed down. Finding that the threat of use of the Taser was carried out in a good faith manner to restore discipline, the court found that the threat did not violate the detainee's constitutional rights.

Also of interest is [Caldwell v. Moore](#), #91-5852, 968 F.2d 595 (6<sup>th</sup> Cir. 1992), upholding the use of a stun gun against a disruptive prisoner to restore discipline and order. In that case, the court found that the mere fact that there was no specific policy regulating the officers' use of stun guns did not, by itself, make their use unconstitutional, and the officers could reasonably conclude that the use of such devices could avoid the need to apply greater force. The court also noted that the prisoner did not receive any injuries serious enough to need immediate medical care, and there was no evidence at all that the defendants acted for an improper purpose or with a "culpable" state of mind, such as intent to injure him.

In contexts where the order given or compliance with it less clearly involves a very immediate safety or security concern, some courts have been more willing to conclude that the use of an electronic control device is an Eighth Amendment violation. See [Hickey v. Reeder](#), 92-3737, 12 F.3d 754 (8<sup>th</sup> Cir. 1993), rehearing denied, 1994 U.S. App. Lexis 1614, in which it was concluded that it violated the Eighth Amendment rights of an inmate for him to be shocked with a stun gun when he merely refused to sweep his cell as instructed. The appeals court found that in this instance, the action taken was an exaggerated response intended to make an example of the inmate and cause him pain, and also constituted summary corporal punishment in violation of his rights. The court stated that "[A] stun gun inflicts a painful and frightening blow, which temporarily paralyzes the large

muscles of the body, rendering the victim helpless. This is exactly the sort of torment without marks ... which, if inflicted without legitimate reason, supports the Eighth Amendment's objective component. "

An electronic control device may be used when a detainee presents a threat of physical force. Officers need not wait until the detainee or prisoner is actually then in the process of attacking them before using force, and may properly do so to prevent an impending attack.

In [Rubins v. Roetker](#), No. Civil Action 89-C-1727, 737 F. Supp. 1140 (D. Colo. 1990), an inmate was loudly and aggressively expressing his wish to get into a physical fight, and correctional officers' use of force, including a stun gun, against him was not an Eighth Amendment violation. In this case, indeed, a magistrate judge at one point expressed surprise that more force was not used against the inmate, given his conduct, which included kicking his feet and repeatedly refusing to cooperate.

What about the use of a Taser against a prisoner who is in restraints? In [McBride v. Clark](#), 2006 U.S. Dist. Lexis 9143, 2006 WL 581139 (W.D. Mo. March 8, 2006), a federal court granted summary judgment to an officer who used a Taser against a prisoner who kept yelling and screaming after he was placed in a restraint chair. The prisoner additionally had dislodged an IV, causing himself to bleed, and had told the officer that he had Hepatitis C. In this case, the court found, the important interest of protecting the safety of the officer and preventing the spread of communicable disease, as well as maintaining control of the prisoner rendered the use of the Taser on the prisoner's neck while he was in the restraint chair objectively reasonable. See also the court's decisions granting summary judgment in the same case to the county, [McBride v. Christian County](#), 2006 U.S. Dist. Lexis 9144 (W.D. Mo.), and to the county sheriff, [McBride v. Robertson](#), 2006 U.S. Dist. Lexis 9161 (M.D. Mo.).

In [Alford v. Osei-Kwasi](#), #A91A1864, 203 Ga. App. 716, 418 S.E.2d 79 (Ga. App. 1992), the court was confronted with a case in which a pregnant prisoner was subdued with a Taser device, and her child was subsequently born. At the time of the incident, the prisoner was creating a disturbance in the jail by repeatedly kicking the door. The guards on duty found it necessary to call in a supervisor after they were unable to stop the prisoner's disturbance.

Various efforts short of the use of force failed to put a stop to the disturbance, until the supervisor, a lieutenant, entered the cell and used a Taser to subdue the prisoner. The plaintiff prisoner, while arguing that the use of the Taser had been "unnecessary," also herself admitted that she had not intended to stop disturbing the cell block until she got what she wanted. Discussing the use of the Taser in this

context, the court stated:

"Although we also are concerned about using a device like a Taser, we cannot agree that its use is inherently wanton, malicious, or sadistic. If used properly it avoids the physical injuries associated with other means of force. Further, although incapacitated by the Taser, Alford produced no credible evidence that the Taser caused her or [her subsequently born child] any serious injury or that it routinely caused serious injuries in others. Moreover, Tasers are used in other state penal systems and have been used for years in the DeKalb County Jail without report of serious injuries. Further, even Alford's expert did not condemn their use generally. Therefore, we do not find that using the Taser, per se, constituted a violation of the Eighth Amendment."

It should be noted, in this context, however, that a report by the Police Executive Research Forum published in October of 2005 contained a guideline that states that "CEDs [conducted energy devices] should not generally be used against pregnant women, elderly persons, young children, and visibly frail persons unless exigent circumstances exist." [Conducted Energy Devices \(CED\): Development of Standards for Consistency and Guidance](#), by the Police Executive Research Forum, with funding from DOJ's Office of Community Oriented Policing Services (COPS) and support of BJA and DOJ's Less Lethal Technology Working Group.

Further, a model policy on the use of Electronic Control Weapons published by the International Association of Chiefs of Police (IACP) in August of 2005 states that, "As in all uses of force, certain individuals may be more susceptible to injury. Officers should be aware of the greater potential for injury, when using an ECW against children, elderly, persons of small stature irrespective of age, or those who the officer has reason to believe are pregnant, equipped with a pacemaker, or in obvious ill health." (These statements should be kept in mind in connection with the cases discussed in the next section of this article also).

## **2. Use Against Disabled or Disturbed Persons**

Officers on occasion need to use force against disabled or disturbed persons, sometimes in connection with ordinary law enforcement operations (search and seizure, arrest, etc.), and sometimes in connection with the need to simply protect the disabled or disturbed persons themselves, or to protect others against them, such as in connection with an officer's "community caretaking" function.

In a wide variety of contexts, the use of electronic control devices, when force against such persons is required, may constitute a preferable method to the use of other available weaponry, including batons, chemical agents, directly applied

physical force, or deadly weapons, all of which may have more potential to result in serious bodily injury or death.

One such case in which the court upheld the use of a Taser as part of the officer's community caretaking function is Stanley v. City of Baytown, No. Civ.A H-04-2106, 2005 WL 2757370 (S.D. Tex.). In this case, the officer used a Taser on a person in medical distress resisting him in an ambulance. Similarly, in Gruver v. Borough of Carlisle, #4:CV05-1206, 2006 U.S. Dist. Lexis 31448, 2006 WL 1410816 (M.D.Pa. May 19, 2006), summary judgment was granted for the defendants in a lawsuit brought arising out of an officer's use of a TASER to restrain a man who was then suffering a hypoglycemic or diabetic attack. The man had been driving erratically, was "incoherent" when questioned by the officer, and started to walk off in a manner that allegedly could even give rise to a concern that he might become injured if not restrained and given medical attention.

See also N.A. ex. Rel. Ainsworth v. Inabinett, #2:05 CV 740, 2006 U.S. Dist. Lexis 68003, 2006 WL 2709850 (M.D. Ala. Sep. 20, 2006), granting summary judgment for the use of a Taser on a 16-year-old male who was allegedly suicidal. In that case, the officer had information not only that the suspect was suicidal, with a history of mental illness and violent behavior, but also had been informed that he had made a threat that he would harm officers who came to the scene of the incident. Even under these circumstances, the officer first attempted to reason with the suspect, then tried to apply strategic force using his hands, and only then used a Taser against him after warning him twice. The officer only used the Taser once, which was all that was needed to subdue him sufficiently to handcuff him, thus avoiding a possible suicide and possible harm to the officer or to others. Further, sometimes merely the threat of use of an electronic control device at a person who is under some sort of disability may be sufficient to compel compliance. See Policky v. City of Seward, 433 F. Supp. 2d 1013 (D. Neb. May 25, 2006), in which the court ruled that merely drawing and pointing an electronic control device against a 58-year-old man who had recently had heart surgery, and who would not otherwise submit to the officer, was not a seizure.

### **3. Some Useful References**

Electronic Control Devices: Legal Resources

<http://www.ecdlaw.info/>

Respiratory Effect of Prolonged Electrical Weapon Application on Human Volunteers, Jeffrey D. Ho, MD et al., *Academic Emergency Medicine* (Feb. 5, 2007), abstract at:

<http://www.aemj.org/cgi/content/abstract/j.aem.2006.11.016v1>

Cardiac Electrophysiological Consequences of Neuromuscular Incapacitating

Device Discharges, K. Nanthakumar MD et al., 48 J. Am. Coll. Cardiol. 798 (2006), abstract at:  
<http://content.onlinejacc.org/cgi/content/abstract/j.jacc.2006.02.076v1>

Use of Tasers by Selected Law Enforcement Agencies, U.S. Government Accountability Office, GAO Report 05-464 (2005), viewable at:  
<http://www.gao.gov/new.items/d05464.pdf>

Jumping the Gun: Can Municipalities Be Held Liable Under 42 U.S.C. §1983 for Failing to Provide Police Officers with Less-Lethal Weapons?, Melissa A. Celli, 39 Suffolk U. L. Rev. 185 (2005).

Non-Lethal Weapons (a compilation of sources), Air University Library (2005), viewable at: <http://www.au.af.mil/au/aul/bibs/soft/nonlethal.htm>

TASER and Less Lethal Weapons: An Exploratory Analysis of Deployments and Effectiveness, Charlie Mesloh, et al., 5 (5) Law Enforcement Executive Forum 67 (2005).

A Content Analysis of the Emerging Trends in the Use of Non-Lethal Force Research in Policing, Darrell L. Ross, 5 (1) Law Enforcement Executive Forum 121 (2005).

Unreasonable Seizure of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People, 34 Colum. Human Rights L. Rev. 261 (2003).

The International Legal Implications of "Non-Lethal" Weapons, David P. Fidler, 21 Mich. J. Int'l L. 51 (1999).

The React Security Belt: Stunning Prisoners and Human Rights Groups Into Questioning Whether its Use is Permissible Under the United States and Texas Constitutions, Shelley Nieto Dahlberg, 30 St. Mary's L. J. 239 (1998).

Less-Than-Lethal Force Weaponry: Law Enforcement and Correctional Agency Civil Law Liability for the Use of Excessive Force, Neal Miller, 28 Creighton L. Rev. 733 (1995).

Non-Lethal Weapons Technologies, Legalities, and Potential Policies, Joseph W. Cook, et al., 5 USAFA J. Leg. Stud. 23 (1994-95), viewable at:  
<http://www.airpower.maxwell.af.mil/airchronicles/apj/mcgowan.html>

Click [here](#) to get to a menu of other useful resources and policies, which were

referenced in connection with prior articles in this series.

\* **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 stungun. 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, TASER International, dominates the world market [Nasdaq: TASN].

The ULTRON II® is a handheld contact stun gun manufactured by Stinger Systems, Inc. [Nasdaq: STIY.OB].

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