

Shocking the Conscience: What Police Tasers and Weapon Technology Reveal About Excessive Force Law



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ABSTRACT

Since *Graham v. Connor*, the U.S. Supreme Court's 1989 opinion establishing the Fourth Amendment standard for assessing whether a police officer's use of force was unconstitutionally excessive, the law has slowly developed through a body of narrow and fact-specific precedents that guide judges' excessive force and qualified immunity analyses. Recently, the Ninth Circuit—the source of many of the most influential excessive force opinions—decided three contentious cases regarding when an officer's use of a taser is unconstitutional. On one view, these cases raise novel questions about how to apply the Fourth Amendment standard for nontraditional and technologically advanced uses of force. In this Comment, however, I argue that these cases predominantly present issues that pervade all excessive force jurisprudence and illuminate judicial trends and tendencies disadvantaging plaintiffs while advantaging defendant officers. In light of this understanding, my proposal is not for new rules or standards in taser cases. Rather, I suggest that courts, first, faithfully apply *Graham's* standard of balancing the nature and quality of the Fourth Amendment intrusion against the government's interest in the officer's use of force and, second, employ a reality-based approach in deciding whether the officer is entitled to qualified immunity. For courts to do this, excessive force jurisprudence must evolve to match the development of police weapons technology. That evolution includes fully understanding and considering the distinctive effects and risks posed by tasers and presuming that a reasonable police officer would have done the same.

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INTRODUCTION

In the context of lawsuits claiming that a police officer's use of a taser was unconstitutional, courts use words literally that they usually employ only figuratively. A court in a different context might describe someone's actions or statements as shocking,¹ stunning,² or paralyzing,³ but taser cases require no such rhetorical flourish. In those cases, despite the lofty safety claims frequently made to support taser use, a court might describe an officer's deployment of a taser as shocking a victim's entire body,⁴ stunning a suspect's neck, thigh, or arm,⁵ or paralyzing a person's central nervous system temporarily⁶—or, worse, their whole body permanently.⁷ In spite of, or perhaps because of, the commonness of these terms, judges are likely to use them in taser cases without adequately considering and determining what exactly they mean in relation to the Fourth Amendment right against a police officer's unreasonable use of force.⁸

In *Graham v. Connor*,⁹ the U.S. Supreme Court held that assessing whether a plaintiff's Fourth Amendment rights have been violated in an excessive force case requires “a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake.”¹⁰ With respect to the intrusion side of the balance, the Ninth Circuit—the site of some of the most influential police taser cases—purports to “assess the gravity of the particular intrusion on Fourth Amendment interests by evaluating the type and amount of force inflicted.”¹¹ In this Comment, I argue that

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1. *E.g.*, *FCC v. Pacifica Found.*, 438 U.S. 726, 747 (1978) (referring to a comedian's jokes).
 2. *E.g.*, *McDonald v. City of Chi.*, 130 S. Ct. 3020, 3044 (2010) (referring to constitutional analysis that takes international law into account).
 3. *E.g.*, *Zemel v. Rusk*, 381 U.S. 1, 7 n.4 (1965) (referring to the potential effect of a particular federal court configuration).
 4. *See* *Bryan v. MacPherson*, 630 F.3d 805 (9th Cir. 2010).
 5. *See* *Brooks v. City of Seattle*, 599 F.3d 1018, 1021 (9th Cir. 2010).
 6. *See* *Mattos v. Agarano*, 661 F.3d 433, 449 (9th Cir. 2011) (en banc).
 7. *See, e.g.*, AMNESTY INT'L, EXCESSIVE AND LETHAL FORCE? AMNESTY INTERNATIONAL'S CONCERNS ABOUT DEATHS AND ILL-TREATMENT INVOLVING POLICE USE OF TASERS 29–30 (2004); James E. Winslow et al., *Thoracic Compression Fractures as a Result of Shock From a Conducted Energy Weapon: A Case Report*, 50 ANNALS EMERGENCY MED. 584 (2007), available at <http://www.charlydmiller.com/LIB11/2007NovTaserSpineFracture.pdf>.
 8. *See* *Graham v. Connor*, 490 U.S. 386 (1989) (establishing that excessive force claims against police officers are to be analyzed using a Fourth Amendment reasonableness standard).
 9. *Id.*
 10. *Id.* at 396.
 11. *Miller v. Clark Cnty.*, 340 F.3d 959, 964 (9th Cir. 2003).

judges in police taser cases have generally failed to evaluate adequately the type and amount of force inflicted and, therefore, have failed to apply the *Graham* test properly.

This failure stems from two frequently made, faulty assumptions that are especially apparent in taser cases but are present throughout excessive force cases generally: first, that the type and amount of force inflicted can be fairly evaluated without a more thorough understanding of what tasers actually do, or of what remains unknown about what they do; and, second, that the gravity of the particular intrusion can be fairly assessed without considering a victim's experience of pain and emotional distress. To remedy this inadequate Fourth Amendment analysis in taser cases, I argue that courts must acquire and consider more complete information about the police technology at issue, something courts have actively done in other contexts. Specifically, courts should understand and consider tasers' direct and indirect effects and taser victims' experiences of pain, fear, and emotional distress as integral steps in the constitutional analysis. Further, in light of the qualified immunity issues raised by technologically evolving police weapons like tasers, I suggest that courts presume that officers and police department policymakers have a basic understanding of a taser's effects since, in most circumstances, a reasonable officer would not deploy or authorize deployment of a weapon without a basic understanding of what it can do in the given circumstances.

A number of deaths and severe injuries have occurred during police encounters in which a taser was deployed, and substantial burdens presently disadvantage plaintiffs seeking relief for alleged police taser misconduct. Thus, it is necessary to examine how courts adjudicate such cases and what implications they have for excessive force jurisprudence generally and for cases involving police weapons with similar properties to tasers specifically.

Recent Ninth Circuit taser decisions that will likely have a substantial impact in all circuits may be seen as a first step toward disrupting the trend of incomplete judicial analysis and a move toward a more thorough and principled evaluation of whether the use of force was reasonable. However, the extent and substance of these cases' future impact is far from clear. In October 2011, the Ninth Circuit handed down its en banc decisions in the consolidated cases of *Mattos v. Agarano* and *Brooks v. City of Seattle*,¹² which expand on the court's influential and controversial 2010

12. *Mattos v. Agarano*, 661 F.3d 433 (2011) (en banc). Note that, because the two cases were consolidated, this citation refers to the en banc rehearing of both *Mattos v. Agarano* and *Brooks v. Seattle*. As of press time, the Supreme Court is deciding whether to hear an appeal from the defendant officers in *Brooks v. City of Seattle*. Adam Liptak, *A Ticket, 3 Taser Jolts and, Perhaps, a Trip to the*

opinion in *Bryan v. MacPherson*.¹³ The basic facts of these cases, elaborated in Part III but necessary for contextualizing the discussion in Parts I and II, are as follows.¹⁴

In *Bryan*, a twenty-one-year-old male (Bryan) got out of his car after being pulled over for a seatbelt violation and stood roughly twenty-five feet away from Officer MacPherson. Bryan's testimony and other evidence indicate that he stood in place and never advanced toward MacPherson. Bryan asserted that he heard no warning before MacPherson shot him with a taser, resulting in significant injuries, pain, and hospitalization, both from the direct impact of the taser and the secondary effects of temporary paralysis, which caused him to collapse onto the pavement. One of the most notable aspects of the case was the Ninth Circuit's designation of tasers, when shot at a suspect,¹⁵ as an "intermediate, significant level of force."¹⁶

In *Mattos*, a woman (Jayzel Mattos) called the police to make a domestic violence report against her husband (Troy Mattos). When the police arrived, they found Troy sitting outside and saw that the situation had calmed. Despite Troy's cooperation and Jayzel's request to discuss the situation outside to avoid waking her sleeping children, the police acted belligerently and refused to step outside. One officer approached Troy to arrest him and, because Jayzel was standing in between them, pressed his body up against hers. In response, Jayzel put her hands up in front of her chest. Without warning, the officer then shot her in the hand with a taser.

In *Brooks*, a seven-months-pregnant woman (Brooks) was driving her child to school when she was pulled over for allegedly speeding through a school zone at thirty-two miles per hour. After refusing to sign the traffic ticket, the officer placed her under arrest. When she would not leave the car (which at that point was off, with the keys on the floor), multiple officers arrived and agreed to tase her—which they did three times in under a minute, inflicting excruciating pain and permanent scars.

Observed together, these cases—all of which held on appeal that the defendant officers were not liable—begin to reveal the contentiousness, pro-defendant biases, and complex array of issues that are frequently embedded in excessive force

Supreme Court, N.Y. TIMES, May 14, 2012, <http://www.nytimes.com/2012/05/15/us/police-taser-use-on-pregnant-woman-goes-before-supreme-court.html>.

13. *Bryan v. MacPherson*, 630 F.3d 805 (9th Cir. 2010).

14. For further details of these cases and citations to the opinions, see Part III, *infra*.

15. When fired like a gun, as in *Bryan* and *Mattos*, tasers are used in "dart mode," as distinguished from tasers pressed directly against a person to deliver the electricity, as in *Brooks*, which is referred to as "drive-stun mode." I examine this distinction in multiple contexts throughout this Comment.

16. *Bryan*, 630 F.3d at 810.

cases, but that are specifically illuminated when the force used is a taser or similar weapon. In each case, the Ninth Circuit addressed some issues in ways that move toward a fairer and more principled approach to taser cases, addressed some issues in ways that impede this approach, and ignored some issues that should be included in this approach. Contrary to recent commentaries on these cases,¹⁷ this complexity does not primarily reflect a problem of confused taser law in need of clearer standards; it reflects taser law as a uniquely generative venue for the ongoing dispute about excessive force jurisprudence that frequently pits a moderate and compromise-seeking contingent of judges against an extreme and authoritarian contingent. Thus, while I call for a substantial shift in how judges frequently approach taser cases and excessive force claims generally, my argument is not for radical law reform, nor for reductionist consensus on the promulgation of bright-line standards. Rather, I simply propose that courts comply with the controlling authority of *Graham* when assessing reasonableness and employ a reality-based approach when addressing qualified immunity.

To demonstrate the need for this judicial approach, I begin by examining the distinctive properties of tasers and the state of existing research about their effects, particularly regarding discrete populations for whom tasers pose a heightened risk of serious injury or death. I then use that information in Part II to illustrate the questions of excessive force law that the distinctive properties of tasers call sharply into focus—questions that courts will increasingly face because of the evolving nature of police weapons designed to cause pain or incapacitation while, ideally, minimizing long-term physical injury. I further explain in Part II how, in light of lower courts' interpretation of the Supreme Court's qualified immunity ruling in *Ashcroft v. al-Kidd*¹⁸ and other obstacles pervading excessive force cases, technological advances in police weapons may dramatically limit the ability of plaintiffs harmed by such weapons to seek a remedy, even when the constitutional violation is recognized as egregious. In Part III, I apply these discussions of taser facts and recent legal developments to describe the opinions in *Bryan*, *Mattos*, and *Brooks*. Finally, I assess in Part IV how aspects of those cases either move toward or depart from a fairer and more principled approach, and I identify important questions that remain unanswered by the Ninth Circuit. Ultimately, I conclude that to apply the *Graham*

17. See, e.g., George G. Baxter, IV, Case Comment, *Constitutional Law—Ninth Circuit Characterizes Taser as “Intermediate” Level of Force Requiring Justification of Strong Governmental Interest—Bryan v. Macpherson*, 630 F.3d 805 (9th Cir. 2010), 44 SUFFOLK U. L. REV. 593, 603–04 (2011); Michelle E. McStravick, Note, *The Shocking Truth: Law Enforcement’s Use and Abuse of Tasers and the Need for Reform*, 56 VILL. L. REV. 363, 391–93 (2011).

18. 131 S. Ct. 2074 (2011).

test adequately and to apply the qualified immunity doctrine fairly in taser cases, excessive force jurisprudence must evolve to match the development of police weapons technology. That evolution includes fully considering the effects and risks posed by tasers and newly emerging police weapons, and presuming that police defendants have done the same.

I. THE NATURE AND QUALITY OF TASERS: WHAT THEY ARE, WHAT THEY DO, AND WHAT WE STILL DO NOT KNOW

A. What Tasers Are

The term “taser,” which is now generally used to refer to any conducted energy device, electronic control device, or stun gun,¹⁹ was popularized by TASER International (TI), the corporation that produces and distributes the vast majority of such devices.²⁰ Though tasers have been in existence since 1969 and have been used by police since at least 1980,²¹ today’s main issues first arose in 1993 with the founding of AIR TASER, Inc., which would later be renamed TASER International.

The taser business got off to a bumpy start. In 1975, the New York police commissioner classified tasers as “dangerous weapons.”²² One year later, the federal Department of Alcohol, Tobacco, and Firearms classified tasers as firearms, thus making them subject to the same registration laws and regulations as handguns.²³ Because of such official classifications, tasers were scarcely used by either civilians or police departments for many years. This changed in 1993 when TI developed a taser powered by compressed nitrogen, not gunpowder, thus removing the weapon from the firearms classification—and from government oversight.²⁴ The demand for tasers by police agencies began to grow dramatically in 1999 as a result of TI’s new

19. I use the term “taser” throughout this Comment to describe all such devices, not just those manufactured by TASER International, Inc. (TI).

20. According to a 2010 survey, over 96 percent of the U.S. police agencies that employ conducted energy weapons use those produced by TI. MICHAEL R. SMITH ET AL., A MULTI-METHOD EVALUATION OF POLICE USE OF FORCE OUTCOMES: FINAL REPORT TO THE NATIONAL INSTITUTE OF JUSTICE 3-19 (2010).

21. *Id.* at 3-18.

22. See *Metropolitan Briefs: Concern Sues Over Electronic Gun*, N.Y. TIMES, Dec. 14, 1975, at 74.

23. See *Electronic Dart Gun Is Ruled a Firearm to Be Registered*, N.Y. TIMES, Mar. 19, 1976, at 35.

24. *In re Taser Int’l S’holder Derivative Litig.*, No. CV-05-123-PHX-SRB, 2006 WL 687033, at *1 (D. Ariz. Mar. 17, 2006).

neuromuscular incapacitation technology,²⁵ which paralyzes the body's motor nervous system, inhibiting coordinated movement.²⁶

The demand, though, has outpaced TI's ability to adequately test and understand its constantly evolving technology. According to TI's shareholders, who sued the company in 2006 for misrepresenting the risks of tasers, the company's founders "did not possess the experience, expertise or financial resources to conduct sophisticated testing on the new design. Instead, the newly-designed weapon was tested on a single pig in 1996 [and] on 5 dogs in 1999."²⁷ Despite the uncertainty of their effects, taser sales skyrocketed: From 2002 to 2005, the number of police agencies providing tasers to each of their officers jumped from 159 to 1735.²⁸ A 2010 survey showed that more than 11,500 police agencies nationwide provide tasers to their officers;²⁹ in 2012, a TI cofounder reported that tasers "are used by 17,000 of the 18,000 law enforcement agencies in the United States."³⁰

The tasers used today are handheld projectile devices that "look[] a lot like a gun,"³¹ the product of a strategic redesign by TI to make them more appealing to prospective customers.³² The redesign also makes it more likely for an officer to

25. See Expert Report: Patrick (Rick) Smith at 21, *Tucker v. Las Vegas Police Dep't*, No. CV-S-05-1216-LDG-RJJ (D. Nev. Nov. 26, 2007), 2007 WL 6936692; *Corporate History*, TASER INT'L, <http://www.taser.com/corporate-history> (last visited May 16, 2012).

26. See Shaun H. Kadir, Note, *Stunning Trends in Shocking Crimes: A Comprehensive Analysis of Taser Weapons*, 20 J.L. & HEALTH 357, 361 (2007).

27. *In re Taser Int'l S'holder Derivative Litig.*, 2006 WL 687033, at *1. After the court rejected TI's motions to dismiss, TI reached a settlement with its shareholders. See Taser Int'l, Inc., *TASER International Reaches Agreements to Settle Securities Class Action and Derivative Litigation*, GLOBENEWSWIRE (Aug. 9, 2006, 5:11 PM), <http://www.globenewswire.com/newsroom/news.html?d=103578>.

In 2008, a jury found TI liable for reasons similar to those alleged by the shareholders in 2006. See Verdict and Settlement Summary, *Heston v. City of Salinas*, 26 Trials Dig. 11th 6, 2008 WL 2467758 (2008). In this products liability action resulting from a man's death after being tased by police, TI was found negligent in its product design and in its failure to warn police of the dangerous risks posed by tasers. *Id.* As a result, the jury awarded the plaintiffs \$1,021,000 in compensatory damages and \$5,020,000 in punitive damages. *Id.* On May 5, 2011, the Ninth Circuit upheld the verdict. See *Heston v. TASER Int'l, Inc.*, 431 F. App'x 586 (9th Cir. 2011).

28. ACLU OF N. CAL., *SITUN GUN FALLACY: HOW THE LACK OF TASER REGULATION ENDANGERS LIVES* 3 (2005).

29. SMITH ET AL., *supra* note 20, at 1-2, 3-18.

30. Quentin Hardy, *Taser's Latest Police Weapon: The Tiny Camera and the Cloud*, N.Y. TIMES, Feb. 21, 2012, <http://www.nytimes.com/2012/02/21/technology/tasers-latest-police-weapon-the-tiny-camera-and-the-cloud.html>.

31. *All Things Considered: Tasers Look to Expand Market for Stun Guns* (NPR radio broadcast, Apr. 1, 2005) (report of Laura Sullivan), available at <http://www.npr.org/templates/story/story.php?storyId=4571973>.

32. *In re TASER Int'l S'holder Derivative Litig.*, 2006 WL 687033, at *2.

mistakenly fire a pistol instead of a taser, with sometimes-fatal results.³³ Tasers can be deployed in either dart mode or drive-stun mode—a property raising legal questions that continue to vex courts and commentators.³⁴

In dart mode, compressed nitrogen is used to propel two barbs with enough force to penetrate two inches of clothing, at which point an electrical pulse of fifty thousand volts is delivered to the target's body for either the standard five-second duration or however long the officer chooses to depress the trigger.³⁵ The electrical current causes involuntary muscle contractions on the body mass between the two barbs, which lodge in the body an additional thirteen inches apart for every seven feet of distance between the shooter and the target.³⁶ In drive-stun mode, the taser is pressed against the subject's body, which causes a painful current to run through the specific body area to which the taser is applied but does not cause neuromuscular incapacitation.³⁷ In some instances, a taser in drive-stun mode can cause permanent burn marks and scars.³⁸ In both modes, tasers inflict pain that has been described in the severest of terms.³⁹ While these two modes represent the most common ways police use taser technology, TI is constantly developing new technology that will pose new questions for courts assessing the reasonableness of the police's use of force.⁴⁰

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33. See, e.g., *Torres v. City of Madera*, 648 F.3d 1119 (9th Cir. 2011) (denying qualified immunity to an officer who claimed to have intended to use a taser when the officer instead drew a pistol and killed an unarmed suspect); *Henry v. Purnell*, 652 F.3d 524 (4th Cir. 2011) (en banc) (same); *Yount v. City of Sacramento*, 183 P.3d 471 (Cal. 2008) (describing an officer mistakenly firing a pistol instead of a taser at the suspect); Motion to Set Bail at 13, *People v. Mehserle*, No. 547353-7 (Cal. Super. Ct. Jan. 30, 2009), available at http://cdn.sfgate.com/chronicle/acrobat/2009/01/30/motion_for_bail.pdf (asserting that the defendant officer “mistakenly deployed his service pistol rather than his taser” when he shot and killed Oscar Grant in Oakland, California); Assoc. Press, *Kitsap County Sheriff's Deputy Mistakes Pistol for Taser*, SEATTLE TIMES, June 23, 2006, http://seattletimes.nwsourc.com/html/localnews/2003081125_webtaserpistol23.html.
34. See *infra* Parts III and IV.
35. See AMNESTY INT'L, ‘LESS THAN LETHAL?’ THE USE OF STUN WEAPONS IN US LAW ENFORCEMENT 38 (2008) (explaining that officers can “overrid[e] the 5-second default cycle by keeping their fingers depressed on the trigger”); Kadir, *supra* note 26, at 361.
36. See GARRY BREITKREUZ, HOUSE OF COMMONS OF CAN., STANDING COMM. ON PUB. SAFETY & NAT'L SECURITY, STUDY OF THE CONDUCTIVE ENERGY WEAPON—TASER[®] 4 (2008).
37. See *Brooks v. City of Seattle*, 599 F.3d 1018, 1026 (9th Cir. 2010).
38. See STANFORD CRIM. JUSTICE CTR., USE OF TASERS BY LAW ENFORCEMENT AGENCIES: GUIDELINES AND RECOMMENDATIONS 7 (2005); see also *Brooks v. City of Seattle*, No. C06-1681RAJ, 2008 WL 2433717, at *2 (W.D. Wash. June 12, 2008) (explaining how the defendant officers' multiple applications of the taser in drive-stun mode on a pregnant woman “permanently scarred her”).
39. See Part I.B.2, *infra*, for personal accounts describing the experience of being tased.
40. See, e.g., David Hambling, *Taser Grenade Aims to Extend Shocking Distance*, NEW SCIENTIST, Oct. 31, 2009, at 24 (describing a new “taser grenade” being developed by TI that can incapacitate people

B. The Known and Unknown Effects of Tasers

Most scholarship focusing on tasers, while calling generally for increased research, training, and other uncontroversial methods of improvement, supports the wide availability of tasers for law enforcement in a wide array of circumstances.⁴¹ This support often stems from conclusions based on the known benefits of taser use balanced against the known negatives of taser use.⁴² There are, however, three primary issues regarding what we presently know and do not know about tasers that should be given greater weight in any policy or legal assessment: the lack of impartial studies, the painful effects of being tased, and the particularly harmful—and potentially deadly—effects that tasers have on certain vulnerable populations.

1. Lack of Impartial Taser Studies

There is broad agreement that the available data on taser effects, regarding both the physical effects and the sensation of being tased, is lacking.⁴³ Further,

nearly 200 feet away); *Proposed Non-Lethal Weapons Won't Stop Attacks, Says Union*, DOMINION POST, Dec. 20, 2010, <http://www.stuff.co.nz/dominion-post/news/4475609/Proposed-non-lethal-weapons-won-t-stop-attacks-says-union> (describing the Taser XRep, a new wireless taser that fires an “electric bullet” . . . from a standard pump-action shotgun”); Alan Travis, *Taser Firm Loses Licence After Raoul Moat Stand-Off*, GUARDIAN, Sept. 28, 2010, <http://www.guardian.co.uk/uk/2010/sep/28/raoul-moat-taser-firm-loses-licence> (quoting an expert describing the Taser XRep as “a potentially lethal weapon” that applies its shock for four times as long as the commonly used taser models). Additionally, other entities may adapt taser technology to be even more dangerous, inciting a technological race that promotes faster development of more dangerous weapons and with fewer safeguards. Cf. Christopher Leake, *Police Forces on Alert Over Deadly Million-Volt 'Tasers' Disguised as Mobile Phones*, MAILONLINE (Feb. 13, 2012, 3:06 AM), <http://www.dailymail.co.uk/news/article-2099921/police-forces-alert-deadly-million-volt-Tasers-disguised-mobile-phones.html>.

41. See, e.g., DENNIS K. MCBRIDE & NATALIE B. TEDDER, POTOMAC INST. FOR POLICY STUDIES, EFFICACY AND SAFETY OF ELECTRICAL STUN DEVICES 4 (2005), available at http://www.potomacinstitute.org/images/stun_devices_report_final.pdf (applying a cost-benefit type of analysis and concluding that, while there is strong need for research, regulations, and uniform standards, tasers are “relatively safe and clearly effective”); Matthew J. Spriggs, Note, “Don’t Tase Me, Bro!” *An Argument for Clear and Effective Taser Regulation*, 70 OHIO ST. L.J. 487 (2009).
42. See, e.g., SMITH ET AL., *supra* note 20, at 2-1 to 2-3, 2-14 (discussing various positive and negative findings regarding tasers and concluding that “significant injuries associated with [taser] use are rare”).
43. See, e.g., AMNESTY INT’L, *supra* note 35, at 2-3 (stating that studies have been “limited in scope,” that there is a “need for additional research,” and that existing studies “underscore the need for more research”); MCBRIDE & TEDDER, *supra* note 41, at 5 (calling for research to be done “at the organism, organ, tissue and cell levels”); Christian Sloane & Gary M. Vilke, *Riot Control Agents, Tasers, and Other Less Lethal Weapons*, in SUDDEN DEATHS IN CUSTODY 113, 128 (Darren L. Ross & Theodore C. Chan eds., 2006) (finding that studies evaluating the effects of tasers “on cardiac physiology are limited[, as t]he majority of literature available . . . is based on the . . . early models of the Taser”).

much of the data that is available comes from studies funded by or closely connected to TI, casting doubt on the studies' neutrality.⁴⁴ This is particularly problematic in light of claims by TI's shareholders that the company has "wildly mischaracterized" the dangers posed by its products.⁴⁵ Further, as of 2006, several police agencies had "filed lawsuits accusing [TI] of misleading them about the [taser's] safety and claim[ing] that the company failed to conduct adequate tests before selling the weapon."⁴⁶

The lack of impartial studies and testing directly affects the reliability of the available information. In a recent, comprehensive report commissioned by the National Institute of Justice (NIJ) about the risks and benefits of tasers, the authors assessed various "controlled human trials" and concluded that, while "not risk free," tasers are "relatively safe when used on healthy at-rest and physiologically stressed subjects."⁴⁷ However, in addition to conceding the lack of available research upon which this conclusion is based,⁴⁸ the authors do not reveal that, of the eleven studies reviewed, seven were conducted by researchers who are both "external medical consultants" to and shareholders of TI.⁴⁹ Further demonstrating the problem, the

The dearth of research adequately addressing the extent of the health risks posed by police use of tasers does not result from lack of judicial concern or interest. As early as 1988, in its holding that the use of tasers in prisons was not per se unconstitutional, the Ninth Circuit cautioned that its conclusion was not "to be taken as holding that use of a device whose long-term effects are unknown would never violate the eighth amendment, nor that research could not uncover evidence of adverse long-term effects that would call into question the use of tasers." *Michenfelder v. Sumner*, 860 F.2d 328, 336 (9th Cir. 1988).

44. See AMNESTY INT'L, AMNESTY INTERNATIONAL'S CONTINUING CONCERNS ABOUT TASER USE 12 (2006) ("Importantly, the studies have also relied in the main on data provided by one of the manufacturers of taser, Taser International . . ."); Sloane & Vilke, *supra* note 43, at 129 (stating that most of the studies examining the current model of taser "have been manufacturer-sponsored studies"). The lack of impartial and independent research is unsurprising given that there are no uniform testing standards for new police technology in the United States. In contrast, in the United Kingdom, new police weapons must be tested and approved of by the Home Office. See Travis, *supra* note 40.
45. *In re Taser Int'l S'holder Derivative Litig.*, No. CV-05-123-PHX-SRB, 2006 WL 687033, at *1, *3-4 (D. Ariz. Mar. 17, 2006).
46. Robert Anglen, *Study Raises Concerns Over Tasers' Safety*, ARIZ. REPUBLIC, Feb. 13, 2006, <http://www.azcentral.com/arizonarepublic/news/articles/0213tasershock.html>.
47. SMITH ET AL., *supra* note 20, at 2-12.
48. See SMITH ET AL., *supra* note 20, at 2-1 ("The lack of independent research on [tasers] and injuries has left law enforcement agencies without the information they need to make sound policy decisions or to respond to inquiries from citizens, special interest groups, and policy-makers . . .").
49. See, e.g., Donald M. Dawes & Mark W. Kroll, *Neuroendocrine Effects of CEWs*, in *TASER® CONDUCTED ELECTRICAL WEAPONS: PHYSIOLOGY, PATHOLOGY, AND LAW* 179 (Mark W. Kroll & Jeffrey D. Ho eds., 2009); Jeffrey D. Ho, *Serum and Skin Effects of CEW Application*, in *TASER® CONDUCTED ELECTRICAL WEAPONS: PHYSIOLOGY, PATHOLOGY, AND LAW*, *supra*, at 143.

report to the NIJ relies on several studies coauthored by a researcher who has both criticized the inadequacy of existing research and has *been* criticized for contributing to the inadequacy of available research.⁵⁰

Finally, further research is needed on the effects of deploying a taser in drive-stun mode versus in dart mode. Dart mode may appear more severe because it uses penetrating barbs and results in neuromuscular incapacitation, facts which have led many police agencies to classify it as the higher level of force. However, some experts assert that dart mode is more likely to be reasonable force because it may be safer and more effective than drive-stun mode.⁵¹ As discussed in Parts III and IV, the Ninth Circuit has classified tasers in dart mode as intermediate force,⁵² and, while having initially found drive-stun mode to be lower force than dart mode in its original *Brooks v. City of Seattle* opinion,⁵³ upon en banc rehearing, the court declined to designate drive-stun at a specific level of force.⁵⁴

2. Pain, Fear, and Emotional Distress

Judges and supporters of the expansive use of tasers by police officers often give minimal consideration to the interrelated concepts of pain, fear, and emotional distress. Despite the lack of scientific research on the sensation of being tased, there is plenty of anecdotal evidence suggesting the severity of the pain: Upon being voluntarily tased in the course of conducting research, subjects have stated, “It is the most profound pain I have ever felt”;⁵⁵ “[It was] excruciatingly painful—like someone reached into my body to rip my muscles apart with a fork, and there was nothing I

Further, there is reason to be skeptical of the neutrality of the National Institute for Justice (NIJ), the governmental body to whom this report was submitted. The National Research Council, in its report commissioned by the NIJ to assess the agency, concluded that the NIJ is “severely hampered by a lack of independence, authority, and discretionary resources to carry out its mission.” CHARLES F. WELLFORD ET AL., NAT’L RESEARCH COUNCIL, STRENGTHENING THE NATIONAL INSTITUTE OF JUSTICE 2 (2010).

50. See *supra* notes 43–44 (indicating Dr. Gary M. Vilke and his coauthors’ criticism of existing taser studies); *infra* note 95 and accompanying text (faulting Vilke and his coauthors for deliberately omitting critical variables from their research and thus misrepresenting the actual risks that tasers may pose to subjects during police encounters).
51. See N.Y. CIVIL LIBERTIES UNION, TAKING TASERS SERIOUSLY: THE NEED FOR BETTER REGULATION OF STUN GUNS IN NEW YORK 23 (2011) (“Experts strongly emphasize that Tasers are meant to be used in [dart] mode whenever feasible, both because it is more effective and because it is safer.”).
52. See *Bryan v. MacPherson*, 630 F.3d 805, 810 (9th Cir. 2010).
53. See *Brooks v. City of Seattle*, 599 F.3d 1018, 1026–28 (9th Cir. 2010).
54. See *Mattos v. Agarano*, 661 F.3d 433, 443 (9th Cir. 2011) (en banc).
55. AMNESTY INT’L, *supra* note 7, at 6 (quoting a firearms consultant who was voluntarily tased).

could do to stop it”;⁵⁶ “[It was like] having two screwdrivers attached to jackhammers being driven into my back”;⁵⁷ and “[It was like] being hit on the back with a ‘four-by-four’ by Arnold Schwarzenegger.”⁵⁸ Further, police officers “subjected to even a fraction of the normal taser discharge during training have reported feeling acute pain”⁵⁹ and have suffered various injuries, including compression and spinal fractures just from the intensity of the muscle contractions.⁶⁰ Such reports explain the concern of some that taser use can amount to torture.⁶¹

Further, for a suspect unprepared for the unfamiliar sensation of being electrocuted and losing all motor control, the pain, fear, and emotional distress experienced is likely far greater than that experienced by researchers in a controlled setting. Pain and fear are closely related: The brain interprets pain “as a signal of bodily threat” that “creates the urge to escape,” resulting in “pain-related fear [that] may be more disabling than pain itself.”⁶² The strangeness of the pain caused by a

56. *All Things Considered*, *supra* note 31.

57. Rob Pincus, *TASER International's M26: The Next Generation of Moderate Level Force*, S.W.A.T. MAG., Apr. 2003, at 78, 79.

58. *Madrid v. Gomez*, 889 F. Supp. 1146, 1174–75 (N.D. Cal. 1995).

59. AMNESTY INT'L, *supra* note 7, at 5.

60. See Winslow et al., *supra* note 7; Allison Torres Burtka, *Police and Human Rights Groups Are Wary of Pocket-Size Taser*, TRIAL, Dec. 2007, at 72.

61. See Press Release, Committee Against Torture Concludes Thirty-Fourth Session, Issues Concluding Observations on Reports of Canada, Switzerland, Finland, Albania, Uganda, and Bahrain, U.N. Press Release HR/4844 (May 20, 2005), available at <http://www.un.org/News/Press/docs/2005/hr4844.doc.htm> (finding that tasers can be used as “instruments of torture”); AMNESTY INT'L, *supra* note 44, at 24.

One professor, who was part of a county working group formed to promulgate guidelines for police use of tasers, volunteered to be tased and provided a detailed description of the experience:

Faster than I could think, the sting was replaced with something that felt as if every muscle, from my legs through my chest and my jaw, had suddenly and painfully seized up. It was like the most painful cramp I'd ever had, but giant-sized, body-wide, and with a sharpness that is hard to describe. My teeth locked together. All the while, a painful pulse went through me at regular, rapid intervals; it seemed to zap through me, collecting in my chest. I let out an involuntary, grunting sound from somewhere deep in my gut. I remember only one coherent thought in my head while this was occurring: STOP! STOP! GET THIS OFF ME! Despite my strong desire to do something, all through the Taser exposure I was completely paralyzed It lasted just five seconds, but it seemed much longer—the longest five seconds of my life.

David A. Harris, *Taser Use by Law Enforcement: Report of the Use of Force Working Group of Allegheny County, Pennsylvania*, 71 U. PITT. L. REV. 719, 726–27 (2010). *Contra All Things Considered*, *supra* note 31 (quoting a TI spokesman as describing the effects of being tased as “similar to working out”).

62. Johan W.S. Vlaeyen & Geert Crombez, *Fear and Pain*, PAIN CLINICAL UPDATES, Aug. 2007, at 1, 1, 4; cf. David Dante Troutt, *Screws, Koon, and Routine Aberrations: The Use of Fictional Narratives in Federal Police Brutality Prosecutions*, 74 N.Y.U. L. REV. 18, 97 (1999) (discussing police brutality’s “immeasurable . . . psychic toll” on victims).

taser—that is, the fact that a taser’s incapacitating cycles of electrical current are unlike anything most people have experienced—exacerbates fear because the brain does not know the extent of the bodily threat. Moreover, failing to suppress the instinctual “urge to escape” in this context is usually a criminal act (resisting arrest) and will likely result in further pain (being subdued by officers), thus creating an internal conflict that can trigger panic and enhance the experience of pain and fear. The pain and fear likely escalate dramatically as the taser is applied because the suspect does not know when her suffering will end.⁶³

Pain is defined by the International Association for the Study of Pain as “an unpleasant sensory and emotional experience associated with actual or potential tissue damage, or described in terms of such damage,”⁶⁴ thus indicating pain’s expansive nature and the inextricable link between the “sensory” and “emotional” aspects of the experience. Further, tasers cause significant physical intrusions in forms other than long-term tissue damage, including temporary paralysis of one’s body and interference with the normal functioning of one’s brain and muscles.⁶⁵

Science is increasingly capable of measuring and mapping pain. For example, scientists now use brain scans “to measure the true depth of a person’s suffering” and use various brain-imaging techniques to reveal physical differences in the brains of people who are in pain versus those who are not.⁶⁶ Further, studies indicate that pain visibly activates multiple parts of the brain, leading to the possibility of objective pain measurements.⁶⁷

3. Potentially Lethal Taser Effects on Vulnerable Populations

The most troubling aspect of taser use may be the “severe unintended effects”⁶⁸—including death—that can accompany tasing for members of vulnerable populations.⁶⁹ As a result, many have proposed that taser use by law enforcement

63. Cf. AMNESTY INT’L, *supra* note 44, at 18 (quoting a woman who was tased seven times by officers in Kings County, Washington: “It hurt so bad, I just wanted them to stop. And I don’t understand why they did it over and over and over again.”).

64. *Pain and Memory*, PAIN CLINICAL UPDATES, Spring 1999, at 1, 1 (1999).

65. See Harris, *supra* note 61, at 720.

66. Jonathan Leake, *Scientists Discover Way of Measuring Pain*, SUNDAY TIMES, June 7, 2009.

67. See *id.*

68. *In re TASER Int’l S’holder Derivative Litig.*, No. CV-05-123-PHX-SRB, 2006 WL 687033, at *3 (D. Ariz. Mar. 17, 2006).

69. See, e.g., Harris, *supra* note 61, at 722 (describing the finding of a working group convened by a district attorney that “certain groups . . . may be more vulnerable to risks of injury or death by Taser™: the elderly, the young . . . , pregnant women, and persons with mental or physical illness or distress”).

be limited to situations in which deadly force would also be justified until there is sufficient research regarding the risks posed to various populations and in various circumstances.⁷⁰ As of February 2012, Amnesty International (Amnesty) calculated that “at least 500 people in the United States have died since 2001 after being shocked with tasers either during their arrest or while in jail,” with nearly one-fifth of those deaths occurring in California.⁷¹ Taser deaths are increasingly profiled in traditional news sources⁷² and have become the subject of multiple blogs with names like Truth . . . Not Tasers, TaserWatch, and Tasered While Black.⁷³ Sources like these reveal the scope of the problem but have not spurred the necessary impartial scientific inquiries into taser deaths.

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70. See, e.g., ACLU OF N. CAL., *supra* note 28, at 2 (urging California to adopt legislation allowing officers to use tasers “solely as an alternative to deadly force”); AMNESTY INT’L, *supra* note 35, at 51 (concluding that police “departments should either cease using [tasers] or limit their use to situations where they can be effectively used to avoid the resort to lethal force or firearms”); Chris Megerian, *New N.J. Stun Gun Rules Allow for Freer Use by Police*, NJ.COM (Oct. 7, 2010, 7:11 PM), http://www.nj.com/news/index.ssf/2010/10/new_nj_stun_gun_regulations_al.html (quoting the ACLU of New Jersey as urging the same policy—one that is quite similar to New Jersey’s actual policy—which replaces its previous ban on tasers and “will allow officers to fire stun guns on anyone threatening death or serious bodily injury”); *Archive of Home Office Police, Operational Policing*, NAT’L ARCHIVES (Aug. 4, 2010), <http://tma.europarchive.org/20100419081706/http://www.police.homeoffice.gov.uk/operational-policing/firearms/taser/index.html> (stating that tying taser use permissibility to firearm permissibility was the policy in the United Kingdom until 2007, when it was slightly modified to allow officers to use tasers when “they are facing violence or threats of violence of such severity that they would need to use force to protect the public, themselves or the subject”); cf. COALITION FOR JUSTICE & ACCOUNTABILITY, *TASERS: A REASSESSMENT 10* (2005), available at <http://www.indybay.org/olduploads/sj-taser-review.pdf> (“[B]ecause of the safety risks to the public and police, the escalated use of force, and the failure to satisfy international standards of law enforcement, today’s electroshock technology has shown that it has no place in our society’s law enforcement agencies and must be banned.”).
71. Press Release, Amnesty Int’l, *Amnesty International Urges Stricter Limits on Police Taser Use as U.S. Death Toll Reaches 500* (Feb. 15, 2012), <http://www.amnestyusa.org/news/press-releases/amnesty-international-urges-stricter-limits-on-police-taser-use-as-us-death-toll-reaches-500>. California has the highest number of taser deaths (ninety-two), followed by Florida (sixty-five). *Id.*
72. See, e.g., Patrik Jonsson, *Three Deaths in One Weekend Puts Taser Use by Cops in Crosshairs*, CHRISTIAN SCI. MONITOR (Aug. 8, 2011, 4:29 PM), <http://www.csmonitor.com/USA/Justice/2011/0808/Three-deaths-in-one-weekend-puts-Taser-use-by-cops-in-crosshairs>; Robert Schneider, *Tasers, Police, and Cardiac Arrest: Human Failure or Technology Gone Wrong?*, EXAMINER.COM (Mar. 5, 2010), <http://www.examiner.com/healthcare-in-new-york/tasers-police-and-cardiac-arrest-human-failure-or-technology-gone-wrong> (“Taser disasters are regularly reported in the press.”).
73. Patti Gillman, *TRUTH . . . NOT TASERS*, <http://truthnottasers.blogspot.com> (last visited May 16, 2012) (started by the family of a man who died shortly after being tased by police in 2004); *TASERWATCH*, <http://taserwatch.newsvine.com> (last visited May 16, 2012); *TASERED WHILE BLACK*, <http://taseredwhileblack.blogspot.com> (last visited May 16, 2012); see also *TASEROFTHEDAY*, <http://taseroftheday.blogspot.com> (last visited May 16, 2012).

There are, though, a handful of such inquires that indicate the substantial, unintended risks of tasers.⁷⁴ In 2009, the University of California, San Francisco, released a report finding “a sixfold increase in sudden deaths during the first year of Taser use [in California]—amounting to nearly six deaths per 100,000 arrests.”⁷⁵ According to a 2006 report by the *Arizona Republic* examining 167 deaths following police officers’ deployment of a taser, medical examiners concluded in 27 cases that “[t]asers were a cause, a contributing factor or could not be ruled out in [the] death.”⁷⁶ Further, medical examiners ruled out tasing as a factor in only 35 of the 167 deaths.⁷⁷ In 2007, the U.S. Justice Department’s Bureau of Justice Statistics released a report containing a section focused on the “[i]ncreasing number of arrest-related deaths involv[ing] the use of tasers.”⁷⁸ The increasing trend is alarming: In 2003, the Justice Department recognized three such deaths; in 2005, it recognized twenty-four.⁷⁹ Similarly, Amnesty identified only three taser-related deaths in 2001 but identified sixty-one in 2005.⁸⁰

Attention to the findings of such studies could prevent tragic consequences by providing officers with simple information that could save lives. One cardiology expert posited, “Maybe a simple change of technique is what is necessary The longer you hold the trigger, the higher the danger to the heart.”⁸¹ This is corroborated by Amnesty, which stated in its 2008 report, “Many [of those who died after being tased by officers] were subjected to multiple or prolonged shocks, often far more than the standard five-second cycle, despite warnings for several years of

74. According to the Stanford Criminal Justice Center, “the few studies that have been conducted, as well as the anecdotal evidence, suggest that there are some serious health risks involved when individuals not falling within that [healthy, sober young adult] category are tasered.” STANFORD CRIM. JUSTICE CTR., *supra* note 38, at 4.

75. See Elizabeth Fernandez, *UCSF Study Raises Doubts About Stun Gun Safety*, S.F. CHRON., Jan. 14, 2009, http://articles.sfgate.com/2009-01-24/bay-area/17196239_1_stun-guns-tasers-death-rate. One cardiologist involved in the study stated, “Tasers are not as safe as I thought I didn’t expect what we found I thought we would find no difference in the rate of sudden death. But there was a rather dramatic rise.” *Id.* (internal quotation marks omitted).

76. Robert Anglen, *167 Cases of Death Following Stun-Gun Use*, ARIZ. REPUBLIC, Jan. 5, 2006.

77. See *id.* Presumably, no definitive determination was made in the remainder of the 167 cases.

78. CHRISTOPHER J. MUMOLA, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 219534, ARREST-RELATED DEATHS IN THE UNITED STATES, 2003–2005, at 4 (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ardus05.pdf>. In this report, the federal government recognized the role of police tasers in thirty-six deaths in a three-year period and recognized that in seventeen of those deaths, tasers were the direct cause of death, not just a contributing factor. *Id.* The report notes that “[d]ue to reporting gaps, these 36 cases do not represent a complete count of all deaths in which use of a [taser] was involved.” *Id.*

79. *Id.*

80. AMNESTY INT’L, *supra* note 44, at 3.

81. Fernandez, *supra* note 75 (internal quotation marks omitted).

the potential health risks of such deployment.”⁸² Yet only 5.4 percent of police agencies regulate the duration for which officers can apply a taser,⁸³ only 5.6 percent regulate the number of times that the taser can be applied,⁸⁴ and such factors have borne little legal weight in the Ninth Circuit.⁸⁵

In some cases, it is unknown what factors caused the death of otherwise healthy taser victims, such as Everette Howard. Howard was an 18-year-old high school wrestler attending a college preparatory course in the summer of 2011 when he was tased by campus police, after which he went into fatal cardiac arrest.⁸⁶ In other cases, though, specific populations emerge as being particularly susceptible to grave harm from tasers.

Suspects Under the Influence of Narcotics. The heightened risks for suspects under the influence of narcotics are demonstrated anecdotally by three similar incidents that occurred in Ninth Circuit states in 2004. In Los Angeles, Phillip LeBlanc, unarmed and with one hand cuffed to a fence, died after being tased twice by one of the eleven Los Angeles Police Department (LAPD) officers at the scene.⁸⁷ While the coroner identified the cause of death as “excited delirium caused by cocaine intoxication,”⁸⁸ four expert witnesses testified “that LeBlanc’s death was caused by cardiac arrest triggered by the Taser discharge; that the amount of cocaine present in LeBlanc’s body was insufficient to cause death; that LeBlanc was already vulnerable to cardiac arrest because of his cocaine intoxication; . . . [and] that a Taser discharge against LeBlanc constituted a use of deadly force”⁸⁹ In Las Vegas, a suspect under the influence of phencyclidine (PCP) died after officers

82. AMNESTY INT’L, *supra* note 35, at 3; *see also* ACLU OF N. CAL., *supra* note 28, at 6–7 (describing the death of a California man after being tased seventeen times in a three-minute period).

83. *See* SMITH ET AL., *supra* note 20, at 3–24 to 3–25.

84. *See id.*

85. For one particularly egregious example, see *Sanders v. City of Fresno*, 551 F. Supp. 2d 1149 (E.D. Cal. 2008), *aff’d*, 340 F. App’x 377 (9th Cir. 2009). In *Sanders*, the Ninth Circuit affirmed summary judgment for officers who tased an unarmed suspect five times in dart mode and five times in drive-stun mode, exposing him to taser shocks for up to seventy seconds total, leading to his death. *Id.* at 1158–60 (finding the initial tasing objectively reasonable and the subsequent tasings protected by qualified immunity). The district court noted that, of the precedent cases “involving multiple Taser applications, each case found no constitutional violation.” *Id.* at 1164. Despite the fatal result, the court considered the officers’ use of tasers in this case to be a “medium . . . quantum of force.” *Id.* at 1168.

86. *See* Philip Caulfield, *Student, Everette Howard, 18, Dies After Being Shot With Taser by Campus Cops at U. Cincinnati*, N.Y. DAILY NEWS, Aug. 8, 2011, http://articles.nydailynews.com/2011-08-08/news/29885357_1_campus-cops-taser-college-prep-program.

87. *LeBlanc v. City of Los Angeles*, No. CV 04-8250 SVW, 2006 WL 4752614, at *3–4, *22 (C.D. Cal. Aug. 16, 2006) (granting summary judgment to the defendant officers on qualified immunity grounds).

88. *Id.* at *4.

89. *Id.* at *5.

tased him seven times.⁹⁰ According to the medical examiner who performed the autopsy, the seven taser applications combined with the effects of PCP “depleted” the suspect and induced cardiac arrest.⁹¹ In Fresno, a suspect died due to “complications of cocaine intoxication” after being tased ten times by officers.⁹²

Lethal incidents like these are not unexpected for suspects under the influence of stimulants, as demonstrated by a 1999 LAPD bulletin warning about such risks.⁹³ In 2006, researchers found that 70 percent of the taser-related deaths examined involved illicit drug use,⁹⁴ and, in 2008, the same researchers reiterated their concerns by criticizing a study that “consciously took . . . variables [like drug intoxication] out of the equation” and was thus “potentially misleading about Taser safety.”⁹⁵ In Amnesty’s 2008 report, it found that “[t]he most common cause of death given by . . . medical examiners . . . was heart failure caused by ingestion of cocaine or other stimulant drugs.”⁹⁶ In its 2006 report, Amnesty identified thirty taser-related deaths in Ninth Circuit states alone during one fifteen-month period, of which at least eleven involved suspects who were tased multiple times while under the influence of narcotics.⁹⁷

Suspects With Heart Conditions. Individuals under the influence of narcotics are at higher risk of death following taser exposure because of the effects that both the drugs and the taser have on the heart.⁹⁸ Heart-related concerns about tasers

90. Neal-Lomax v. Las Vegas Metro. Police Dep’t, 574 F. Supp. 2d 1170, 1178–80 (D. Nev. 2008), *aff’d*, 371 F. App’x 752 (9th Cir. 2010) (finding no constitutional violation and granting summary judgment to defendant officers).

91. *Id.* at 1181.

92. Sanders v. City of Fresno, 551 F. Supp. 2d 1149 (E.D. Cal. 2008) (internal quotation marks omitted).

93. See *LeBlanc*, 2006 WL 4752614, at *13 (noting that the expert’s testimony (quoted *supra* note 89) was “consistent with a [sic] LAPD training bulletin issued in 1999,” which stated that drug, particularly cocaine, intoxication “may make a suspect more susceptible to sudden death by effecting an increase of the heart rate to a critical level” (internal quotation marks omitted)).

94. Jared Strote & H. Range Hutson, *Taser Use in Restraint-Related Deaths*, 10 PREHOSPITAL EMERGENCY CARE 447, 448 (2006).

95. Jared Strote & H. Range Hutson, Letter to the Editors, *Taser Safety Remains Unclear*, 52 ANNALS EMERGENCY MED. 84, 84–85 (2008), available at <http://download.journals.elsevierhealth.com/pdfs/journals/0196-0644/PIIS0196064408000061.pdf>.

96. AMNESTY INT’L, *supra* note 35, at 26.

97. AMNESTY INT’L, *supra* note 44, at 31–51.

98. See, e.g., DEF. SCIENTIFIC ADVISORY COUNCIL, DSAC SUB-COMMITTEE ON THE MEDICAL IMPLICATIONS OF LESS-LETHAL WEAPONS (DOMILL), SECOND STATEMENT ON THE MEDICAL IMPLICATIONS OF THE USE OF THE M26 ADVANCED TASER para. A28, at 10 (2004), available at <http://www.theiacp.org/LinkClick.aspx?fileticket=43AbP3RjqZl%3D> (“[T]here is sufficient indication . . . that excited, intoxicated individuals or those with pre-existing heart disease could be more prone to adverse effects from the M26 Taser, compared to unimpaired individuals.”); DEF. SCIENTIFIC ADVISORY COUNCIL, DSAC SUB-COMMITTEE ON THE MEDICAL IMPLICATIONS OF LESS-LETHAL WEAPONS (DOMILL), DOMILL STATEMENT ON THE

were known to courts as early as 1986, when a New York judge noted that “there has been great concern about the impact [of tasers] on people with heart problems and [their] use has been outlawed in this State.”⁹⁹ The effects of tasers on the cardiovascular system may be the most intensely debated issue among researchers. Indeed, much of the research that TI emphasizes focuses solely on taser effects on young, healthy individuals, reaching the conclusion that tasers have “no adverse effects” on a subject’s cardiovascular or respiratory health.¹⁰⁰ Others contend that tasers pose significant risks to those with heart conditions and are capable of directly inducing cardiac arrest, seizures, and ventricular fibrillation.¹⁰¹ For this reason, experts warn that officers should never fire a taser at someone’s chest¹⁰² and that a person “hit with a Taser chest shot could die of ventricular fibrillation.”¹⁰³

Mentally Ill Suspects. Mentally ill suspects are a high-risk population for several reasons. They are more likely to react to the unfamiliar, painful, and frightening sensation of being tased, or threat of being tased, with panic that escalates the situation,¹⁰⁴ as was the case with Michael Parker, Jr., a 24-year-old man diagnosed with

COMPARATIVE MEDICAL IMPLICATIONS OF THE USE OF THE X26 TASER AND THE M26 ADVANCED TASER para. 21 (2005) (“The possibility that other factors such as illicit drug intoxication, alcohol abuse, pre-existing heart disease and cardioactive therapeutic drugs may modify the threshold for generation of cardiac arrhythmias [after taser exposure] cannot be excluded.”).

99. *People v. Sullivan*, 500 N.Y.S.2d 644, 647 (App. Div. 1986).
100. See SMITH ET AL., *supra* note 20, at 2-10 to 2-12 (surveying controlled human trials promulgated by TI that fail to account for the variables prevalent in vulnerable populations, like heart conditions).
101. See AMNESTY INT’L, *supra* note 35, at 35 (“In the vast majority of the 334 post[-taser] fatalities documented by Amnesty International, the deceased went into cardiac or respiratory arrest at the scene”); Anglen, *supra* note 46 (summarizing the concerns of several researchers, including Army scientists who issued a memorandum on tasers stating that “[s]eizures and ventricular fibrillation can be induced by the electric current” (internal quotation marks omitted)); Jaxon Van Derbeken, *SFPD Takes Second Look at Tasers*, S.F. CHRON., Feb. 28, 2010, http://articles.sfgate.com/2010-02-28/news/18373017_1_tasers-san-francisco-stun (describing a UCLA cardiologist and former TI advisor who, observing that there had been no detailed reviews of heart data on taser deaths, “decided to do just that on his own, without Taser’s sponsorship. He learned of 422 deaths of people who had been shot with the device, but was able to obtain records for fewer than half the cases. Of those for which he did get data, Swerdlow found 118 instances in which heart spasms could have been a death factor. . . . Most of the victims were men, averaging 35 years old, and had been using illegal drugs.”).
102. See Fernandez, *supra* note 75 (arguing that police agencies should have a rule against “fir[ing] Tasers at the chest area”).
103. Van Derbeken, *supra* note 101.
104. In *Bojic v. City of San Jose*, Bojic, a mentally ill man, was approached by an officer because of complaints that he was smoking near the door of a Starbucks. Appellant’s Opening Brief at 9–10, *Bojic v. City of San Jose*, 358 F. App’x 906 (9th Cir. 2009) (No. 07-17343), 2008 WL 4212624. Witnesses testified that Bojic, appearing frightened, moved into a corner, which is when the officer drew and aimed his taser, which several witnesses, and likely Bojic, believed was a pistol. *Id.* at 10–11.

schizophrenia and bipolar disorder who died after police tased him in an attempt to take him to the hospital.¹⁰⁵ They may be taking medications for mental health problems that make them more prone to taser-induced cardiac arrest.¹⁰⁶ As pain compliance techniques, tasers may have unpredictable effects—or no effects—on mentally ill suspects.¹⁰⁷ Finally, because of their vulnerable social position, mentally ill suspects are likely to be the victims of officers resorting to tasers before attempting other effective, but less convenient, means.¹⁰⁸ These risks have prompted many groups to urge that tasers be deployed against mentally ill suspects “only in extreme or exigent circumstances.”¹⁰⁹

Suspects With Other High-Risk Traits or Conditions. For certain groups, there is an inverse relationship between the health risks posed by tasers and the likely threat posed by the individuals. A young child or an elderly adult, for instance, is more likely to be harmed by being tased and is less likely to pose a threat justifying the force. Further, the traits that tend to make these individuals more vulnerable and less threatening are readily observable. Nevertheless, officers have recently tased schoolchildren,¹¹⁰

Bojic responded by attacking the officer, who then drew his actual pistol and shot and killed Bojic. *Id.* at 11–12.

105. See Ashanti Blaize, *Fort Worth Man Dead After Police Use Taser*, NBCDFW.COM (Apr. 20, 2009, 7:43 AM), <http://www.nbcdfw.com/news/local/Fort-Worth-Man-Dead-After-Police-Use-Taser.html> (“[His mother] watched as officers struggled with her son and then used a Taser gun on him. ‘He was laying flat on his stomach like that, shaking, and he was foaming out the mouth,’ she said. ‘I came out and said, ‘Ya’ll are killing him.’”).
106. See ACLU OF N. CAL., *supra* note 28, at 4.
107. Cf. Christopher D. Prater & Robert G. Zylstra, *Medical Care of Adults With Mental Retardation*, 73 AM. FAM. PHYSICIAN 2175, 2180 (2006), *available at* <http://www.aafp.org/afp/2006/0615/p2175.html> (“Many persons with mental retardation . . . do not have predictable responses to pain.”); C. Nathan DeWall, *Alone But Feeling No Pain: Effects of Social Exclusion on Physical Pain Tolerance and Pain Threshold, Affective Forecasting, and Interpersonal Empathy 1–2* (Feb. 18, 2006) (unpublished M.S. thesis, Florida State University), *available at* http://etd.lib.fsu.edu/theses_1/available/etd-04032006-132654/unrestricted/cnd_thesis.pdf (“With regard to physical pain, social exclusion may disrupt the ability to respond to physical pain in the same manner as people who have not experienced social exclusion. This would lead to increases in both pain threshold (i.e., sensitivity to pain) and pain tolerance (i.e., withstanding greater pain).”).
108. At a psychiatric medical center in Los Angeles, county police officers used a taser to subdue a patient, prompting warnings against this use of force in 2004 from the U.S. Centers for Medicare and Medicaid Services. Cheryl Erwin & Robert Philibert, *Shocking Treatment: The Use of Tasers in Psychiatric Care*, 34 J.L. MED. & ETHICS 116, 116 (2006). Despite the warning and the threat from federal health officials to pull funding, the center continued to rely on police officers using tasers to subdue patients. *Id.*
109. Harris, *supra* note 61, at 722.
110. See AMNESTY INT’L, *supra* note 44, at 26; Demian Bulwa, *BART Police Pull Tasers, Will Retrain Officers*, S.F. CHRON., Apr. 16, 2010, *available at* http://articles.sfgate.com/2010-04-16/news/20852001_1_tasers-bart-police-department-officers (“The BART Police Department stripped its

elderly adults suffering from dementia,¹¹¹ and pregnant women.¹¹² According to Dr. John Clark, the former chief physician of the Los Angeles County Sheriff's Department, those three groups should fall under an "Absolute [Taser] Use Exception[]," along with people in high-risk physical circumstances, including those locked in restraints, positioned at a dangerous height,¹¹³ or located near a potential hazard, such as standing water¹¹⁴ or flammable gas.¹¹⁵ Another risk factor cited by Clark is obesity,¹¹⁶ a factor that has also come up in at least two Ninth Circuit cases that involved taser-related deaths.¹¹⁷ However, as detailed in Part I.C.1, the

officers of Tasers on Thursday, days after a sergeant fired the electric darts of his [taser] at a 13-year-old boy fleeing from police . . . on his bicycle.”).

111. See AMNESTY INT'L, *supra* note 7, at 17 (describing Oregon police officers in separate incidents tasing two people, both of whom were over seventy years old, were unarmed, and were posing no threat); Jeff Fabian, Note, *Don't Tase Me Bro!: A Comprehensive Analysis of the Laws Governing Taser Use by Law Enforcement*, 62 FLA. L. REV. 763, 781 (2010).
112. For the incident underlying *Brooks v. City of Seattle*, 599 F.3d 1018, 1026 (9th Cir. 2010), in which officers tased an unnamed and passive pregnant woman multiple times, see Part III.C. Though the officer's use of a taser against a pregnant woman in *Brooks* did not harm the fetus, this is not always the case. One pregnant woman in California miscarried after officers tased her for not submitting to a strip search while in prison (see *Valdez v. Ayers*, 988 F.2d 126 (9th Cir. 1993) (unpublished disposition)); another woman, also in California, miscarried after being tased in the back by an officer, with two expert witnesses finding the most likely cause of the miscarriage to be “electro-shock” (see STANFORD CRIM. JUSTICE CTR., *supra* note 38, at 6 (also stating that “some studies have suggested a link between electro-shock and miscarriage”)); and another miscarried after being tased, with the taser darts “sending a current across her uterus” (Michael Brooks, *Shock Tactics*, NEW SCIENTIST, Aug. 11, 2001, at 1111).
113. Cf. Jen Chung, *After Cops Taser Him, Naked Man Falls to Death*, GOTHAMIST (Sept. 25, 2008, 9:00 AM), http://gothamist.com/2008/09/25/after_cop_tasers_him_naked_man_fall.php (describing the events in which a police officer, on orders from his superior, shot a mentally ill man on a fire escape with a taser, causing him to “freeze” and fall “on his head on the sidewalk”).
114. For example, most correctional officers at the California Institution for Men are no longer equipped with tasers after an officer electrocuted a prisoner by tasing him while the prisoner was taking a shower. Interview With Officer Ramirez, California Inst. for Men (Oct. 13, 2011).
115. See *Is There a Proper Place for Tasers in the Use of Force Continuum?*, in U.S. DEP'T OF JUSTICE, NAT'L INST. OF CORR., PROCEEDINGS OF THE LARGE JAIL NETWORK MEETING 31, 34 (2006) (summarizing the presentation of Dr. John Clark).
116. See *id.* at 33.
117. See *Neal-Lomax v. Las Vegas Metro. Police Dep't*, 574 F. Supp. 2d 1170, 1184 (D. Nev. 2008) (“[The officer] knew Lomax was obese and suspected he was high on PCP. Plaintiffs thus argue [the officer] should have known Lomax was susceptible to an adverse medical response to the Taser.”); *LeBlanc v. City of Los Angeles*, No. CV 04-8250, 2006 WL 4752614, at *13 (C.D. Cal. Aug. 16, 2006) (stating that the suspect was obese and believed by the officers to be mentally ill or intoxicated); cf. Philip Caulfield, *43-Year-Old Man, Allen Kephart, Dies After Being Shot With Taser During Dispute Over Blown Stop Sign*, N.Y. DAILY NEWS, May 12, 2011, http://articles.nydailynews.com/2011-05-12/news/29553988_1_tasers-cop-shot-shock-weapon (quoting the deceased taser victim's father, a volunteer for the sheriff's department, as saying that “Tasers are deadly” and the police “should know there could be problems . . . using them on someone who is [350 pounds]”).

potentially life-saving guidelines promulgated by Clark and other experts discussed in this Part are absent in the policies of many police agencies.

Suspects for Whom Tasers Are Ineffective. One of the least scientifically studied aspects of tasers is their potential to escalate a situation's volatility and impede officers' efforts to subdue a suspect. This might not be surprising from a sociological standpoint: Cases like *Mattos v. Agarano*¹¹⁸ and *Bojic v. City of San Jose*¹¹⁹ demonstrate that an officer's quick resort to the use of a taser, which may even occur "at the first sign of . . . minor resistance,"¹²⁰ can increase the dangerousness of the encounter. Less expected, though, is the possibility of tasers' physiological effects impeding arrests and making the situation more perilous for both police and suspects.

The lowered effectiveness of tasers appears to be most salient with intoxicated individuals, and, while the research is markedly limited, the anecdotal evidence demonstrates that in certain situations, taser use actually makes it more difficult for an officer to effect an arrest.¹²¹ Tasers may cause the intoxicated subject "extreme agitation" while making the subject resistant (or, in other cases, acutely susceptible) to pain,¹²² and even potentially equipping the subject with "superhuman' strength."¹²³

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118. 661 F.3d 433, 439 (2011) (en banc); see *infra* Part III.B (describing how taser use and police belligerence escalated what may have otherwise been a calm situation).
119. 358 F. App'x 906 (9th Cir. 2009); see *supra* note 104 (relating the facts of this case).
120. AMNESTY INT'L, *supra* note 35, at 9; see *infra* Part I.C (surveying the situations in which taser use is authorized in various police agencies).
121. By 2004, the Las Vegas Police Department was distributing training materials stating that for people "under the influence of drugs/alcohol or [who are] mentally disturbed," a taser in dart mode can fail to cause neuromuscular incapacitation in the suspect and instead "becomes a pain compliance tool [with] limited threat reduction potential," as "pain compliance DOES NOT WORK" for suspects on drugs like PCP. *Neal-Lomax v. Las Vegas Metro. Police Dep't*, 574 F. Supp. 2d 1170, 1177 (D. Nev. 2008) (internal quotation marks omitted).
122. While some drug interactions might cause imperviousness to pain, others might cause "decreased pain tolerance" and "proneness to overreact [to] discomfort," making the use of a taser on an individual under the influence of narcotics particularly unpredictable. Margaret A. Compton, *Cold-Pressor Pain Tolerance in Opiate and Cocaine Abusers: Correlates of Drug Type and Use Status*, 9 J. PAIN & SYMPTOM MGMT. 462, 462-63 (1994) (citation and internal quotation marks omitted); see *id.* at 471 (discussing how "drug abuse and pain tolerance are psychobiologically interrelated").
123. In 2006, TI began including a warning on tasers describing the following behaviors indicating Sudden In-Custody Death Syndrome: "extreme agitation," "imperviousness to pain," "exhaustive exertion," and "superhuman' strength." TASER INT'L, PRODUCTS WARNING—LAW ENFORCEMENT 2 n.2 (2006), available at <http://www.storesonlinepro.com/files/1791046/uploaded/Police%20Taser%20Warning.pdf>.

These examples demonstrate that it is unreasonable for police agencies to lack policies that significantly restrict taser use, especially for populations most susceptible to harm, pending more thorough studies.¹²⁴ Underlying the concerns about vulnerable populations is the often-overlooked reality of police taser use, discussed in the following Part: Members of physically susceptible populations do not present concerns at the margins of this issue. Rather, they are the ones most likely to be targeted by officers and involved in altercations resulting in taser use in the first place.

C. How Tasers Are Used by Police Agencies

1. The Standards

While the provision of tasers to police officers has proliferated in the last decade, their use remains “almost entirely unregulated.”¹²⁵ This is true in terms of the absence of both centralized regulation and regulation within individual agencies. A 2010 survey funded by the NIJ found that only 38.4 percent of the agencies that responded to the survey¹²⁶ have a specific taser-use policy.¹²⁷ In a 2005 U.S. Government Accountability Office (GAO) report, none of the seven major law enforcement agencies studied had comprehensive taser policies distinct from their general use-of-force policies.¹²⁸ Further, there is a large degree of variation among where agencies place tasers on the use-of-force continuum, a multilevel guide devised by police agencies to inform officers about what level of force is

124. Cf. Annette Newell, *Fayetteville Police Surrenders 'Stun Guns' Following Death*, NBC 17 (Aug. 31, 2011, 5:49 PM), <http://www2.nbc17.com/news/cumberland-county/2011/aug/31/5/taser-use-defended-ar-1348191> (noting two police departments that banned tasers after taser-related deaths).

125. STANFORD CRIM. JUSTICE CTR., *supra* note 38, at 15; *see also* McBride & Tedder, *supra* note 41, at 4 (“There are no federal restrictions or guidelines for [taser] use—nor for importation from foreign suppliers for that matter. Moreover, there is no regulating body (private or public) and there are no industry standards.”). Regulation may be least likely in states where TI has close ties to policymakers. In addition to TI cofounder and chairman Tom Smith’s selection as an Arizona congressional candidate’s finance chair, TI spends hundreds of thousands of dollars on lobbying expenses and in campaign contributions. *See* OPENSECRETS.ORG, <http://www.opensecrets.org/index.php> (search for “taser”) (last visited May 16, 2012).

126. This survey covered 518 agencies. SMITH ET AL., *supra* note 20, at 3–5. It is likely that a lower percentage of agencies have formal policies and data than indicated by the NIJ findings, assuming that the 45.5 percent of the agencies that were contacted by the NIJ but failed to respond to the survey are less likely to have formal policies to report. *Id.* at 3–5.

127. *Id.* at 3–20.

128. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-464, TASER WEAPONS: USE OF TASERS BY SELECTED LAW ENFORCEMENT AGENCIES 7 (2005).

appropriate in a given situation.¹²⁹ In fact, the seven agencies surveyed by the GAO placed tasers at three different use-of-force levels.¹³⁰

While taser policies vary widely, the majority of agencies appear to place tasers relatively in the middle of their use-of-force continuums, usually at the same level as pepper spray and below impact weapons like batons or punches.¹³¹ Thus, it is common for agencies to permit taser use in “low-level encounters,” sometimes “at the first sign of even minor resistance.”¹³² This is particularly troubling when that low-level encounter involves young people engaging in typical adolescent behavior, as was recently the case at a high school where the school officer, upon seeing two students begin to pretend to box but not actually make contact with each other, shot one student in the chest with a taser.¹³³

129. See *The Use-of-Force Continuum*, NAT'L INST. JUST. (Aug. 4, 2009), <http://www.ojp.usdoj.gov/nij/topics/law-enforcement/officer-safety/use-of-force/continuum.htm>. The NIJ provides a sample use-of-force continuum with five levels ranging from “officer presence,” the lowest level of force, to “lethal force,” the highest level. *Id.*

130. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 128, at 9.

131. See, e.g., AMNESTY INT'L, *supra* note 7, at 12; AMNESTY INT'L, *supra* note 44, at 19 (noting that Mesa, AZ places tasers below “hard hands” and “impact weapons” and that San Diego, CA places tasers at the same level as chemical sprays, “takedown techniques,” and “distraction techniques”); REX BARTON, UNIV. OF TENN. MUN. TECHNICAL ADVISOR SERV., CONDUCTED ENERGY WEAPON (M26 TASER) POLICY (2003) (placing tasers at the same level as chemical sprays); HASTINGS, NEB. POLICE DEP'T, GENERAL ORDER P5003, ADVANCED TASER DEPLOYMENT (2003) (same); SEATTLE POLICE DEP'T, DIRECTIVE D 05-016, DEPARTMENT POLICY GOVERNING LESS LETHAL OPTIONS: THE TASER AND THE PATROL LESS LETHAL SHOTGUN WITH BEANBAG ROUNDS (2005) (placing tasers in drive-stun mode on the level of control holds and lower than chemical sprays and placing tasers in dart mode above pain-compliance techniques but below “punches, kicks, and batons”); SMITH ET AL., *supra* note 20, at 3-22 (finding that 57 percent of police agencies responding to its survey place tasers and chemical sprays at the same use-of-force level); U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 128, at 10 (noting that Orange County, CA places tasers at the same level as verbal commands, that Austin, TX places tasers at the same level as chemical sprays and impact weapons, and that Phoenix, AZ, San Jose, CA, and Ohio Highway Patrol all place tasers at the same level as chemical sprays); VALLEJO POLICE DEP'T, SPECIAL ORDER 2003-3 (REVISED), TASER USE AND DEPLOYMENT POLICY (2004) (placing tasers at the same level as control holds).

132. AMNESTY INT'L, *supra* note 35, at 9.

133. See Paul Garber, *Taser Used to Break Up Fight at East Forsyth High School*, WINSTON-SALEM J., Jan. 12, 2012, <http://www2.journalnow.com/news/2012/jan/11/2/taser-used-to-break-up-fight-at-east-forsyth-high--ar-1805074> (displaying a video of the tasing and stating that students have been tased by school officers three times in the last two years); see also Complaint at 1-2, *A.E. v. City of Syracuse* (N.D.N.Y. Dec. 21, 2010), available at http://www.nyclu.org/files/releases/Taser_Complaint_Final_12.21.10.pdf (“Plaintiff A.E., fifteen years old at the time of the incident . . . , brings this action against the City of Syracuse and three of its police officers who recklessly injured him with a taser and handcuffed him when he was trying to break up a fight between two female classmates. . . . The officers’ actions were . . . a result of the City of Syracuse’s failure . . . to treat tasers as weapons capable of inflicting serious injury and even death. The Syracuse Police Department’s current policies and practices encourage officers to deploy tasers in a manner that poses undue risks to people,

Further, while some agencies differentiate between drive-stun mode and dart mode in their policies,¹³⁴ the vast majority of agencies do not, allowing officers to employ either mode in any situation in which tasing would be permissible.¹³⁵

To better understand the often vague use-of-force policies, the NIJ asked police agencies if a taser would be permitted in five different situations premised on a scenario in which an officer pulls over a suspect for a moving violation and discovers that the suspect has an outstanding misdemeanor warrant.¹³⁶ Of these hypothetical situations, the one entailing the lowest governmental interest¹³⁷ involved the officer telling the suspect that he is under arrest, after which the suspect sits down on the ground with his hands clearly visible, silently refuses repeated commands to stand up or to place his hands behind his back, and says, "I don't want to go to jail." Of the agencies that have specific taser policies, 29.6 percent would permit an officer to deploy a taser in drive-stun mode and 20.1 percent would permit an officer to deploy a taser in dart mode in this situation.¹³⁸ In the situation entailing the second-lowest governmental interest, in which the suspect tenses his arms while the officer tries to handcuff him, continuing to tense and pull against the officer for fifteen to twenty seconds, 65.2 percent of the agencies would permit taser use in drive-stun mode and 58.7 percent would permit taser use in dart mode.¹³⁹

Despite the ongoing controversies and inadequate research regarding the effects of tasers on certain vulnerable populations or in certain high-risk circumstances,¹⁴⁰ between 40 percent and 57 percent of agencies with taser-specific policies, training, or both had no restrictions on taser use against children, suspects with apparent heart conditions, suspects with obvious physical disabilities, or

especially the students who are continuously monitored by Syracuse police officers in the schools."); cf. Aaron Sussman, Comment, *Learning in Lockdown: School Police, Race, and the Limits of Law*, 59 UCLA LAW REV. 788 (2012) (discussing the growing number of school police officers in poor communities of color and the officers' increased willingness to use force against students for minor misconduct).

134. See, e.g., SEATTLE POLICE DEPT, *supra* note 131.

135. See SMITH ET AL., *supra* note 20, at 3-24 (stating that 86.8 percent of law enforcement agencies responding to its survey have the same policy governing tasers deployed in drive-stun mode and tasers deployed in dart mode).

136. *Id.* at 3-9 to 3-13.

137. As per *Graham*, this situation entails the lowest governmental interest because the suspect is posing less of a threat to the officers and the public and is displaying less resistance to arrest than in the other hypothetical situations. See *Graham v. Connor*, 490 U.S. 386, 396 (1989).

138. SMITH ET AL., *supra* note 20, at 3-9 to 3-10.

139. *Id.* at 3-11.

140. See, e.g., *supra* note 113 (describing a New York City officer who tased a man on a fire escape, causing him to fall to his death); *supra* note 114 (describing a prison inmate tased while taking a shower).

suspects showing symptoms of excited delirium.¹⁴¹ A lower, but still substantial, percentage of agencies had no restrictions on taser use against susceptible groups like pregnant¹⁴² or handcuffed suspects,¹⁴³ or in high-risk circumstances like suspects in close proximity to flammable substances¹⁴⁴ or suspects in an elevated area from which they might fall if temporarily paralyzed.¹⁴⁵ Thus, where police agencies do have taser policies, they usually fall short not just of the policies proposed by civil liberties and human rights organizations¹⁴⁶ but also those put forth by moderate groups with diverse expertise.¹⁴⁷

2. The Benefits

The primary—and substantial—benefit of tasers is clear: A police officer fearing for her safety or the safety of others can often subdue a suspect in an effective and far less intrusive way by using a taser instead of deadly force.¹⁴⁸ In

141. SMITH ET AL., *supra* note 20, at 3-24. The survey did not solicit information about restrictions related to suspects under the influence of stimulants or other narcotics, though research indicates this may be a particularly vulnerable group. *See supra* Part I.B.3. Nor did the survey solicit information about restrictions related to where on the body a taser should be applied, despite warnings by cardiology experts about the risk of aiming at the chest. *See supra* note 102 and accompanying text. In at least 42 percent of the potentially taser-related deaths reviewed by Amnesty International, officers tased the deceased in the chest. AMNESTY INT'L, *supra* note 35, at 41.

142. No restrictions set forth by 16.6 percent of agencies. SMITH ET AL., *supra* note 20, at 3-24.

143. No restrictions set forth by 24.9 percent of agencies. *Id.*

144. No restrictions set forth by 10.2 percent of agencies. *Id.*

145. No restrictions set forth by 27.8 percent of agencies. *Id.*

146. *E.g.*, ACLU OF N. CAL., *supra* note 28; AMNESTY INT'L, *supra* note 35.

147. A working group convened by the Allegheny County, Pennsylvania District Attorney proposed that tasers be classified as “less lethal weapons” and stated, “[d]epartmental policy ordinarily should prohibit use of Tasers™ to counter passive resistance, in which the subject does not comply with orders but is not taking action to prevent custody. Use of Tasers™ against passive resistance amounts to forcing compliance through pain, and is not an appropriate use of the weapon.” Harris, *supra* note 61, at 721. The working group further recognized that “certain groups . . . may be more vulnerable to risks of injury or death by Taser™ Therefore, departmental policies should allow uses against such persons *only in extreme or exigent circumstances.*” *Id.* at 722.

In Canada, the Standing Committee on Public Safety and National Security in 2008 recommended that police agencies

stipulate that use of [tasers] can be justified only in situations where a subject is displaying assaultive behaviour or represents a threat of death or grievous bodily harm.

This immediate restriction is necessary given the persisting uncertainty about the effects of [taser] technology on the health and safety of persons subjected to it, and the scarcity of independent, peer-reviewed research in this regard.

BREITKREUZ, *supra* note 36, at 2.

148. *See* STANFORD CRIM. JUSTICE CTR., *supra* note 38, at 4 (“The clear consensus of the research [on tasers] is that a one-time five-second shock does not seriously or permanently injure a healthy and sober young adult who is not pregnant.”). This carefully worded description of the consensus is laden

fact, even when compared to force well below deadly force, some argue that tasers are the safer option for the suspect, primarily because they usually do not cause lasting tissue damage.¹⁴⁹ The basic assertion used to endorse tasers, and the oft-repeated mantra of TI,¹⁵⁰ is that tasers keep police safe without inflicting serious or permanent injury on the suspect.¹⁵¹ Two situations in which deploying a taser in dart mode is often the optimal use of force are when there is (1) an unarmed suspect at risk of escape who the police reasonably believe poses a significant threat of harm to others;¹⁵² and (2) a suspect approaching an officer or a civilian in a manner reasonably believed to indicate a physical threat.¹⁵³ However, as many

with qualifications for good reason, as elaborated on in Part I.C.2, *supra*. Of course, as described, tasers can result in death, and many advocates have argued for tasers to be considered deadly force. See *supra* note 70 and accompanying text.

149. See, e.g., *Taser Beats Baton*, NEW SCIENTIST, Nov. 21, 2009, at 6 (“Using a Taser to subdue a suspect is safer than police batons and fists. That is the unexpected conclusion of a study of incidents in which US police used force to tackle a person who was resisting arrest.”). Further, certain models of tasers are equipped with data-keeping devices that can protect officers against frivolous claims and protect the interests of suspects by ensuring a greater degree of police accountability than is ensured by other less-lethal uses of force. See *On Officer Video Solutions*, TASER INT’L, <http://www.taser.com/products/on-officer-video> (last visited May 16, 2012) (showing modern taser models with built-in data mechanisms that can keep track of when the taser was deployed, how many times it was deployed, and for how long each cycle was held, thus increasing officer accountability and protecting against exaggerated claims of police misconduct).
150. See, e.g., *Products: Taser M26c*, SHIELDHER, <http://www.shop.shieldherstore.com/TASER-M26c-M26c.htm> (last visited May 16, 2012) (“[The M26 gives you the battle-tested, field-proven capability to incapacitate dangerous subjects with minimum risk of serious injury.”).
151. See David A. Koplow, *Tangled Up in Khaki and Blue: Lethal and Non-Lethal Weapons in Recent Confrontations*, 36 GEO. J. INT’L L. 703, 718 (2005) (“Proponents assert that the charge is highly effective, even against the most determined (or substance-abusing) resisters, yet no permanent injury is inflicted. [Tasers] are also much more useable in confined spaces, such as inside an aircraft in flight, where use of a conventional bullet would be inadvisable.”).
152. In such circumstances, a taser is the optimal use of force because the alternatives are to allow the suspect to escape and likely inflict harm on others or to use deadly force against the suspect. See *Tennessee v. Garner*, 471 U.S. 1, 3 (1985) (“We conclude that [deadly] force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.”). As discussed in Parts III and IV, none of the plaintiffs in the major Ninth Circuit taser cases posed a threat to the public, and any threat to an officer was minimal, or at least a far cry from being “a substantial and immediate risk of physical injury to others.” *Scott v. Harris*, 550 U.S. 372, 384, 386 (2007) (holding that an officer ramming the car of a suspect engaged in reckless, high-speed flight resulting in the suspect’s death was reasonable because of the extreme nature of the harm posed to the public).
153. For example, in *MacEachern v. City of Manhattan Beach*, a homeless suspect allegedly wielded a knife while twenty-five feet away from an officer. 623 F. Supp. 2d 1092, 1095–96 (C.D. Cal. 2009). The officer drew his pistol and ordered the suspect to drop the knife and get down on the ground, but the suspect instead “made a few steps towards” the officer and, upon being warned again, “took a few more steps towards” to the officer, after which the officer shot and killed the suspect. *Id.* at 1095. In this situation, in which a likely mentally ill man posed a severe, but not immediate, physical

cases discussed herein demonstrate, tasers are frequently used in situations far less serious or appropriate for the use of force than in these two scenarios.

3. The Victims

The populations particularly susceptible to severe injury or death from taser exposure are frequently also the populations most likely to be targeted and involved in police altercations resulting in taser use in the first place. Most importantly for the following legal analysis, these groups are then the ones likely to be disadvantaged by the current judicial approach to excessive force taser cases, an approach that exacerbates the anti-plaintiff tendencies that pervade excessive force jurisprudence.¹⁵⁴

People of color in poor communities are more likely than others to have negative police encounters¹⁵⁵ and, during the encounter, are disproportionately exposed

threat to the officer, a taser would have allowed the officer to incapacitate the suspect before he came within striking distance.

154. See *infra* Part II.

155. See, e.g., CHRISTINE EITH & MATTHEW R. DUROSE, U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 234599, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2008 (2011), available at <http://www.bjs.gov/content/pub/pdf/cpp08.pdf>. According to the latest Justice Department report on public-police contact, the percentage of police contacts for blacks in which force was threatened or used was nearly three times the percentage for whites, *id.* at 12; the percentage of traffic stops in which police searched the driver was 12.3 percent for blacks (a higher figure than in the two previous versions of the report, from 2002 and 2005), 5.8 percent for Latinos, and 3.9 percent for whites, *id.* at 10; and the percentage of blacks and Latinos who believed they were pulled over for legitimate reasons was 12.5 percent and 3.8 percent lower than for whites, respectively, *id.* at 8. See also M. Chris Fabricant, *War Crimes and Misdemeanors: Understanding "Zero-Tolerance" Policing as a Form of Collective Punishment and Human Rights Violation*, 3 DREXEL L. REV. 373, 377 (2011) (describing aggressive police stop-and-frisk policies that are "indiscriminate and directed largely at law-abiding young black and Latino men"); K. Babe Howell, *From Page to Practice and Back Again: Broken Windows Policing and the Real Costs to Law-Abiding New Yorkers of Color*, 34 N.Y.U. REV. L. & SOC. CHANGE 439, 441 (2010) (stating that, under tough-on-crime policies in New York, people of color consistently composed 85 percent of arrests); Press Release, Ctr. for Constitutional Rights, New NYPD Data Shows Record Number of Stop-and-Frisks in 12-Month Period (Feb. 11, 2009), <http://ccjjustice.org/newsroom/press-releases/new-nypd-data-shows-record-number-stop-and-frisks-12-month-period> (reporting the finding that approximately 90 percent of people stopped and frisked by the police officers in New York City are nonwhite, despite being less likely than whites to have committed an offense); cf. THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION 109 (Steven R. Donziger ed., 1996) ("Most studies reveal what most police officers will casually admit: that race is used as a factor when the police decide to follow, detain, search, or arrest.").

to high levels of force,¹⁵⁶ including the use of tasers.¹⁵⁷ People with mental illness are also disproportionately at risk of having police contact,¹⁵⁸ and, according to one scholar, mentally ill people of color are at “great[] risk of being subjected to police brutality”¹⁵⁹—a claim underscored by recent and tragic taser deaths.¹⁶⁰ Several reports indicate that people with mental illness are particularly at risk of being tased by police officers.¹⁶¹

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156. See ANDREA J. RITCHIE & JOEY L. MOGUL, IN THE SHADOWS OF THE WAR ON TERROR: PERSISTENT POLICE BRUTALITY AND ABUSE OF PEOPLE OF COLOR IN THE UNITED STATES 22–23 (2007), available at <http://www2.ohchr.org/english/bodies/cerd/docs/ngos/usa/USHRN15.pdf> (stating that LAPD officers were three times as likely to ask black drivers who they pulled over to step out of the car than they were to ask white drivers who they pulled over for the same reason); Natalie Bucciarelli Pedersen, *A Legal Framework for Uncovering Implicit Bias*, 79 U. CIN. L. REV. 97, 107–09 (2010) (surveying studies on bias revealing that, in the same scenario, police officers may be more likely to use deadly force on nonwhite suspects than on white suspects); Troutt, *supra* note 62, at 104 (“Black and Latino men not only report higher rates of victimization at the hands of police officers, but, relative to whites, they also experience disproportionately harsher treatment in other aspects of the criminal justice system.”).
157. Reports show that police disproportionately use tasers against people of color. In some cities, blacks and Latinos compose up to 90 percent of those tased by police, and in Seattle, blacks composed nearly half of all people tased by police despite constituting less than 10 percent of the population. RITCHIE & MOGUL, *supra* note 156, at 12. In Wichita, Kansas, “[b]lack people are five to six times as likely as white people to have Tasers used on them.” Dion Lefler, *Wichita Report: Tasers Used More on Blacks*, WICHITA EAGLE, Nov. 1, 2011, <http://www.kansas.com/2011/11/01/2085468/report-tasers-used-more-on-blacks.html>; see also Mary Beth Pfeiffer, *Blacks Hit With Tasers Far More Than Whites*, POUGHKEEPSIE J., Feb. 20, 2012, <http://pqasb.pqarchiver.com/poughkeepsiejournal/access/2590062401.html?FMT=ABS>; N.Y. CIVIL LIBERTIES UNION, *supra* note 51, at 3 (“People of color are overwhelmingly represented in Taser incidents.”).
158. See Linda A. Teplin, *Keeping the Peace: Police Discretion and Mentally Ill Persons*, NAT’L INST. JUST. J., July 2000, at 8, 12, <https://www.ncjrs.gov/pdffiles1/jr000244c.pdf> (citing a study finding that “[t]he probability of being arrested was 67 percent greater for suspects exhibiting signs of mental disorder than for those who apparently were not mentally ill”).
159. Camille A. Nelson, *Racializing Disability, Disabling Race: Policing Race and Mental Status*, 15 BERKELEY J. CRIM. L. 1, 7 (2010).
160. In one case, Jonathan White, a mentally ill black man, died in November 2011 after being tased by officers in San Bernardino, California. *Mentally Ill Man Tasered, Dies in Police Custody*, KTLA.COM (Nov. 16, 2011, 3:53 AM), <http://www.ktla.com/news/landing/ktla-man-dies-in-police-custody-after-tazing,0,4146524.story>. In another, Roger Anthony, a mentally ill, sixty-one-year-old black man with a hearing impairment, was riding his bicycle when he was tased to death by police in South Carolina for failing to obey (or hear) their instructions to stop. The town mayor stated that he would not blame Anthony’s family members if they sued the town and that “[t]here has been no information that this man was a threat to anybody.” Daniel Miller, *Police Killed Deaf Cyclist With Stun Gun After He Failed to Obey Instructions to Stop*, MAILONLINE (Nov. 24, 2011, 7:19 AM), <http://www.dailymail.co.uk/news/article-2065629/Police-killed-deaf-cyclist-stun-gun-failed-obey-instructions-stop.html> (internal quotation marks omitted).
161. See, e.g., Roma Khanna, *Houston Police Used Tasers on the Mentally Ill*, HOUS. CHRON., May 27, 2007, <http://www.chron.com/news/houston-texas/article/Houston-police-used-Tasers-on-the-mentally-ill-1588221.php> (“More than 120 encounters between Houston police and people with mental illness ended with officers using their Tasers to control troubled suspects in the grips of a mental crisis, according

Statistics about taser victims, in addition to the policy concerns they raise, have substantive implications for courts adjudicating excessive force taser cases. First, they may indicate that taser use, as compared to other uses of force, will more frequently give rise to excessive force claims, as the populations most likely to be tased are also the ones most likely to suffer unintended (but not necessarily unanticipated) severe harm. Second, the discrete populations I have discussed frequently intersect, compounding the risk of harm and raising questions about how courts assess reasonableness in excessive force taser cases.¹⁶² Finally, the clear legal obstacles that marginalized and economically disadvantaged groups face in bringing excessive force claims combine with the legal implications of the distinctive properties of tasers to pose questions at the heart of the Ninth Circuit cases discussed in Part III.

II. LEGAL IMPLICATIONS OF THE DISTINCTIVE PROPERTIES OF TASERS

Several legal questions arise from the distinctive properties of tasers, properties that likely describe other emerging police technologies. In short, tasers are (1) widely and increasingly used by police officers in an array of circumstances, including those in which only a minimal threat is presented; (2) capable of causing extreme pain and emotional distress while minimizing lasting physical injury; (3) a technology with effects that are relatively untested, unknown, and fiercely debated by experts; and (4) a technology that in some circumstances can cause severe injury or death.

to a Houston Chronicle review of more than 1,000 incidents since December 2004.”); Nick Shields & Josh Mitchell, *Taser Use Under Scrutiny*, BALTIMORE SUN, Mar. 20, 2007, http://articles.baltimoresun.com/2007-03-20/news/0703200141_1_taser-baltimore-county-county-police (“The death of a mentally ill Baltimore County man as police attempted to subdue him with a Taser has revived a debate about the safety of the high-voltage stun guns and whether police might be too quick to use them.”).

162. For example, black men, in addition to having a higher-than-average risk of being tased by police, are also disproportionately likely to suffer from heart disease, see *Heart Disease and African Americans*, OFF. MINORITY HEALTH, <http://minorityhealth.hhs.gov/templates/content.aspx?ID=3018> (last updated May 16, 2012) (“In 2008, African American men were 30 percent more likely to die from heart disease, as compared to non-Hispanic white men. . . . African American women are 1.5 times as likely as non-Hispanic whites to have high blood pressure.”), and untreated mental illness, see U.S. DEP’T OF HEALTH & HUMAN SERVS., MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL 80–90, available at <http://www.surgeongeneral.gov/library/mentalhealth/pdfs/c2.pdf> (noting that mental illness is estimated to be more prevalent among blacks than whites due to “socio-economic differences”). The same structural and economic conditions that create these overlapping risk factors will likely limit these populations’ ability to vindicate their excessive force claims through the courts. See *infra* Part III.A.

A. Excessive Force Analyses: *Graham* and Qualified Immunity

Excessive force claims against state or local police officers arise under 42 U.S.C. § 1983, which enables an individual to file an action for damages against any state actor, often police officers or prison guards, for violating the individual's constitutional rights while acting under state authority.¹⁶³ A plaintiff alleging that a police officer used excessive force in violation of the plaintiff's Fourth Amendment rights¹⁶⁴ is constitutionally entitled to a jury trial under the Seventh Amendment.¹⁶⁵ Despite this, it is rare for plaintiffs to get in front of a jury. The defendant officer will virtually always file a motion for summary judgment based on qualified immunity,¹⁶⁶ benefiting, as discussed below, from the many pro-defendant

163. 42 U.S.C. § 1983 (2006); see Paul Hoffman, *The Feds, Lies, and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America*, 66 S. CAL. L. REV. 1453, 1504 (1993) ("Section 1983 actions are intended to fulfill at least two basic purposes in the police abuse context. First, such actions are designed to compensate victims of police abuse, usually through an award of compensatory damages. Second, such actions are intended to make police officers and departments accountable to constitutionally required standards of conduct." (footnote omitted)).

Section 1983 claims are the most discussed responses to allegations of police misconduct because, despite the difficulties facing plaintiffs bringing such claims, the barriers to justice through other legal avenues are even more insurmountable. For example, it is extremely rare for police officers to face criminal prosecutions for misconduct, and many barriers prevent plaintiffs from bringing state tort claims against officers or police departments. See Stephen Clarke, *Arrested Oversight: A Comparative Analysis and Case Study of How Civilian Oversight of the Police Should Function and How It Fails*, 43 COLUM. J.L. & SOC. PROBS. 1, 4–6 (2009); Jeremy R. Lacks, Note, *The Lone American Dictatorship: How Court Doctrine and Police Culture Limit Judicial Oversight of the Police Use of Deadly Force*, 64 N.Y.U. ANN. SURV. AM. L. 391, 399–400 (2008).

164. The Fourth Amendment protection relevant to this analysis is that against unreasonable seizures, which include an officer's use of excessive force when attempting to effect an arrest. See U.S. CONST. amend. IV; *Graham v. Connor*, 490 U.S. 386, 387 (1989).

165. See Catherine T. Struve, *Constitutional Decision Rules for Juries*, 37 COLUM. HUM. RTS. L. REV. 659, 661–62 n.8 (2006) (stating that "excessive force claims" seeking damages fall within the category of § 1983 suits for which there is a "Seventh Amendment right to a jury determination of the question of liability").

166. Defined in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), qualified immunity shields state actors from liability if their actions did not violate clearly established law "of which a reasonable person would have known." *Id.* at 818.

While the issues in this analysis are most salient when qualified immunity defenses are raised in summary judgment motions, it should be noted that excessive force plaintiffs face particularly significant legal obstacles at various stages of the litigation. See Teresa E. Ravenell, *Hammering in Screws: Why the Court Should Look Beyond Summary Judgment When Resolving § 1983 Qualified Immunity Disputes*, 52 VILL. L. REV. 135, 136–38, 164 (2007) (discussing the "heightened pleading standards in § 1983 litigation" that courts have adopted and noting that "courts as a whole have failed to develop a uniform approach to burdens of production and persuasion in § 1983 qualified immunity cases," with most circuits placing the burdens in whole or in part on plaintiffs); John Burton, *Up Against a Blue Wall*, TRIAL, July 2010, at 34, 36 (advising lawyers considering police misconduct litigation that, "[u]nless the police action is particularly outrageous or the injuries are catastrophic, these

advantages that come with it. The two crucial inquiries for qualified immunity at the summary judgment or, perhaps increasingly, the motion to dismiss¹⁶⁷ stage are whether the facts alleged by the plaintiff could reasonably be found to amount to a constitutional violation under the *Graham* balancing analysis and whether the right alleged to have been violated was clearly established at the time of the injury.¹⁶⁸ Courts can address these inquiries in either order, and they need not address both questions if they can dispose of the case on just one.¹⁶⁹ In excessive force cases generally, it is often the question of whether the officer's use of force violated a clearly established right that most disadvantages plaintiffs and allows officers to escape liability.¹⁷⁰ Taser cases specifically illuminate the problems regarding *Graham* balancing when the use of force is poorly understood and regarding qualified immunity when the right that needs to be clearly established emerges from a technologically novel police weapon.

In *Graham*, the Supreme Court established (without addressing qualified immunity)¹⁷¹ that a police officer used excessive force in violation of the Fourth Amendment when the force used was objectively unreasonable in light of the circumstances as perceived by a reasonable officer at the scene.¹⁷² To assess whether the officer's force was reasonable, courts must conduct 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."¹⁷³ The Court listed three factors to guide assessments of the countervailing governmental interest: (1) the severity of the suspect's alleged crime; (2) the threat posed by the suspect to officers and the public; and (3) whether the suspect was actively resisting or evading

cases are usually not viable . . . [as] judges do not like them, and juries will not want to 'reward' a criminal, even if his or her rights were clearly violated").

167. While qualified immunity has traditionally been raised primarily in motions for summary judgment, courts may be increasingly willing to grant qualified immunity on the pleadings. See *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (finding the question of qualified immunity to be justiciable as a question of law in a motion to dismiss); Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15 (2010).

168. See *Saucier v. Katz*, 533 U.S. 194 (2001); *supra* note 166.

169. See *Pearson v. Callahan*, 555 U.S. 223 (2009). Thus, a court may grant summary judgment to a defendant officer without ever deciding if that officer violated the plaintiff's constitutional rights.

170. See Diana Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117, 122 (2009) ("[Under the current qualified immunity regime], the benefit of the doubt goes to the defendant police officer. If there is any way his actions could have been believed to be a reasonable response to the situation, as perceived by the officer at the time, the Fourth Amendment is not violated.").

171. *Graham v. Connor*, 490 U.S. 386, 399 n.12 (1989).

172. *Id.* at 396–97.

173. *Id.* at 396 (citations omitted).

arrest.¹⁷⁴ Because of the distinctive properties of tasers, there are new considerations that courts should account for when assessing both the plaintiff's Fourth Amendment interest (the nature and quality of the intrusion) and the government's countervailing interests in safely effecting an arrest. As described below, pro-defendant biases are pervasive in excessive force cases, and taser cases in particular illuminate these biases regarding (1) determining the facts; (2) weighing the parties' interests in the *Graham* constitutional analysis; and (3) finding whether the right was clearly established in the qualified immunity inquiry, particularly when that right involves force that is technologically novel and its effects poorly understood.

1. Whose Facts? The Police Officer's Story Versus the Troublemaker's Story

The Supreme Court and the Ninth Circuit have stated that excessive force cases tend to entail complicated and disputed facts¹⁷⁵ that courts must resolve in the light most favorable to the plaintiff at the summary judgment stage.¹⁷⁶ Because of this, the Ninth Circuit has repeatedly asserted that "summary judgment in excessive force cases [is to] be granted sparingly"¹⁷⁷—a rather hollow admonition given summary judgment's pervasive role in excessive force litigation.¹⁷⁸ When deciding if a reasonable jury could conclude that the force was excessive, courts engage in

174. *Id.* These three factors have been adopted as the floor for a court's inquiry in the Ninth Circuit, with other factors also requiring consideration in given circumstances. See *Deorle v. Rutherford*, 272 F.3d 1272, 1283 (9th Cir. 2001) ("[W]here it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under *Graham*, the reasonableness of the force employed."); *Chew v. Gates*, 27 F.3d 1432, 1440 n.5 (9th Cir. 1994) (listing the following additional factors a court may consider: "whether a warrant was used, whether the plaintiff resisted or was armed," the number of suspects or officers involved, whether the plaintiff was sober, "the availability of alternative methods" of effecting the arrest, "the nature of the arrest charges," and "whether other dangerous or exigent circumstances existed at the time of the arrest").

175. See, e.g., *Scott v. Harris*, 550 U.S. 372, 383 (2007) (stating in an excessive force case that "we must still slough our way through the factbound morass of 'reasonableness'"); *Santos v. Gates*, 287 F.3d 846, 853 (9th Cir. 2002) ("[B]alancing [the plaintiff's interests with the countervailing governmental interest] nearly always requires a jury to sift through disputed factual contentions . . .").

176. See *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (stating that the court does not weigh conflicting evidence regarding facts but draws all inferences in the light most favorable to the nonmoving party).

177. *Santos*, 287 F.3d at 853; see also *Alexander v. Cnty. of Los Angeles*, 64 F.3d 1315, 1322 (9th Cir. 1995) (stating that in most excessive force cases, the question of reasonableness "is normally a jury question").

178. Cf. Craig M. Reiser, Note, *The Unconstitutional Application of Summary Judgment in Factually Intensive Inquiries*, 12 U. PA. J. CONST. L. 195, 208 (2009) ("[S]ummary judgment is still granted in excessive force cases where formalistic adherence to the standard should lead to a jury trial.").

Graham balancing by looking at the facts as asserted by both parties—in other words, courts weigh the stories told by “honorable police officers” against the stories told by “blameworthy troublemakers.”¹⁷⁹

This Subpart is not about summary judgment’s legal threshold for deciding whether there is a “genuine dispute as to any material fact”¹⁸⁰ or the overall increase in summary judgment grants,¹⁸¹ though such an inquiry would be highly relevant for excessive force cases.¹⁸² Rather, as the title indicates, this Subpart is about how courts determine the facts, which of course presupposes that, contrary to the federal procedural rules, this is actually something they do.¹⁸³ As demonstrated by some of the previously cited Ninth Circuit cases in which courts granted summary judgment without oral argument and by other cases indicating an “overly enthusiastic use of summary judgment” that undermines plaintiffs’ “constitutional rights to a day in court and jury trial,”¹⁸⁴ courts routinely determine the facts when engaging in *Graham* balancing.¹⁸⁵ Even less justifiable is an appellate court’s willingness to determine its own facts, reject those found by the trial court, and assert that, even though dissenting judges found material facts regarding the reasonableness

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179. Ian F. Haney López, *Is the “Post” in Post-Racial the “Blind” in Colorblind?*, 32 CARDOZO L. REV. 807, 820 (2011) (“[V]irtually any hint of culpability—of bad behavior—on the part of arrested minorities may serve for many to justify abusive police practices. In turn, hints of minority culpability raise the political costs of remonstrating against police abuse, for it can readily be portrayed as an attack on honorable police officers and an endorsement of undeserving and blameworthy troublemakers.”).
180. FED. R. CIV. P. 56.
181. See Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 706–07 (2007) (“Federal trial judges are now more likely to grant summary judgment, depriving litigants of the opportunity for jury trial (and the chance to have the merits of their claims determined by a more diverse group of decision makers). For this reason, the federal ‘summary judgment industry’ has been the subject of much recent scholarly attention.” (footnotes omitted)).
182. The increased use of summary judgment to prevent plaintiffs from arguing their case in front of a jury, especially in suits in which plaintiffs are vindicating their constitutional or statutory rights, has been widely criticized by scholars and some jurists. See John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522 (2007); Schneider, *supra* note 181; Adam N. Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81 (2006); Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139 (2007); Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897 (1998) (Wald is the former chief judge for the U.S. Court of Appeals for the District of Columbia).
183. *Contra Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (“[A]t the summary judgment stage the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.”).
184. Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1071 (2003).
185. Cf. Schneider, *supra* note 181, at 728 (stating that, when ruling on motions for summary judgment, “[d]istrict judges are now evaluating intent and credibility and acting as fact-finders”).

of an officer's force to be disputable, no reasonable jury could.¹⁸⁶ Such was the case when the Supreme Court majority in *Scott v. Harris*¹⁸⁷ decided that the deadly force at issue was objectively reasonable, garnering a scathing dissent from Justice Stevens, who caustically chastised his "colleagues on the jury" for "usurp[ing] the jury's factfinding function"¹⁸⁸ in order to hold that a police officer's use of deadly force was objectively reasonable.¹⁸⁹

A crucial issue, then, is whether plaintiffs can effectively convey their version of the story. Courts routinely tip the *Graham* balance by devaluing the plaintiff's narrative and privileging the defendant officer's narrative, which, despite the many reasons to be skeptical of it,¹⁹⁰ becomes the official narrative.¹⁹¹ Plaintiffs—who may well also be criminal defendants—"do not enjoy the presumption of credibility

186. See, e.g., *Scott v. Harris*, 550 U.S. 372 (2007); *Colston v. Barnhart*, 130 F.3d 96 (5th Cir. 1997). In both cases, the majority relied primarily on videotape evidence to determine that an officer's use of deadly force was reasonable and therefore entitled to summary judgment, despite contrary findings by the lower courts and dissenting judges. Cf. *Shager v. Upjohn Co.*, 913 F.2d 398, 403 (7th Cir. 1990) (Posner, J.) ("The growing difficulty that district judges face . . . due to docket pressures . . . makes appellate courts reluctant to reverse a grant of summary judgment merely because a rational factfinder could return a verdict for the non-moving party, if such a verdict is highly unlikely as a practical matter . . .").

187. 550 U.S. 372.

188. *Id.* at 395 (Stevens, J., dissenting).

189. *Id.* at 384–86 (majority opinion) (holding, based primarily on a videotape of the incident, that an officer's ramming the car of a suspect while in high-speed flight, resulting in the suspect's death, was objectively reasonable and thus entitled to qualified immunity). As one scholar put it in an article that preceded *Scott*, "If court of appeals judges can disagree so sharply as to the inferences to be drawn from the 'facts,' the summary judgments in [such cases] appear questionable. . . . [T]he clear disagreement among 'reasonable people' . . . suggests that to some degree the judges were both finding the facts and applying the law based on 'paper' presentations and that the merits should have been left until trial, when the record would be more fully developed and the trier better equipped to evaluate witness credibility." Miller, *supra* note 184, at 1131–32.

190. See, e.g., Jon Loevy, *Truth or Consequences: Police "Testilying"*, LITIGATION, Spring 2010, at 13, 14 ("Criminal defense attorneys insist that 'testilying' by police officers, as [lying in the courtroom] is sometimes referred to, has become so endemic in criminal cases that it has become the norm. The prosecutors know they are lying, the judges know they are lying, and yet the police lie anyway."); Lacks, *supra* note 163, at 417–22 (discussing pervasive problems regarding excessive force cases in some police departments with officers "testilying" or concealing the truth in investigations out of loyalty to fellow officers and officers conducting incomplete, inaccurate, and misleading witness interviews).

Indeed, the notion that it is routine for police officers to lie, or at least shade facts, is hardly foreign to the Ninth Circuit: According to Chief Judge Kozinski, "It is an open secret long shared by prosecutors, defense lawyers and judges that perjury is widespread among law enforcement officers." Amir Efrati, *Legal System Struggles With How to React When Police Officers Lie*, WALL ST. J., Jan. 29, 2009, at A12.

191. Cf. Troutt, *supra* note 62, at 21 ("[T]he apparently intractable problem of police use of excessive force and its relative immunity from federal (or state) criminal prosecution is made possible largely by an enduring mythology that influences normative conceptions of police behavior as well as legal treatment of such cases.").

and authority associated with [police] accounts and therefore must struggle to sustain their persuasive power.”¹⁹²

This imbalance is further tipped in favor of defendant officers when the plaintiffs are poor blacks or Latinos, groups disproportionately targeted by police and, during the encounter, disproportionately exposed to higher levels of force, including tasers.¹⁹³ These plaintiffs may be treated no more fairly once in the courtroom, where an officer’s story enjoys the presumption of credibility while the plaintiff’s story is met with skepticism.

a. Taser Cases: Partial Facts, Partial Factfinder

In the recent case of *Ciampi v. City of Palo Alto*,¹⁹⁴ the Northern District of California granted summary judgment to officers who tased Joseph Ciampi multiple times, deploying their tasers in both dart and drive-stun mode. Ciampi, a homeless man representing himself pro se, was approached by officers after a man called

192. *Id.* at 89; see also Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257, 306 (2007) (“There are numerous, documented cases of judges crediting police testimony that was so blatantly false that the prosecution could not have possibly met its burden of presenting a credible witness. Judges . . . get to know the jurisdiction’s police officers, and if a judge forms an opinion that an officer is a ‘good cop,’ it creates a natural tendency to believe that police officer is always telling the truth.” (footnote omitted)); cf. Schneider, *supra* note 181, at 711 (arguing, with respect to female plaintiffs specifically, but with similar implications for male plaintiffs in subordinated social positions, that “[t]here are many subtle ways in which judicial decision making with respect to summary judgment can be problematic,” including evaluating credibility and assessing the facts).

193. Many plaintiffs in taser cases seek relief on equal protection grounds, claiming that their race was a factor in the officers’ use of excessive force. Virtually none of these claims are successful. For Ninth Circuit examples, see *McKenzie v. City of Milpitas*, 953 F.2d 1387 (9th Cir. 1992) (unpublished disposition); *Gomez v. City of Fremont*, 730 F. Supp. 2d 1056 (N.D. Cal. 2010); *Eastman v. City of North Las Vegas*, No. 2:07-cv-01658-RLH-RJJ, 2010 WL 428806 (D. Nev. Feb. 1, 2010); *Martinez v. Spokane County*, No. CV-07-409-FVS, 2009 WL 3062472 (E.D. Wash. Sept. 22, 2009); *Murphy v. Coconino County Sheriff’s Office*, No. CV-08-8089-PHX-DGC, 2009 WL 2383016 (D. Ariz. July 31, 2009); *Jackson v. City of Pittsburg*, No. C 09-01016 WHA, 2009 WL 1684701 (N.D. Cal. June 12, 2009); *Garcia v. City of Ceres*, No. CV F 08-1720 LJO SMS, 2009 WL 529886 (E.D. Cal. Mar. 2, 2009); *Releford v. City of Tukwila*, No. C07-2009RSM, 2009 WL 497131 (W.D. Wash. Feb. 25, 2009); *Ortega v. City of Oakland*, No. C07-02659 JCS, 2008 WL 4532550 (N.D. Cal. Oct. 8, 2008); *Neal-Lomax v. Las Vegas Metropolitan Police Department*, 574 F. Supp. 2d 1170 (D. Nev. 2008); *Campos v. City of Glendale*, No. CV-06-610-PHX-DGC, 2007 WL 4468722 (D. Ariz. Dec. 14, 2007); *McDonald v. Pon*, No. C05-1832JLR, 2007 WL 4420936 (W.D. Wash. Dec. 14, 2007); *Rios v. City of Fresno*, No. CV-F-05-644 OWW/SMS, 2006 WL 3300452 (E.D. Cal. Nov. 14, 2006); *Beaver v. City of Federal Way*, No. CV05-1938MJP, 2006 WL 3203729 (W.D. Wash. Nov. 3, 2006); and *LeBlanc v. City of Los Angeles*, No. CV 04-8250 SVW (VBKx), 2006 WL 4752614 (C.D. Cal. Aug. 16, 2006).

194. 790 F. Supp. 2d 1077 (N.D. Cal. 2011).

911 to complain about Ciampi living out of his car near the man's house.¹⁹⁵ Though the 911 dispatcher told the resident that this was not a crime, three police officers—who would also acknowledge that Ciampi “was not violating any laws”—arrived on the scene to “check it out.”¹⁹⁶ Despite not suspecting him of any crime, the officers insisted that Ciampi open the car door and talk to them, even resorting to an unlawful “ruse” to “coerce [Ciampi] from his van.”¹⁹⁷ The court included a number of facts when it identified the countervailing governmental interests in tasing Ciampi. First, Ciampi was “upset” about being harassed by police.¹⁹⁸ Additionally, the officers’ erroneously believed that Ciampi was a heroin addict, which Ciampi denied, accurately explaining that the marks on his arm were from a skin condition, not a needle.¹⁹⁹ Ciampi also began calling a lawyer when the officers placed him under arrest for unidentified reasons, disobeying police orders to end the call. Finally, Ciampi stopped as he exited the vehicle to pick up an open bottle of soda that had fallen over, which one officer thought “could be a dry-ice bomb which could be used as a weapon against us.”²⁰⁰ The officers tased Ciampi at least twice in dart mode, aiming “in the direction of [Ciampi’s] face and groin area,” and then deployed the taser into his chest in drive-stun mode.²⁰¹ “In addition to the injuries acknowledged by Defendants,” which the court did not detail, Ciampi suffered a puncture wound upon falling, reporting “blood all over the back of his shorts from the wound.”²⁰² The court presented the officers’ versions of the story first in its opinion, despite being inconsistent and mutually conflicting,²⁰³ even after police allegedly tampered with the recordings, a claim Ciampi did not have the money to pursue. Ciampi’s version was consistent and supported by audio and visual recordings.²⁰⁴ Thus, at the outset of presenting

195. *Id.* at 1086.

196. *Id.*

197. *Id.* at 1087, 1090. “Concluding that the rest of the encounter flowed from the unlawful ruse, [the trial judge] dismissed the criminal complaint.” *Id.* at 1090.

198. *Id.* at 1086–87.

199. *Id.* at 1087 n.2 (“No party currently contends that Plaintiff is a heroin addict or unlawfully uses controlled substances.”). Upon noticing his skin condition, an officer asked Ciampi, “Are you a heroin addict or what?” *Id.* at 1087 (internal quotation marks omitted).

200. *Id.* at 1087–88.

201. *Id.* at 1087–89.

202. *Id.* at 1089.

203. *Id.* at 1086, 1088 n.3.

204. *Id.* at 1101–02. Ciampi was able to support his version of the story with evidence despite the police officers’ best efforts to obstruct him from doing so. The officers repeatedly failed to comply with discovery obligations, forcing the pro se plaintiff to file multiple motions to compel production of the recordings, which Ciampi “repeatedly argued . . . [had been] altered, manipulated, or even destroyed.” *Id.* at 1092–93. Despite Ciampi providing evidence indicating that the officers did in fact tamper

the facts, Ciampi was disadvantaged by his poverty; the benefit of the doubt afforded to the officers' story; and the presumption of reasonableness given to the officers' belief that they were dealing with a violent heroin addict who kept a dry-ice bomb in his van.²⁰⁵

* * *

The complicated and disputed nature of the facts is particularly salient in taser cases because of the number of variables related to tasers, such as how many times the taser was cycled, for what duration, in what mode, and so forth, particularly for protracted encounters involving multiple officers. Despite this observation and the Ninth Circuit's claimed reluctance to grant summary judgment in excessive force cases, Ninth Circuit appellate and district courts have granted summary judgment on qualified immunity grounds to defendants in several factually disputed taser cases, often doing so without even affording the opportunity for oral argument.²⁰⁶

with evidence, the court rejected this evidence because Ciampi did not take the expensive step of obtaining expert testimony. *Id.* at 1093 ("It also appears that Defendants and their expert have made errors during the discovery process that have contributed to Plaintiff's suspicions regarding tampering. . . . However, . . . Plaintiff has not produced admissible expert testimony suggesting that Defendants altered or tampered with the MAV or Taser recordings.").

205. After acknowledging the officers' unfounded presumption that Ciampi was a heroin addict, the court issues the reminder that "Defendants' actions must be judged based upon the reasonableness of their actions in light of the facts and circumstances confronting them at the time, [and a]lthough it appears that Plaintiff attempted to demonstrate that his sores were not consistent with drug use, given the tense and fast-moving circumstances, it was not unreasonable for Defendants to conclude otherwise." *Id.* at 1087 n.2, 1099.
206. *See, e.g.*, *Kanda v. Longo*, No. 2:09-CV-00404-EJL, 2010 WL 3000678, at *1 (D. Idaho July 27, 2010) (declining oral argument and granting summary judgment where an unarmed female victim, who was inebriated and had just been beaten by multiple assailants, was tased by officers who "then took hold of [the victim] and put her down face first" on the ground, a process which required the victim to replace broken ocular bones surgically); *Cutler v. Kootenai Cnty. Sheriff's Dep't*, No. CV-08-193-N-EJL, 2010 WL 2000042 (D. Idaho May 19, 2010) (declining oral argument and granting summary judgment where a guard shot an inmate with a taser despite the inmate having complied with the officer's command to freeze); *McMillian v. Gem County, Idaho*, No. CIV 07-078-S-EJL, 2008 WL 5069094 (D. Idaho Nov. 25, 2008) (declining oral argument and granting summary judgment where an officer shot a suspect with a taser despite the suspect's compliance with the officer's orders and the fact that the plaintiff told the officer prior to the tasing that he had suffered two heart attacks in the past); *Jensen v. Burnsides*, No. CV-06-2356-PHX-GMS, 2008 WL 4700020, at *1-2 (D. Ariz. Oct. 23, 2008) (declining oral argument and granting summary judgment where an officer tased the unarmed victim four times before shooting and killing him); *Ramirez v. City of Ponderay*, No. CV07-368-N-EJL, 2008 WL 2445483, at *3-4 (D. Idaho June 16, 2008) (declining oral argument and granting summary judgment where officers tased an unarmed father and son three times each, one of whom was suspected of DUI, and where the only physical contact made with an officer was the son's "push[ing the officer's] arm aside" and then

For many taser victims, the forces that make them susceptible to severe injury from being tased (Part I.B.3) and that increase the likelihood of being tased (Part I.C.3) converge, resulting in conditions that not only hurt them in their police encounter but also when they seek relief for their injuries in the courtroom. First, the taser victim may be unable to afford a lawyer or find one to take the case pro bono or on contingency, as many lawyers are very reluctant to take such cases.²⁰⁷ The taser victim who decides to press her Fourth Amendment claim then has no choice but to bring it pro se. Doing so all but eliminates the chances of relief, as demonstrated by a host of taser cases in which district courts within the Ninth Circuit granted summary judgment or a motion to dismiss against pro se plaintiffs despite allegations of severe constitutional violations.²⁰⁸ Excessive force cases are often expensive, but cases involving tasers and other technologically advanced police weapons require significant expenditures on expert witnesses from various disciplines,²⁰⁹ especially given the dearth of studies available that are not tied to TI.²¹⁰

“struggling” after being tased and placed in an arm lock); *Walker v. City of Post Falls*, No. CV07-264-N-EJL, 2008 WL 4997056, at *1-2 (D. Idaho May 21, 2008) (declining oral argument and granting summary judgment where officers tased an unarmed, handcuffed DUI suspect and where the court cited no facts indicating that the suspect posed a safety threat).

207. *Cf.* *Burton*, *supra* note 166, at 36 (advising lawyers about the hurdles facing plaintiffs in police misconduct litigation). John Burton, it should be noted, is not one of those very reluctant lawyers—he is currently leading the way in the Ninth Circuit to help taser victims obtain relief for their constitutional violation. *See Significant Cases*, LAW OFFS. JOHN BURTON, <http://www.johnburtonlaw.com/sigcases.htm> (last visited Apr. 3, 2012).
208. *See, e.g., Gomez*, 2010 WL 2898316; *Godinez v. Lara*, No. 1:10-cv-303 OWW GSA, 2010 WL 1798009 (E.D. Cal. May 3, 2010) (granting defendants’ motion to dismiss where officers tased plaintiff between nine and eleven times but pro se plaintiff did not allege specific enough actions by the officers in his complaint); *Zackery v. Stockton Police Dep’t*, No. CIV S-05-2315 MCE DAD P, 2008 WL 53224 (E.D. Cal. Jan. 2, 2008) (granting summary judgment to defendants against pro se plaintiff where the officers tased the plaintiff twice and where the degree to which the officers already had the plaintiff under control was disputed and not supported by evidence other than conflicting oral testimony); *McDonald*, 2007 WL 4420936 (granting summary judgment against pro se plaintiff where officers tased the unarmed plaintiff twice for noncompliance with verbal commands while arresting him for shoplifting even though the plaintiff was outnumbered by three officers and two security guards); *Cotton v. Donner*, No. C 06-0862 MJJ (PR), 2007 WL 1031260 (N.D. Cal. Mar. 30, 2007); *Ramsey v. Cortez*, No. CV 05-0300-PHX-FJM (DKD), 2006 WL 2947602 (D. Ariz. Oct. 16, 2006) (granting summary judgment to defendants where the question of whether they actually tased plaintiff was in dispute and where the pro se plaintiff failed to file a timely response to the motion).
209. *Cf.* John F. Pressley, Jr., *Litigation of Police Cases*, NAT’L BAR ASS’N MAG., Mar./Apr. 1995, at 16, 19 (“[P]laintiffs should be aware that expert testimony may be required prior to filing the complaint. Expert testimony can be expensive when one considers expenses related to preparation for deposition, conducting the deposition (including deposing the opposing party’s expert) and the expert’s trial testimony. Total costs can be prohibitive and experts normally require payment up front.”).
210. *See supra* note 44 and accompanying text.

Second, and most importantly, the plaintiff will have to contend with complex, interrelated biases that affect which facts the court will privilege and which story the court will believe. As discussed, a court may have a pro-police, anti-suspect/plaintiff bias,²¹¹ as well as a potential racial bias.²¹² The key obstacle to a fair determination of facts, though, comes from how these biases interact with (1) the little weight many judges give to pain, fear, and emotional distress as Fourth Amendment interests; and (2) the difficulty of verbalizing the experience of being tased in a way to which a judge can relate.

Judges frequently doubt, or are at least skeptical of, plaintiffs' allegations of painful mistreatment.²¹³ This skepticism is likely stronger when the pain is not a heightened version of a familiar injury, as with a baton blow, but rather an entirely unfamiliar one: the sensation of suddenly losing all motor functions, undergoing temporary paralysis, and being electrocuted. Moreover, the skepticism may derive from plaintiffs' difficulty in communicating that sensation. Indeed, one taser victim, a law student, described the pain as "indescribable,"²¹⁴ while a journalist and a taser expert, respectively, resorted to similes about muscles pulled apart with a fork, an attack by former-Governor Schwarzenegger, and being pounded by an imagined screwdriver-jackhammer device.²¹⁵ Along with the various forms of judicial bias at play, judges' "diminution and trivialization of the seriousness" of pain as an injury²¹⁶ and the challenge of describing an unfamiliar sensation add to the bias against plaintiff narratives. This bias, rather than stemming from the police-suspect dichotomy, may result because the narrative is often in the words of those at the intersection of subordinated social statuses.²¹⁷ As described by Lucie White in an

211. See *supra* note 192 and accompanying text.

212. See, e.g., Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010) (relying on social cognition empirical studies to identify implicit racial bias among judges and other state actors); Pedersen, *supra* note 156, at 107–09 (describing various studies indicating that implicit racial bias can affect an officer's decision to use force, and then a judge's decision when ruling on the reasonableness of that force).

213. See Bryan N. Georgiady, Note, *An Excessively Painful Encounter: The Reasonableness of Pain and De Minimis Inquiries for Fourth Amendment Excessive Force Claims*, 59 SYRACUSE L. REV. 123, 151 (2008) (noting that excessive force claims based on pain have "often raised suspicion").

214. Kiran Randhawa, *Taser and CS Could Make a Deadly Combination, Met Officers Warned*, LONDON EVENING STANDARD, Jan. 30, 2012, <http://www.thisislondon.co.uk/standard/article-24032006-taser-and-cs-could-make-a-deadly-combination-met-officers-warned.do> (internal quotation marks omitted).

215. See *supra* notes 56–57 and accompanying text.

216. Cf. Schneider, *supra* note 181, at 710–11 (referring to how judicial bias can lead to judges not taking harms suffered by women seriously when adjudicating motions for summary judgment).

217. The words referred to are those by which courts determine the facts at summary judgment—words spoken or written by the plaintiff at depositions, in declarations, or in other materials entered in the record. See FED. R. CIV. P. 56(c)(1)(A).

article exploring the sociolinguistic power dynamic between members of subaltern groups and the dominant discourse of the legal system:

Familiar cultural images and long-established legal norms construct the subjectivity and speech of socially subordinated persons as inherently inferior to the speech and personhood of dominant groups. Social subordination itself can lead disfavored groups to deploy verbal strategies that mark their speech as deviant when measured against dominant stylistic norms. These conditions—the web of subterranean speech norms and coerced speech practices that accompany race, gender, and class domination—undermine the capacity of many persons in our society to use the procedural rituals that are formally available to them. . . .

. . . [R]ecent research in linguistics and anthropology . . . suggests that when socially subordinated groups gain *formal* access to legal rituals, they are often perceived—and indeed may feel *compelled*—to speak in ways that invite dominant speakers to dismiss or devalue what they say.²¹⁸

White goes on to tell the story of Mrs. G., a poor black woman whose administrative hearing with the welfare office is marked by the themes of intimidation (stemming from Mrs. G.'s “position at the bottom accord[ing] her virtually no social or political power”),²¹⁹ humiliation (caused by the likelihood of the judicial officers not hearing her words as legitimate),²²⁰ and objectification (resulting from the testimonial constraints that forced her to speak only to issues bearing “little relation to her own feelings about the meaning and fairness of the state’s action”).²²¹ One could imagine the intimidation that someone in Jayzel Mattos’s position would feel at the hands of the system that was supposed to protect her, having first been harmed by her husband, then having a male officer press his body against hers before literally controlling her body with a taser,²²² and, finally, having to listen to her local community police officers tell a judge that she is lying. One could imagine the humiliation experienced by someone like Malaika Brooks, who stated that the tasings were “extremely painful” and “permanently scarred her”²²³ only to have judges dismiss her experience as “temporary, localized pain only”²²⁴ and go on to question her fitness as a mother and insist that, absent the tasings, the

218. Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 4–5 (1990).

219. *Id.* at 32.

220. *Id.*

221. *Id.* at 33.

222. *Mattos v. Agarano*, 590 F.3d 1082, 1084–85 (9th Cir. 2010).

223. *Brooks v. City of Seattle*, No. C06-1681RAJ, 2008 WL 2433717, at *2 (W.D. Wash. June 12, 2008).

224. *Brooks v. City of Seattle*, 599 F.3d 1018, 1026 (9th Cir. 2010).

pregnant Brooks might have picked the keys up from off the car floorboard, “start[ed] up the engine,” and “driven off and run over one of the children in the school zone.”²²⁵ And, finally, there is the objectification, manifested in the disjuncture between the confined mode and content of expression and the taser victims’ actual experience but present in another way as well. For Jayzel Mattos and Carl Bryan, who were shot with tasers in dart mode, part of that actual experience outside the realm of courtroom discourse was a literal objectification, a total loss of control over one’s own body caused not by any external overpowering, but rather by a forced internal separation of the mind and body.

Excessive force cases are “uniquely prone to narrative distortion and dilution.”²²⁶ But prior to that are the barriers of language itself. Among all these barriers and biases, taser cases further burden plaintiffs by asking them to provide the facts that explain how exposure to excruciating pain and traumatic emotional distress—how the process of becoming inanimate—intrudes on one’s security in their bodily integrity.

2. The Taser Tilt: Further Tipping the Pro-Defendant *Graham* Balance

The difficulty plaintiffs face in obtaining a fair and complete judicial interpretation of the facts is then compounded as these facts are applied to the substantive law of excessive force analysis, either under the qualified immunity inquiry or under *Graham v. Connor* balancing. Like with determining the facts, when determining a constitutional violation under *Graham*, “the benefit of the doubt goes to the defendant police officer. If there is any way his actions could have been believed to be a reasonable response to the situation, as perceived by the officer at the time, the Fourth Amendment is not violated.”²²⁷ Courts are likely to misjudge both the individual’s and the government’s interests in taser cases because these cases involve poorly understood technology and less serious observable injury (absent the severe unintended effects previously discussed). In the following examples, Ninth Circuit district and appellate courts failed to analyze adequately the intrusion into the plaintiff’s Fourth Amendment right to be secure in her bodily

225. *Mattos v. Agarano*, 661 F.3d 433, 455, 458 (9th Cir. 2011) (en banc) (Kozinski, J., concurring in part and dissenting in part). Appearing to relish deepening the humiliation, Chief Judge Kozinski condemned Ms. Brooks as an unfit mother, referring to her “stubborn effort to put . . . her unborn daughter in harm’s way,” and gleefully suggested that the city give the officers who tased Ms. Brooks “a commendation,” including a “substantial cash bonus.” *Id.* at 456, 458.

226. *Troutt*, *supra* note 62, at 98.

227. *Hassel*, *supra* note 170, at 122.

integrity²²⁸ by ignoring or giving minimal consideration to the intensity of the pain,²²⁹ the emotional distress endured, or the extent of the harm.

In the original panel's opinion in *Brooks v. City of Seattle*,²³⁰ the Ninth Circuit dismissed the pain inflicted as only "temporary" and "localized";²³¹ in the original panel's opinion in *Mattos v. Agarano*,²³² the panel stated that the plaintiff had offered no evidence about the nature of the force or the injury, despite the record showing ample testimony from the plaintiff about the extreme pain she endured.²³³ In *Tolosko-Parker v. County of Sonoma*,²³⁴ the Northern District of California granted summary judgment to defendant officers who tased a mentally ill man with a heart condition multiple times in an attempt to take him to a psychiatric hospital.²³⁵ The man went into cardiac arrest and died shortly after the encounter.²³⁶ The court failed to include in its intrusion analysis how many times and in what mode the victim was tased,²³⁷ the duration of the applications or where on the man's body they were applied, the risks of tasing a mentally ill individual with a heart condition,²³⁸ the availability of other methods to subdue the man in light of the risks raised by his mental illness,²³⁹ and, perhaps most egregiously, the possibility that the tasing at least partially caused the man's death, or that a jury could reasonably make such a finding.²⁴⁰ In *Law v. City of Post Falls*,²⁴¹ the district court granted summary judgment to officers who tased a seventy-five-year-old man already

228. See *United States v. Kreisel*, 508 F.3d 941, 948 (9th Cir. 2007) (stating, in the context of the Fourth Amendment's prohibition of unreasonable searches and seizures, that "bodily integrity [is] 'a cherished value in our society'" (quoting *Schmerber v. California*, 384 U.S. 757, 772 (1966))).

229. See *Georgiady*, *supra* note 213, at 124 (noting that courts often reject excessive force claims unless they pass the threshold for "actual injury," which tends to require long-term tissue damage).

230. 599 F.3d 1018 (9th Cir. 2010).

231. *Id.* at 1026.

232. 590 F.3d 1082 (9th Cir. 2010).

233. *Id.* at 1084.

234. Nos. C 06-06841 CRB, C 06-06907 CRB, 2009 WL 498099 (N.D. Cal. Feb. 26, 2009).

235. *Id.* at *1-3.

236. *Id.* at *1.

237. The only information given by the court is that "the deputies deployed their tasers." *Id.*

238. Even aside from the unique risks posed by tasers, the court failed to consider the man's mental illness as a factor affecting the reasonableness of force generally, as required in the Ninth Circuit. See *Deorle v. Rutherford*, 272 F.3d 1272, 1282-83 (9th Cir. 2001) ("In the . . . instance [of an unarmed, emotionally distraught individual resisting arrest], increasing the use of force may . . . exacerbate the situation . . . [W]here it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under *Graham*, the reasonableness of the force employed.>").

239. See *Chew v. Gates*, 27 F.3d 1432, 1440 n.5 (9th Cir. 1994) ("In some cases, . . . the availability of alternative methods of capturing or subduing a suspect may be a factor to consider [under *Graham*].")

240. See *Tolosko-Parker*, 2009 WL 498099, at *3-4.

241. 772 F. Supp. 2d 1283 (D. Idaho 2011).

physically subdued by two officers who were holding his arms. The court gave little consideration to the “severe burning pain” the plaintiff experienced, the effects on his nervous system and blood pressure that he testified to, the heightened risk of tasing someone who is seventy-five years old, or even the ways in which the use of force violated the police department’s own guidelines.²⁴²

In *Sanders v. City of Fresno*,²⁴³ Michael Sanders, an unarmed suspect who police believed was delusional and under the influence of cocaine, died after four officers tased him at least ten times.²⁴⁴ In granting summary judgment to the officers, the court failed to analyze adequately the nature-and-quality-of-the-intrusion half of the *Graham* balancing because it (1) analyzed “each officer’s use of force separately,” thus failing to examine fully the role that their combined force had in Sanders’s death;²⁴⁵ (2) did not consider the heightened risks posed by a taser to someone who had ingested narcotics strong enough to make him experience paranoid delusions;²⁴⁶ (3) stated, without support, that the pain caused by tasers was “temporary” and “considerably less . . . than other forms of force;”²⁴⁷ and (4) insinuated that the tasings did not contribute to Sanders’s death because he “clearly did not die immediately,”²⁴⁸ disregarding any information about the potential lethal effects of tasers on someone in his state.²⁴⁹

There are also questions about the implications of tasers for the “countervailing governmental interest” side of the *Graham* test. As noted, the potentially lowered efficacy of tasing a suspect in certain vulnerable groups, such as the intoxicated or

242. *See id.* at 1288–90, 1296–1301.

243. 551 F. Supp. 2d 1149 (E.D. Cal. 2008), *aff’d*, 340 F. App’x 377 (9th Cir. 2009).

244. *See id.* at 1156–61.

245. *Id.* at 1167. A similar approach was taken in *Ciampi v. City of Palo Alto*, 790 F. Supp. 2d 1077 (N.D. Cal. 2011), discussed in Part II.A.1.a, *supra*. By analyzing the taser applications separately, courts may be establishing a rule that, after an officer unreasonably tases a suspect, subsequent tasings will be found reasonable to quell resistance, even though (1) the resistance demonstrates that the taser was ineffective; (2) tasing likely *impeded* the governmental interest by making the suspect more violent and harder to control; and (3) multiple tasings increased the risks of severe injury or, as in *Sanders*, death.

246. *Sanders*, 551 F. Supp. 2d at 1169.

247. *Id.* at 1168. For this proposition, the court cited another Ninth Circuit district court case, *Beaver v. City of Federal Way*, 507 F. Supp. 2d 1137, 1142–43 (W.D. Wash. 2007), which did not provide authority for this statement and relied on the defendants’ expert witnesses for its facts about tasers. In that case, the defendant officers’ expert witness also stated that “being tased is painful” and can result in “disorient[ation] . . . and vertigo.” *Id.* at 1144.

248. *Sanders*, 551 F. Supp. 2d at 1168.

249. *See id.* (stating that no evidence had been presented showing that tasers can “create[] a substantial risk of death,” but not discussing the many studies and reports that had been published at the time positing the lethal capability of tasers).

the mentally ill, makes the governmental interest weaker.²⁵⁰ Particularly for intoxicated suspects, tasers may not only be ineffective, they may actually impede the arrest by making the suspect more agitated and even more physically dangerous.²⁵¹ The less effective taser use is in helping to subdue a suspect, the lower the governmental interest in using a taser will be. In such a situation, tasers may cause all the potentially deadly effects regarding heart rate and excited delirium but not cause a suspect to comply with an officer. Like in *Sanders* and other recent Ninth Circuit cases,²⁵² officers will frequently respond to this increased resistance by tasing the suspect multiple times and for increased durations, dramatically raising the physical risk to the suspect while potentially making the suspect increasingly difficult to subdue.²⁵³

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250. See COALITION FOR JUSTICE & ACCOUNTABILITY, *supra* note 70, at 1 (finding that, after a steady decline over five years of the use of deadly force, the San Jose Police Department's use of deadly force "spiked to near-record levels" after tasers were introduced, indicating that tasers may escalate situations rather than resolve them with minimal injuries); ANDREW MAIER ET AL., THE JOINT NON-LETHAL WEAPONS HUMAN EFFECTS CTR. OF EXCELLENCE, HUMAN EFFECTIVENESS AND RISK CHARACTERIZATION OF THE ELECTROMUSCULAR INCAPACITATION DEVICE—A LIMITED ANALYSIS OF THE TASER 25 (2005), available at <http://www.theiacp.org/LinkClick.aspx?fileticket=Nhks8yxUZ3k%3D&tabid=301> ("[Taser studies] contain[] very limited objective scientific research data on the . . . efficacy . . . of these devices.").
251. See *supra* Part I.B.3 (describing effects like "extreme agitation" and "superhuman strength").
252. See, e.g., *Marquez v. City of Phoenix*, No. CV-08-1132-PHX-NVW, 2010 WL 3342000 (D. Ariz. Aug. 25, 2010) (citing the TI warning in its analysis of the plaintiff's products liability claim against TI, granting summary judgment to defendant officers who tased a mentally ill man with a heart condition numerous times, resulting in his death, and focusing on the factors regarding the governmental interest but not on the aspects of tasers and the facts known about the victim that would illuminate the nature of the intrusion and the reasonableness of the force); *Goldsmith v. Snohomish Cnty.*, 558 F. Supp. 2d 1140 (W.D. Wash. 2008) (finding no excessive force where officers fired a taser in dart mode at a mentally ill suspect suffering from a panic attack and, after the suspect ripped the barbs from his abdomen, tased him again in both dart and drive-stun mode, which apparently did not subdue the suspect but did likely lead to the heart attack he suffered during the encounter); *Campos v. City of Glendale*, No. CV-06-610-PHX-DGC, 2007 WL 4468722 (D. Ariz. Dec. 14, 2007). In *Campos*, the plaintiff was in his house when four officers entered (possibly illegally, according to the one count for which the court denied summary judgment) to conduct a "welfare check" after his brother, arrested for firing a gun into the air, told the police that Campos was inside, sleeping, and was hard of hearing. *Id.* at *1 (internal quotation marks omitted). Campos, who was wearing just boxer shorts and thus unlikely to have a weapon on him, as the police allegedly feared, and whose eyes remained closed during the encounter, appeared to be uninjured and raised no concerns about his welfare. When Campos rolled over, an officer cuffed one wrist and, because Campos "recoiled," the officer "placed his taser gun on Plaintiff's back and fired it." *Id.* at *2. "When this did not result in Plaintiff's compliance, Sergeant McClausin fired the taser four or five more times." *Id.* The court held that the force was reasonable and, even if it were not, the officers would be entitled to qualified immunity. *Id.* at *3.
253. In addition to its implications for *Graham* balancing, this phenomenon raises a question that will likely be at issue in a future Ninth Circuit taser case: When a suspect exhibits conditions and behaviors indicating that taser use may be ineffective or may make the suspect even more difficult to

3. The Fourth Amendment's Unwinnable Race: Qualified Immunity and New Police Weapons Technology

Qualified immunity substantially advantages defendant police officers. The doctrine helps courts justify grants of summary judgment²⁵⁴ and provides defendants two opportunities to escape liability, both entailing their own pro-defendant biases.²⁵⁵ The second qualified immunity question, whether the unreasonableness of the force was clearly established, further disadvantages plaintiffs because of the constantly evolving nature of taser technology.²⁵⁶ This issue will surely be raised in the context of emerging police weapons that may similarly cause substantial harm under poorly understood conditions but purport to inflict pain while minimizing tissue damage, such as pain beams,²⁵⁷ Assault Intervention Devices,²⁵⁸ and Long Range Acoustic Devices.²⁵⁹ Under the prevailing formalistic interpretation

control and an officer unreasonably tases the suspect, should all subsequent taser deployments be considered unreasonable, regardless of the suspect's violent reaction?

254. Cf. Bronsteen, *supra* note 182, at 522 (“[S]ummary judgment creates a systemic pro-defendant bias due to the pressure on judges to move their dockets along by terminating cases rather than letting them proceed to trial.”).
255. See Hassel, *supra* note 170, at 118, 126–27 (citing commentators who maintain that treating the resolution of the Fourth Amendment issue as distinct from the resolution of the qualified immunity issue “unfairly benefit[s] the defendant,” creating what Hassel calls “a nearly impenetrable defense to excessive force claims”).
256. See *supra* note 35 (regarding TI's development of new taser weapons like the Taser XRep and the “taser grenade”).
257. See David Hambling, *US Police Could Get 'Pain Beam' Weapons*, NEW SCIENTIST, Dec. 24, 2008, <http://www.newscientist.com/article/dn16339-us-police-could-get-pain-beam-weapons.html> (reporting that the federal government is developing “weapons that inflict pain from a distance using beams of laser light or microwaves, with the intention of putting them into the hands of police to subdue suspects” despite widespread concerns about human rights abuses, including from one security expert who called the weapons “torture at the touch of a button”).
258. This 7.5-foot-tall, joystick-controlled machine that emits a softball-sized ray causing “an unbearable heating sensation in its targets” is being used against “unruly inmates” by at least one Los Angeles County jail. C.J. Lin, *Authorities at Castaic Jail Poised to Use Assault Intervention Device*, L.A. DAILY NEWS, Aug. 20, 2010, http://www.dailynews.com/news/ci_15845458; see Frank Quaratiello, *Raytheon Weapon Gets Heat*, BOS. HERALD, Aug. 29, 2010, http://bostonherald.com/business/general/view/20100829raytheon_weapon_gets_heat_aclu_sees_beam_device_as_torture. Echoes of the concerns igniting the taser controversies are already beginning: “[O]nly a handful of researchers have funded programmes focusing on [this type of technology's] interactions with biological systems. As such, there is a growing need for a better understanding of the mechanisms of these interactions and their possible adverse and therapeutic implications.” P.H. Siegel & V. Pikov, *Impact of Low Intensity Millimetre Waves on Cell Functions*, 46 ELECTRONIC LETTERS S70, S70 (2010).
259. Puck Lo, *Oakland Cops Decide to Not Use Sound Cannon on Protestors*, E. BAY EXPRESS, July 7, 2010, <http://www.eastbayexpress.com/92510/archives/2010/07/07/oakland-cops-decide-to-not-use-sound-cannon-on-protesters> (describing this crowd-control device, a “sonic cannon capable of causing

of qualified immunity, discussed below, the unreasonableness of the use of force for new weapon technologies will rarely be “clearly established.”

It may now be that, with each technological development in police weapons, even egregious constitutional violations will fail to result in the opportunity for a jury trial. In May 2011, the Supreme Court in *Ashcroft v. al-Kidd*²⁶⁰ may have significantly raised the bar for plaintiffs to overcome qualified immunity, making the “impenetrable defense to excessive force claims”²⁶¹ even more ironclad. The Court directed lower courts to identify the right alleged to have been violated with extreme specificity, thus making it more difficult to prove that the right was clearly established.²⁶² A police officer who injures someone severely and unreasonably with a new type of weapon will virtually never be held liable if courts interpret *al-Kidd* to compel finding it reasonable for the officer to not understand that his force was unreasonable. This is clearly demonstrated in the *Mattos v. Agarano/Brooks v. City of Seattle* en banc opinion²⁶³ in which Judge Schroeder writes in her concurrence:

One could argue that the use of painful, permanently scarring weaponry on non-threatening individuals, who were not trying to escape, should have been known to be excessive by any informed police officer under the long established standards of *Graham*. . . . Nevertheless, the Supreme Court’s opinion in *al-Kidd* appears to require us to hold that because there was no established case law recognizing *taser use* as excessive in *similar circumstances*, immunity is required.²⁶⁴

On this interpretation of *al-Kidd*, it will likely take many Fourth Amendment violations before the right not to be injured specifically by tasers, used in a specific way,²⁶⁵ and in specific circumstances is articulated—assuming courts reach the constitutional question at all²⁶⁶—and so too with each new form or model of

extreme pain,” which was going to be adopted by the Oakland Police Department until activists publicized the Department’s purchase order).

260. 131 S. Ct. 2074 (2011).

261. Hassel, *supra* note 170, at 118.

262. *Al-Kidd*, 131 S. Ct. at 2084.

263. *Mattos v. Agarano*, 661 F.3d 433 (9th Cir. 2011) (en banc).

264. *Id.* at 453 (Schroeder, J., concurring) (emphasis added).

265. See *supra* notes 38–39, *infra* notes 362–364 and accompanying text (discussing distinctions between a taser deployed in dart mode (which was designated a specific level of force by the Ninth Circuit in *Bryan*) versus drive-stun mode (which the Ninth Circuit refused to designate a specific level of force in *Brooks*)).

266. After *Pearson v. Callahan*, 555 U.S. 223 (2009), courts are free to grant qualified immunity solely because the asserted right was not clearly established, without ever reaching the question of whether the use of force described by the plaintiff constituted a Fourth Amendment violation.

technology.²⁶⁷ *Al-Kidd* further shifted excessive force law in favor of defendants by, without comment, changing the standard from the right being clearly established as understood by “a reasonable official,” to the right being clearly established as understood by “every reasonable official,” with an accompanying precedent that “place[s] the statutory or constitutional question *beyond debate*.”²⁶⁸ The definitional distinction between these two standards might be ambiguous, but the message from the Court is clear: Qualified immunity is the rule, and any exceptions (especially when made by the Ninth Circuit²⁶⁹) better be beyond doubt.²⁷⁰ However, this message does not necessarily match the law: It is not clear, for instance, how a case like *al-Kidd* involving material witness warrants translates to an excessive force analysis, nor is it clear that *al-Kidd* actually changed any legal rules. Nevertheless, as discussed in Part IV, the stridency of the Court’s message was enough for the Ninth Circuit to structure its qualified immunity analysis around *al-Kidd* in the *Mattos/Brooks* en banc rehearing. When it comes to cases involving new police weapons technology, especially those involving tasers in which courts are likely unreceptive to plaintiffs’ facts alleging a constitutional violation, exceedingly cautious readings of *al-Kidd* result in the immunity now effectively being absolute.

Thus, the distinctive properties of tasers illuminate several broader questions that excessive force jurisprudence has failed to answer and illustrate how these questions will become increasingly significant as taser controversies grow and new police technologies that maximize pain and minimize physical injury develop.

267. Whether such an interpretation of “clearly established” law has any connection to the fairness concept of an officer being on notice about the legality of the force at issue goes to the heart of criticisms of the qualified immunity doctrine. See Hassel, *supra* note 170, at 135 (“The cases in which a violation of the Fourth Amendment has been found and qualified immunity is granted to the defendants are even more analytically disingenuous.”); Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1067 (2010) (expressing skepticism that lawsuits like Bryan’s do much to deter police misconduct given the disconnect between court cases and the information obtained and considered by police officers).

268. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011) (emphasis added).

269. See N.Y. CIVIL LIBERTIES UNION, *supra* note 51, at 14–15 (“The growing legal consensus about the serious risk of pain, injury and death with Taser use parallels an increasing number of court decisions finding Taser use unconstitutional and sanctioning officers and law enforcement agencies for their improper use.”).

270. See *id.* at 2084 (admonishing that it has “repeatedly told courts—and the Ninth Circuit in particular” that the second prong of qualified immunity should be applied in a way that favors and defers to defendant officers (citing *Brosseau v. Haugen*, 543 U.S. 194 (2004))).

III. THE TASER STRUGGLE IN THE NINTH CIRCUIT: *BRYAN, MATTOS, AND BROOKS*

The Ninth Circuit is the epicenter of taser controversies,²⁷¹ as indicated by the large number of taser cases²⁷² and high-profile incidents²⁷³ emerging within its jurisdiction. As such, the Ninth Circuit's three most significant recent excessive force cases involving tasers—*Bryan v. MacPherson*²⁷⁴ and the two cases consolidated for rehearing en banc, *Brooks v. City of Seattle* and *Mattos v. Agarano*²⁷⁵—are likely to have broad influence.²⁷⁶

Furthermore, taser cases, and excessive force cases involving other forms of new police technology, are likely to increase in the Ninth Circuit at a higher rate than in other circuits because of the rapid pace of population growth,²⁷⁷ the

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271. It has also been a focus of excessive force controversies generally, having issued multiple influential decisions regarding Fourth Amendment § 1983 claims. These cases are influential either in establishing widely cited precedent and language or in adjudicating constitutional issues in a way eventually reversed by the Supreme Court. For the former, see, for example, *Smith v. City of Hemet*, 394 F.3d 689 (9th Cir. 2005), *Scott v. Henrich*, 39 F.3d 912 (9th Cir. 1994), and *Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994). For the latter, see, for example, *Katz v. United States*, 194 F.3d 962 (9th Cir. 1999), *rev'd sub nom. Saucier v. Katz*, 533 U.S. 194 (2001), and *Heller v. Busbey*, 759 F.2d 1371 (9th Cir. 1985), *rev'd sub nom. City of Los Angeles v. Heller*, 475 U.S. 796 (1986).
272. A Westlaw search for federal cases including the terms “taser,” “excessive force,” and “Fourth Amendment” resulted in 190 cases for the Ninth Circuit Court of Appeals and district courts within its appellate jurisdiction. This represents 27.4 percent of all federal cases containing these terms—a figure disproportionate to the population living within Ninth Circuit jurisdiction, which constitutes approximately 19.9 percent of the national population. Percentages are derived from U.S. Census Bureau estimated population totals for 2010. *Resident Population Data*, U.S. CENSUS 2010, <http://2010.census.gov/2010census/data/apportionment-pop-text.php> (last visited May 16, 2012).
273. According to Amnesty, which began collecting data in 2001, there have been more deaths related to police taser use in California than in any other state, with the data indicating an alarming trend: By 2004, Amnesty had recorded ten such deaths; by 2012, the number had jumped to ninety-two. *Compare* AMNESTY INT'L, *supra* note 7, at 71–85 (listing individually the ten taser-related deaths in California between 2001 and 2004), *with* Press Release, Amnesty Int'l, *supra* note 71 (recording ninety-two taser-related deaths in California between 2001 and 2012). As of 2008, the most recent year Amnesty published taser death numbers for all states, there had been seventy-eight taser-related deaths in Ninth Circuit states. AMNESTY INT'L, *supra* note 35, at 76.
274. 630 F.3d 805 (9th Cir. 2010).
275. *Mattos v. Agarano*, 661 F.3d 433 (2011) (en banc).
276. Since its disposition less than two years ago, *Bryan* has influenced courts' opinions in the Second, Third, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits. (Westlaw search run April 4, 2012).
277. Of the nine states in the Ninth Circuit, the population in eight increased at a higher rate over the last ten years than the national average, with the ninth state equaling the national average of 9.7 percent growth. *Resident Population Data*, *supra* note 272. The population growth was 35.1 percent in Nevada (the highest of all states nationally), 24.6 percent in Arizona (the second highest of all states nationally), and 10 percent in California. *Id.*

increased police use of tasers,²⁷⁸ and the increased police contacts for individuals who police suspect may be undocumented, a result of draconian state immigration laws.²⁷⁹ Thus, the 2010 opinion in *Bryan* and the 2011 en banc opinions in *Brooks* and *Mattos* are crucial for shaping the boundaries of when and how an officer may deploy a taser against a suspect in the Ninth Circuit, and whether exceeding those boundaries may result in legal relief for the suspect.

A. *Bryan v. MacPherson*

On July 24, 2005, twenty-one-year-old Carl Bryan was driving with his brother back to their parents' house after spending the night at his cousins' house when he was pulled over and issued a speeding ticket.²⁸⁰ The brothers had begun their long drive early in the morning—Bryan still wearing the t-shirt and boxer shorts he had slept in. After one hiccup involving someone mistakenly taking Bryan's keys and his having to borrow a car to retrieve them, the speeding ticket only worsened his mood.²⁸¹ After receiving the ticket, Bryan became emotional and began crying, removing his shirt and using it to wipe his face.²⁸² After trying to compose himself, Bryan continued driving toward his parents' house, but was

278. While taser use among traditional police agencies has been examined by many sources, there may be increasing calls for assessment of taser practices among border patrol officers. Cf. Leslie Berestein & Kristina Davis, *Man Shot With Taser in Fight at Border Dies*, U-T SAN DIEGO, June 1, 2010, <http://www.utsandiego.com/news/2010/jun/01/man-who-was-shot-with-taser-at-border-dies>; Press Release, Amnesty Int'l, Amnesty International Calls for Restrictions on Taser Use by U.S. Border Police Following Death of Mexican Migrant (June 3, 2010), available at <http://www.commondreams.org/newswire/2010/06/03-10>; *Illegal Immigrant Taser Death Ruled a Homicide*, NBC SAN DIEGO (June 2, 2010, 1:45 PM), <http://www.nbcsandiego.com/news/local/Illegal-Immigrant-Taser-Death-Ruled-a-Homicide--95449094.html>; Amy Isackson, *Border Crosser Shot With Taser Taken to Hospital*, KPBS (May 29, 2010), <http://www.kpbs.org/news/2010/may/29/border-crosser-shot-taser-taken-hospital>; Asraa Mustufa, *Undocumented Man in Coma After Taser Incident With Border Patrol*, COLORLINES (Apr. 14, 2011, 12:17 PM), http://colorlines.com/archives/2011/04/undocumented_man_in_coma_after_taser_incident_with_arizona_border_patrol.html.

279. See, e.g., Ed Pilkington, *Arizona Anti-immigration Law Already Felt in State's Hispanic Communities*, GUARDIAN, Apr. 24, 2012, <http://www.guardian.co.uk/world/2012/apr/24/arizona-immigration-law-hispanic-communities> ("Hispanic communities in Arizona are living in a state of virtual siege, civil rights activists in the state are warning, as a result of little-noticed provisions in the harsh anti-illegal immigration law SB 1070 that have already been allowed to go into effect."). Such laws have led to "hardline policing" tactics for anyone police suspect may be in the country without legal authorization, tactics encouraged by Maricopa County Sheriff Joe Arpaio, who is now "under federal investigation for racial profiling Hispanics in his region and for alleged abuse of power." *Id.*

280. *Bryan v. MacPherson*, 630 F.3d 805, 809, 822 (9th Cir. 2010).

281. *Id.* at 822.

282. *Id.*

stopped again, this time by Officer MacPherson, who was out patrolling for seatbelt violations.²⁸³

Bryan pulled over as directed, but, becoming upset, stepped out of the car, cursing at himself and “hitting his thighs,” while MacPherson stood twenty to twenty-five feet away.²⁸⁴ Bryan testified that he did not hear MacPherson tell him to remain in the car and that he remained standing in place.²⁸⁵ Though “the physical evidence indicates that Bryan was actually facing away from Officer MacPherson,” MacPherson asserted that Bryan took “one step” toward him.²⁸⁶ At this point, without warning, MacPherson fired his taser at Bryan, who experienced a “frightening blow,” “paralysis,” and “intense pain throughout his body” before he “fell, uncontrolled, face first into the pavement . . . , shatter[ing] four of his front teeth and caus[ing] facial abrasions and swelling.”²⁸⁷ Bryan was taken to the hospital “so that a doctor could remove” the “barbed probe lodged in his flesh . . . with a scalpel.”²⁸⁸

1. The Ninth Circuit’s Fight Over Carl Bryan Having His Day in Court

The controversy over police taser use in the Ninth Circuit is demonstrated by *Bryan*’s messy procedural history, which began with the trial court finding Carl Bryan’s claims fit for a jury and ended, several withdrawn and reversed opinions later, with the Ninth Circuit granting summary judgment to Officer MacPherson. First, the district court denied MacPherson’s motion for summary judgment, holding that a reasonable jury could find that there was a constitutional violation and that Bryan’s constitutional right was clearly established at the time.²⁸⁹ MacPherson unsuccessfully appealed; the Ninth Circuit panel affirmed the lower court’s holding.²⁹⁰ However, the panel then withdrew this opinion and issued a superseding one, this time reversing the lower court and granting summary judgment because, though MacPherson violated Bryan’s constitutional rights, those

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.* at 824, 826.

288. *Id.* at 824.

289. *Bryan v. McPherson*, No. 06CV1487-LAB (PCL), 2008 WL 344185, at *2 (S.D. Cal. Feb. 7, 2008) (denying summary judgment on qualified immunity grounds to Officer MacPherson because “[a] reasonable jury might infer from this evidence that a reasonable officer would have known a Taser was painful and that the resulting fall might cause injury”).

290. *Bryan v. McPherson*, 590 F.3d 767, 770 (9th Cir. 2009).

rights were *not* clearly established at the time.²⁹¹ At this point, Bryan filed a petition for an en banc rehearing. Upon rejecting the petition, the panel withdrew its second opinion and issued a third and final superseding opinion, this one containing only minor modifications and still granting summary judgment.²⁹² In this final opinion, the dissent from judges urging rehearing en banc (not to reach a different outcome, but to reach the same outcome in a more defendant-friendly way) makes clear that the case is as heated as it is complicated.

The controversy-generating parts of *Bryan* were its finding that Bryan's alleged facts could reasonably state a constitutional violation and the standard it set that tasers deployed in dart mode constitute "an intermediate, significant level of force."²⁹³ In arriving at this conclusion, *Bryan* took a step in the direction of fairly applying the *Graham* balancing test: The level of analysis the court gave to the quality and nature of the intrusion was more thorough and precise than most taser case opinions. That is, the court gave more consideration to Bryan's injuries, his pain, and, to a lesser extent, his fear and emotional distress.

In its analysis, the court cites a string of cases indicating the painful nature of being tased, refers to the "intense pain" and "high levels of pain" that Bryan experienced, and twice describes the "painful and frightening blow" caused by tasers.²⁹⁴ The court goes on to state that "[a] reasonable police officer with Officer MacPherson's training on the X26 [taser] would have foreseen" that Bryan would experience "paralysis" and "excruciating pain . . . radiate[] throughout [his] body"; that Bryan's face would be "smashed" into the pavement, "shatter[ing] four of his front teeth and caus[ing] facial abrasions and swelling"; and that a "barbed probe [would] lodge[] in his flesh, requiring hospitalization."²⁹⁵ In addition, the panel gave some attention to the unintended effects that can accompany taser use, including potential blindness from an errant dart, skull fractures from a subject collapsing after being incapacitated, and even mentioning the risk of death, albeit in a footnote.²⁹⁶

Further, the court notes that MacPherson tased Bryan "[w]ithout . . . warning" and that Bryan "did not pose an immediate threat to Officer MacPherson or

291. *Bryan v. MacPherson*, 608 F.3d 614, 618 (9th Cir. 2010).

292. *Bryan*, 630 F.3d 805 (denying petition for rehearing en banc and superseding previous opinion with new opinion still granting summary judgment on qualified immunity grounds).

293. *Id.* at 826.

294. *Id.* at 811, 824–26.

295. *Id.* at 824, 826.

296. *See id.* at 814, 825 n.7.

bystanders,”²⁹⁷ as he “was obviously and noticeably unarmed, made no threatening statements or gestures, did not resist arrest or attempt to flee, [and] was standing inert twenty to twenty-five feet away from [MacPherson].”²⁹⁸ Finally, in addressing the dissent to the en banc denial, the panel stated that MacPherson’s belief that Bryan was “mentally ill” militated against the reasonableness of the force, not in its favor as urged in the dissent.²⁹⁹ Given the relative depth of this Fourth Amendment intrusion analysis, *Bryan* should serve as a baseline for the proper application of this side of the *Graham* balancing test.³⁰⁰

However, the panel then found itself in the difficult position of reconciling these arguments with its holding that the unreasonableness of the force and the foreseeable effects were not clearly established, a particularly dubious conclusion given the reasoning in *Wakefield v. City of Escondido*.³⁰¹ Two months before MacPherson tased Bryan and in the same judicial district, the *Wakefield* district court denied summary judgment and granted a jury trial,³⁰² a decision affirmed by the Ninth Circuit because the defendant officers “without warning deployed taser shots against an unarmed individual who was partially restrained, who had committed no serious offense, who was in the throes of a claustrophobic attack, and who pleaded with [the officer] not to shoot him.”³⁰³ According to the Ninth Circuit, “Under those facts, ‘closely analogous pre-existing case law’ is not required to put

297. *Id.* at 822, 826.

298. *Id.* at 809.

299. *See id.* at 829 (“[I]f Officer MacPherson believed Bryan was mentally disturbed he should have made greater effort to take control of the situation through less intrusive means.”).

300. One aspect of MacPherson’s force that the court failed to include in its balancing, though, was MacPherson’s *continued* use of force after Bryan was not only subdued, but hospitalized. According to Bryan, while at the hospital, handcuffed to the bed, MacPherson objected to doctor requests to remove the handcuffs and instructed the doctors not to provide Bryan with any pain medication, as MacPherson wanted to have Bryan “tested.” *See* Brief for Plaintiff/Appellee at 11, *Bryan v. MacPherson*, 630 F.3d 805 (9th Cir. 2010) (No. 08-55622), 2008 WL 6659359; *cf.* *LaLonde v. Cnty. of Riverside*, 204 F.3d 947, 961 (9th Cir. 2000) (“[I]n a situation in which an arrestee surrenders and is rendered helpless, any reasonable officer would know that a continued use of the weapon or a refusal without cause to alleviate its harmful effects constitutes excessive force.”).

301. Nos. 05-56769, 05-56809, 2007 WL 2141457 (9th Cir. July 26, 2007).

302. *See* Appellant’s Principal Brief at 2, *Wakefield*, Nos. 05-56769, 05-56809, *aff’g* No. CV-03-01094-MLH/JMA (S.D. Cal. Oct. 18, 2005), 2006 WL 2427537 (stating that the district court denied summary judgment based on qualified immunity in May 2005 and entered the jury’s verdict in August 2005).

303. *Wakefield*, 2007 WL 2141457, at *1; *cf.* Scott Marshall, *Escondido Pays \$280,000 in Excessive-Force Case*, N. COUNTY TIMES, Sept. 28, 2008, http://www.nctimes.com/news/local/escondido/article_0c2d7739-dffc-5464-9025-2f02a0e0ed60.html (describing the results of the August 2005 *Wakefield* trial).

[the officer] on notice that his conduct was unlawful.”³⁰⁴ *Wakefield* has been ignored in virtually all subsequent taser cases, with its only citation narrowing its applicability to the constitutional *Graham* inquiry when the plaintiff was handcuffed or otherwise restrained at the time of the tasing.³⁰⁵

As described, the *Bryan* court first makes strong arguments indicating that MacPherson should have known that his use of force was clearly unreasonable.³⁰⁶ The court proceeds to strengthen the argument *against* qualified immunity by citing cases holding that “analogous case law” is not necessary “to show that a right is clearly established.”³⁰⁷ The court then makes an abrupt about-face based on three questionable premises: (1) at the time of the encounter, there was no Supreme Court or Ninth Circuit decision addressing whether a taser in dart mode constituted an intermediate level of force; (2) tasers are “relatively new” and the “case law . . . is developing”; and (3) *Brooks* and *Mattos*, both of which by the time of the final opinion were vacated pending en banc rehearings and thus carried no weight, had recently concluded that the law was not clearly established.³⁰⁸

2. The Dissent to the Denial of a Rehearing En Banc

Bryan requested that the summary judgment order be reconsidered in an en banc rehearing, a move that turned out to be quite risky for future similarly situated plaintiffs given that all the pressure to grant *Bryan*’s request came from judges who wanted to reconsider the constitutional finding of excessive force, not the finding of qualified immunity. The strikingly personal and aggressive dissent by three judges to the denial of a rehearing en banc,³⁰⁹ in addition to being a precursor to Chief Judge Kozinski’s bitter dissent in the consolidated *Brooks/Mattos* en banc

304. *Id.* (citation omitted).

305. *See Ciampi v. City of Palo Alto*, 790 F. Supp. 2d 1077 (N.D. Cal. 2011).

306. The court found:

All of the factors articulated in *Graham* . . . placed Officer MacPherson on fair notice that an intermediate level of force was unjustified. Officer MacPherson stopped *Bryan* for the most minor of offenses. There was no reasonable basis to conclude that *Bryan* was armed. He was twenty feet away and did not physically confront the officer. The facts suggest that *Bryan* was not even facing Officer MacPherson when he was shot. A reasonable officer in these circumstances would have known that it was unreasonable to deploy intermediate force.

Bryan v. MacPherson, 630 F.3d 805, 832–33 (9th Cir. 2010) (citations omitted).

307. *Id.* at 833.

308. *Id.* (citations and internal quotation marks omitted).

309. *See id.* at 815–17, 821 (Tallman, J., dissenting) (accusing the panel of “endanger[ing] officers and citizens,” misleadingly conveying the facts of the case, “apply[ing] the wrong standards to reach its desired result,” and relying on “bad law”).

opinion,³¹⁰ illustrates judicial refusal to recognize plaintiffs' perspectives and the distinctive properties of tasers. One of the first aspects of the court's opinion that the dissent attacks is the factual narrative. In stating the facts, the court told the story chronologically beginning with Bryan's actions leading up to the encounter with Officer MacPherson.³¹¹ Judge Tallman's dissent states that this was erroneous because *Graham* mandates that facts be related and interpreted only from the perspective of a reasonable officer at the scene.³¹²

This, though, is not a plausible interpretation of *Graham*, which was silent on how courts should state the facts, and such an interpretation would make it even more difficult for courts to adequately consider the Fourth Amendment intrusion, which would actually violate *Graham*. First, the actual language in *Graham* does not indicate that the Court was trying to establish a rule about how courts must tell the story of the incident at issue; rather, the Court stated, "The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight,"³¹³ a mandate with which the *Bryan* court complied.³¹⁴ Relating the complete set of facts is not prohibited by *Graham*, and doing so is essential if courts are to ascertain the reality of police encounters and a given use of force.

Second, if the *Graham* Court were trying to establish such law regarding how courts convey the facts of the case, it likely would not have begun its own statement of facts with:

On November 12, 1984, Graham, a diabetic, felt the onset of an insulin reaction. He asked a friend, William Berry, to drive him to a nearby convenience store so he could purchase some orange juice to counteract the reaction. Berry agreed, but when Graham entered the store, he saw a number of people ahead of him in the check-out line. Concerned about the delay, he hurried out of the store and asked Berry to drive him to a friend's house instead.³¹⁵

Finally, the dissent's use of *Graham* to establish the rules for assessing whether an officer is entitled to qualified immunity is not convincing given that the *Graham*

310. These opinions and the dissent are discussed *infra* Parts IV.A and IV.B and in the Conclusion.

311. *Bryan*, 630 F.3d at 822 (majority opinion).

312. *Id.* at 817 (Tallman, J., dissenting from denial of rehearing en banc) (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989)).

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

314. *See Bryan*, 608 F.3d at 831–32.

315. *Graham*, 490 U.S. at 388–89.

Court explicitly declined to express a view on qualified immunity.³¹⁶ For these reasons and all those discussed in Part II.A.1 about subordinating plaintiffs' stories, the dissent's argument on this point should have no influence on developing excessive force jurisprudence regarding relating or determining the facts.

One of the most troubling aspects of the dissent is the judges' lack of knowledge (or decision to ignore the knowledge) regarding the distinctive properties of tasers and how they would affect *Graham* balancing. To argue that the force was reasonable, the dissent offers that MacPherson thought Bryan "might be high on PCP" or "mentally ill."³¹⁷ A cursory review of the literature, or even some district court taser decisions, would tell the judges that these two factors, by increasing the risk of severe harm and decreasing the likelihood of the taser being effective, should push the balance toward unreasonableness.³¹⁸ Further, the dissent claims that the record "unequivocally established that the application of a taser to an individual is medically safe and unlikely to cause injury."³¹⁹ However, of the four sources cited to support this claim, the only one that bears real legitimacy is the one that most likely contradicts, or at least qualifies, the claim.³²⁰

This dissent illustrates how excessive force debates not only privilege defendant officers but may reframe the terms of the debate to exclude completely victims of police misconduct. On the one side is an extreme dissent that disregards the

316. *Id.* at 399 n.12. The dissenting judges' misguided reliance on a principle they implausibly attribute to *Graham* is particularly ironic given the criticism of a Ninth Circuit precedent later in the dissent, which faults the court in *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001), for "quot[ing] *Graham* out of context." *Bryan*, 630 F.3d at 819 (Tallman, J. dissenting).

317. *Bryan*, 630 F.3d at 816 (Tallman, J. dissenting).

318. See *supra* notes 86–97 and accompanying text (discussing cases and studies indicating the risks for intoxicated suspects, especially those on narcotics like PCP); *supra* notes 104–109 (discussing cases and studies indicating the risks for mentally ill suspects).

319. *Bryan*, 630 F.3d at 819.

320. The four sources are MacPherson's testimony about his own taser experience, testimony from the Coronado Police Department's taser expert, materials from TI, and a report from the International Association of Chiefs of Police (IACP). *Id.* MacPherson, the police department, and TI all faced liability at one point in the litigation and thus have a clear stake in emphasizing the safety of tasers. The IACP, while surely having a police-friendly angle, is a source of legitimate information and has made clear that much taser safety "data does not yet exist" and that tasers may induce heart arrhythmia in susceptible populations. See INT'L ASS'N OF CHIEFS OF POLICE, ELECTROMUSCULAR DISRUPTION TECHNOLOGY: A NINE STEP STRATEGY FOR EFFECTIVE DEPLOYMENT 5 (2005). Further, the IACP has promulgated a model taser policy that would have forbidden MacPherson's taser use because Bryan was not demonstrating "an overt intention (1) to use violence or force against the officer or another person, or (2) to flee in order to resist or avoid detention or arrest (where the officers would pursue on foot)." AMNESTY INT'L, *supra* note 35, at 16 (quoting INT'L ASS'N OF CHIEFS OF POLICE, ELECTRONIC CONTROL WEAPONS, MODEL POLICY (2005)).

facts about tasers that are integral to *Graham* balancing in order to call for broad changes to Ninth Circuit law³²¹ that would add even more oppressive hurdles to potential excessive force claims. On the other side is a majority intent on denying any relief to the plaintiff and that dedicates its full opinion regarding the denial of plaintiff's en banc petition to jabbing back at the dissent. Carl Bryan is on no side, his request for reconsideration of whether he can make his case to a jury deemed too outside the bounds of debate for comment. It is from this context—the *Bryan* battle between an extreme pro-defendant side and a compromising, moderately pro-defendant side—that the *Mattos* and *Brooks* rehearings arose.

B. *Mattos v. Agarano*

In August 2006, a physical altercation occurred between Jayzel Mattos and her husband, Troy, during which Jayzel asked their daughter to call the police.³²² By the time four officers arrived at the Mattos's home, the altercation was over. Troy, who was sitting outside, complied with the officers' request to have Jayzel come to the door to make sure she was safe.³²³ One of the officers waited until Troy had walked into the house to find Jayzel and then stepped inside. When Troy returned with Jayzel and saw this, he demanded that the officer leave his house, as Jayzel had agreed to speak with the officers outside.³²⁴ Though Jayzel also repeatedly asked the officers to "leave the house[] and not disturb her [sleeping] children[,]," another officer stepped into the house to arrest Troy, "bump[ing] against Jayzel" who stood between them.³²⁵ Jayzel felt "uncomfortable and exposed" and "raised her hands, palms forward at her chest, to 'keep [the officer] from flushing his body against [hers].'"³²⁶ In response, an officer shot his taser in dart mode at Jayzel's hand,³²⁷ causing what she described as "an incredible burning and painful feeling locking all of [her] joints."³²⁸ (The original Ninth Circuit panel failed to ascertain what the use of force was and weighed the effects of "a Taser in the drive stun mode," not dart mode).³²⁹

321. See *Bryan*, 630 F.3d at 818–19 (Tallman, J., dissenting) (criticizing the majority for relying on sound Ninth Circuit precedents and calling for a departure from these precedents).

322. *Mattos v. Agarano*, 590 F.3d 1082, 1084 (9th Cir. 2010).

323. *Id.*

324. *Id.*

325. *Id.* at 1084–85.

326. *Id.* at 1085.

327. *Id.*

328. *Id.*

329. *Id.* at 1087.

The district court denied defendants summary judgment on qualified immunity grounds; the Ninth Circuit appellate panel reversed, holding that the use of force was objectively reasonable. Significantly, the court reached this *Graham* conclusion about the quality and nature of the intrusion versus the governmental interest while declaring it “difficult . . . to opine with confidence regarding either the quantum of force involved in a deployment of a Taser gun or the type of force inflicted,” as the plaintiffs had “not offered any evidence about the kind of force or injury a Taser inflicts.”³³⁰ The court did not consider Jayzel’s testimony that the tasing was “incredibly painful” and similar to childbirth as constituting such evidence.³³¹ As elaborated in Part IV, the Ninth Circuit’s original *Mattos* opinion in particular demonstrates why, in cases involving new police weapons technology like tasers, the Ninth Circuit should take the approach it has taken in cases involving new police search technology in order to fulfill the requirements of *Graham*.

C. *Brooks v. City of Seattle*

In November 2004, an officer pulled over Malaika Brooks, who was seven-months pregnant, for driving 32 miles per hour in a 20-miles-per-hour school zone while dropping her son off at Seattle’s African American Academy.³³² The officer gave Brooks a notice of infraction, which she agreed to accept but refused to sign, objecting that she had not been speeding and, when a second officer arrived, doubting his assertion that signing was not an admission of guilt.³³³ After “exchang[ing] heated words,” the officer lied to Brooks by saying that if she did not sign the notice, “she

330. *Id.*

331. *Id.* At least one judge on the panel, Judge Bybee, may not be receptive to the legal significance of a plaintiffs’ experience of pain. See Memorandum From Jay Bybee, Assistant Attorney Gen., to Alberto Gonzales (Aug. 1, 2002), available at http://www.washingtonpost.com/wp-srv/politics/documents/chenev/torture_memo_aug2002.pdf (memorandum popularly known as one of the “torture memos” cowritten by Judge Bybee, justifying the federal government’s use of practices that many consider to be torture); see also *Russo v. Beaton*, 234 F. App’x 725 (9th Cir. 2007) (memorandum opinion) (denying oral argument and affirming summary judgment to three defendant officers who tackled plaintiff, an armed robbery suspect who visibly disposed of his gun, as he was dropping to the ground in compliance with police orders, after which an officer dug his knee into plaintiff’s hand, broke his finger, and denied him medical treatment).

332. See *Brooks v. City of Seattle* 599 F.3d 1018, 1032 n.2 (9th Cir. 2010) (Berzon, J., dissenting), *aff’d in part, rev’d in part sub nom. Mattos v. Agarano*, 661 F.3d 433 (9th Cir. 2011) (en banc); Hector Castro, *Pregnant Woman ‘Tasered’ by Police Is Convicted*, SEATTLE POST-INTELLIGENCE, May 9, 2005, <http://www.seattlepi.com/local/article/pregnant-woman-tasered-by-police-is-convicted-1172950.php>.

333. *Mattos*, 661 F.3d at 437.

would go to jail.”³³⁴ A third officer then arrived and told Brooks she was under arrest. When she asked why, the officer did not respond.³³⁵ Instead, the officer unholstered his taser and asked Brooks if she knew what it was. After replying that she did not, Brooks told the officers that she needed to use the restroom, adding, “I’m less than 60 days from having my baby.”³³⁶ The three male officers ignored Brooks’s request to use the bathroom (which obviously would have served their goal of her exiting the car) and instead discussed how to go about tasing her.³³⁷ “All the while, [the officer holding the taser] appeared to be very agitated and continued yelling at Brooks This frightened her.”³³⁸

After Brooks stated she did not know what the taser was, one officer opened the car door, removed the keys from the ignition and dropped them on the car floor, and grabbed Brooks’s arm, twisting it behind her back while another officer sparked his taser as a demonstration.³³⁹ Brooks “stiffened her body” and, with her free hand, “clutched the steering wheel,” frustrating the officer’s attempt to remove her.³⁴⁰ The officer continued to twist Brooks’s arm behind her back while the other officer, twenty-seven seconds after demonstrating the taser, deployed it in drive-stun mode against her thigh. In the span of forty-two seconds, the officers tased Brooks in her thigh, arm, and, most dangerously, neck, during which time Brooks cried, screamed in pain, and banged her hand against the car horn.³⁴¹ After the third tase, Brooks slumped over in her car. The officers “dragged her out” of the car and on to the ground, laying Brooks on her stomach and “handcuffing her hands behind her back.”³⁴² As a result of the encounter, Brooks suffered “extreme pain,”

334. *Id.* Brooks’s refusal to sign the notice was a nonarrestable offense at the time; today, it is not an offense at all as signature is no longer required. *See Brooks*, 599 F.3d at 1032 (Berzon, J., dissenting).

335. *Mattos*, 661 F.3d at 437.

336. *Id.* (internal quotation marks omitted). One officer, apparently not listening to Brooks, replied by asking her how pregnant she was. *Id.*

337. *Id.*

338. Plaintiff/Appellee’s Responsive Brief, *Brooks v. City of Seattle*, 599 F.3d 1018 (2010) (No. 08-35526), 2008 WL 6690729.

339. *Mattos*, 661 F.3d at 437. This demonstration is a use of force frequently referred to as an arc display and is generally an appropriate step for officers to take before deploying a taser at a suspect.

340. *Id.*

341. *See id.*; *Brooks*, 599 F.3d at 1032 (Berzon, J., dissenting). Experts consider tasing someone in the neck to be particularly dangerous, and doing so is restricted in many model taser policies and police agency guidelines. *See ACLU OF N. CAL.*, *supra* note 28, at 19; AMNESTY INT’L, *supra* note 35, at 53; N.Y. CIVIL LIBERTIES UNION, *supra* note 51, at 17.

342. *Mattos*, 661 F.3d at 437.

“permanent burn scars,” a “rapid heartbeat”³⁴³ that concerned the examining doctor later that day, and, “in all likelihood, emotional pain.”³⁴⁴

The district court denied defendant officers summary judgment, but the Ninth Circuit panel reversed, finding that there was no Fourth Amendment violation and stating that the force used, because the taser was deployed in drive-stun mode, not dart mode as in *Bryan*, was “less than . . . intermediate.”³⁴⁵ The appellate panel was dismissive of Brooks’s injuries, stating that tasers in drive-stun mode cause “temporary, localized pain only,” mentioning Brooks’s permanent scarring only to deem her injuries “far less serious” than those suffered by Carl Bryan,³⁴⁶ and ignoring the question of how her pregnancy factors into the reasonableness analysis of taser use.³⁴⁷ In its *Graham* analysis, the panel further displayed many of the pro-defendant biases discussed in Part II, several of which were ameliorated in the en banc opinion but reemphasized in the en banc dissent, as discussed below in Part IV.B.³⁴⁸

IV. THE *MATTOS* AND *BROOKS* EN BANC REHEARINGS AND IMPLICATIONS FOR A FAIRER APPROACH TO TASER CASES

Like *Bryan*, the Ninth Circuit’s consolidated en banc opinion in *Mattos* and *Brooks* takes some important steps toward a fairer approach to taser cases, while at the same time denying plaintiffs the opportunity for a jury trial on questionable qualified immunity grounds, inadequately assessing certain factors in the *Graham* balancing, and leaving unresolved several questions of law that are sure to arise in other taser cases. Also like *Bryan*, the incendiary partial dissent to the en banc opinion

343. *Id.* at 438, 443.

344. *Brooks*, 599 F.3d at 1032 (Berzon, J., dissenting).

345. *Id.* at 1026–28 (majority opinion).

346. *Id.* at 1026–27. In contrast, the district court in multiple instances considered Brooks’s experience of pain, referring to it as “extreme” and “intense” and quoting Brooks’s testimony about the pain. *See Brooks v. City of Seattle*, No. C06-1681RAJ, 2008 WL 2433717, at *2, *4 (W.D. Wash. June 12, 2008).

347. *See supra* notes 69, 112, 148 and accompanying text (discussing how pregnancy heightens the risk of severe harm inflicted by tasers). Shortly after Brooks’s police encounter, Seattle revised its use-of-force policy, directing officers to evaluate a suspect’s conditions “that may . . . increase the indirect risks . . . of the deployment[, including] subjects who are very old or very young, *pregnant*, physically disabled, suffering from a debilitating illness or medical condition, or drug users.” SEATTLE POLICE DEPT., *supra* note 131, at 3 (emphasis added).

348. One example of pro-defendant bias that did not arise in the en banc opinion but that bears importance for excessive force cases generally is the court’s consideration of the first *Graham* governmental interest factor, the severity of the crime. The court defined the crime as “obstructing an officer,” not failure to sign the citation. *Brooks*, 599 F.3d at 1028. Thus, the court essentially counts the third *Graham* factor (resisting arrest) twice, improperly tipping the balance in favor of the countervailing governmental interest.

reveals the hostility toward excessive force plaintiffs held by many judges and how, for these judges, cases involving tasers and similar technologically advanced police weapons can be disposed of without any real inquiry into the quality and nature of the intrusion, and thus without any clarity shed on the legal questions raised by such weapons.³⁴⁹

A. Telling the Story

The court tells Jayzel Mattos's and Malaika Brooks's stories in a more complete and fair way than seen in the original opinions. The court does this, first, by adequately setting the scene. Regarding Mattos, while some inferences are left to be drawn, the court describes the following: After enduring a violent altercation with her husband, three officers arrived at the home, followed later, for unclear reasons, by Officer Aikala, the apparent source of the belligerence and violent escalation.³⁵⁰ The court describes how Jayzel and an officer agreed to speak outside to avoid waking her children, "but, before she could comply, Aikala entered the residence," blocking Jayzel. The court states that, while Jayzel was speaking with the other officer and "attempting to defuse the situation," Aikala "pushed up against Jayzel's chest"; the court then uses Jayzel's words to describe how she "extended [her] arm to stop [her] breasts from being smashed against Aikala's body."³⁵¹ Aikala further interrupted Jayzel from speaking with the officer by, despite his having made contact with her, intimidatingly asking, "Are you touching a police officer?"³⁵² The court concludes the story using its own narrative and Jayzel's testimony: "Then, without warning, Aikala shot his taser at Jayzel in dart-mode. Jayzel 'felt an incredible burning and painful feeling locking all of [her] joints [and] muscles and [she] f[e]ll hard on the floor."³⁵³ Regarding Brooks, the court adequately presents the facts in

349. I discuss the partial dissent below but provide the following quotation here to demonstrate that my "incendiary" characterization is not hyperbolic: "The majority and concurrence get the law wrong . . . This mistake will be paid for in the blood and lives of police and members of the public." *Mattos v. Agarano*, 661 F.3d 433, 458 (9th Cir. 2011) (en banc) (Kozinski, J., concurring in part and dissenting in part).

350. The majority, though, does not go quite as far in conveying Aikala's belligerence and unreasonableness as Judge Silverman, who in his partial dissent writes, "If Mattos's story is credited and Aikala's disbelieved, Officer Aikala dropped a nuclear bomb when a BB gun would have sufficed." *Id.* at 459 (Silverman, J., concurring in part and dissenting in part).

351. *Id.* at 449 (internal quotation marks omitted).

352. *Id.* at 439 (internal quotation marks omitted).

353. *Id.* (alterations in original) (citation omitted). The original Ninth Circuit panel, in addition to discounting Jayzel's experience of pain, omits the crucial fact that no officer warned her before she was tased. See *Mattos v. Agarano*, 590 F.3d 1082 (2010).

the light most favorable to the plaintiff and provides details about the most relevant aspects of the encounter, such as where on Brooks's body the police applied the taser and how much time elapsed between each tasing.³⁵⁴

Second, the court tells the story in a way that gives due attention to the specific qualities of the use of force. The court explained how the "aluminum darts penetrated Jayzel's skin" and, quoting *Bryan*, how electrical pulse overrides the central nervous system, paralyzes the body, and "render[s] the target limp and helpless."³⁵⁵ As cited above, the court then describes Jayzel's experience of pain, often quoting her words, and also notes the secondary dart-mode effect of her collapsing to the ground. Regarding Brooks, the court established certain facts—namely, Brooks's pregnancy, where she was tased, how many times, and for what duration—that have critical implications in taser cases.³⁵⁶

Third, the court sets out legally significant facts that the original Ninth Circuit panels ignored or stated incorrectly. For *Mattos*, the court emphasized that no warning preceded the tasing, finding that this fact—which was omitted entirely by the original panel—"pushes this use of force far beyond the pale."³⁵⁷ For both *Mattos* and *Brooks*, the court is careful to identify whether the taser was deployed in dart mode (*Mattos*) or drive-stun mode (*Brooks*).³⁵⁸ The court's consideration of the legal implications distinctive to either type of force is discussed below, but taking the first step of identifying how the taser was used is important in light of prior cases that fail to identify the mode³⁵⁹ and in light of the original *Mattos* opinion, which misidentified the use of force as a taser deployed in drive-stun mode.³⁶⁰

Finally, in conveying the story, the majority rebukes the dissent's "rank speculation" of conceivable ways in which Brooks may have posed a threat, such as her having a spare key with which she could have started her car and sped off.³⁶¹ The majority's rebuke highlights the tension between interpreting the plaintiff's story in the most favorable light versus finding reasons to defer to officers' claims that

354. *Mattos*, 661 F.3d at 437.

355. *Id.* at 449 (quoting *Bryan v. MacPherson*, 530 F.3d 805, 824 (9th Cir. 2010)) (internal quotation marks omitted).

356. *Id.* at 437–38.

357. *Id.* at 451. Further, the court cited to multiple Ninth Circuit excessive force cases and cases involving tasers to support finding an officer's use of force unreasonable when the officer does not issue a warning despite having the opportunity to do so. *Id.*

358. *Id.* at 443, 449.

359. *E.g.*, *Tolosko-Parker v. Cnty. of Sonoma*, Nos. C 06-06841 CRB, C 06-06907 CRB, 2009 WL 498099 (N.D. Cal. Feb. 26, 2009) (discussed in Part II.A.2, *supra*).

360. *Compare id.*, with *Mattos v. Agarano*, 590 F.3d 1082, 1087 (2010).

361. *Mattos*, 661 F.3d at 444 n.5.

there was sufficient threat to justify the use of force. Similarly, the court corrects the original *Mattos* panel's error of giving undue weight to the threat posed by Troy, rather than by Jayzel, the proper subject of *Graham's* threat inquiry and who the court emphasized "posed no threat to the officers."³⁶² Given that threat is the most important factor in establishing the government's countervailing interest³⁶³ and that courts have routinely characterized tasers as relatively low levels of force, properly conveying facts potentially salient to the threat factor is critical for fair *Graham* balancing in taser cases.³⁶⁴

B. Applying the *Graham* Balancing Test

Most significantly for taser cases as a whole in the Ninth Circuit, the court insisted on addressing *Graham's* constitutionality-of-the-force question first (as previously required under *Saucier v. Katz*)³⁶⁵ rather than the qualified immunity doctrine's clearly-established question (as now permitted under *Pearson v. Callaban*)³⁶⁶ in order to "promote[] the development of constitutional precedent' in an area where this court's guidance is sorely needed."³⁶⁷

Like in *Bryan v. MacPherson*,³⁶⁸ the en banc court moved in the right direction in its analysis of the nature and quality of the intrusion by distinguishing between drive-stun mode and dart mode and addressing the implications of either type of force for the *Graham* balance. For Brooks in particular, the court improved upon the original panel's dismissive treatment of the intrusion caused by a taser in drive-stun mode by citing the "extreme pain" she endured and the resulting "permanent

362. *Id.* at 449. The court emphasized that the correct inquiry is whether "the suspect posed an immediate threat" and, because Jayzel was the suspect, analyzed whether "she posed an immediate threat to the officers' safety." *Id.* (quotation marks and citation omitted). This clarification helped rectify the original panel's discomfiting finding that a wife calling the police to report that her husband is acting threateningly can be shot with a taser on the justification that the husband was, in fact, acting threateningly.

363. See *Chew v. Gates*, 27 F.3d 1432, 1441 (9th Cir. 1994) (describing "threat" as "the most important single element of the three specified [*Graham*] factors").

364. While the threat posed by someone other than the suspect/plaintiff is germane to the question of reasonableness, that threat is properly considered as part of the *Graham* totality-of-the-circumstances analysis. See *Mattos*, 661 F.3d at 450. Given the increase in police weapons technologies like tasers that can be used for pain compliance and crowd control, see *supra* notes 40, 257–259, the court's clarification of the threat analysis is particularly important and should cast doubt on future cases that rely on precedents in which the threat considered came primarily from a crowd, not the victim of the allegedly excessive force. See, e.g., *Jackson v. City of Bremerton*, 268 F.3d 646 (9th Cir. 2001); *Eberle v. City of Anaheim*, 901 F.2d 814 (9th Cir. 1990).

365. 533 U.S. 194 (2001).

366. 555 U.S. 223 (2009).

367. *Mattos*, 661 F.3d at 440 (quoting *Pearson*, 555 U.S. at 224).

368. 590 F.3d 767 (9th Cir. 2009).

burn scars.³⁶⁹ Regarding both *Mattos* and *Brooks*, the court included the experience of pain in its *Graham* balancing by referring to the personal testimony from the plaintiffs and the findings of other courts about the pain inflicted. By doing so, the court sets an important precedent of analyzing the case-specific nature of the harm while also setting a baseline approach for future analyses in which plaintiffs are unable to articulate their personal experience in a way to which courts are receptive. Thus, even a court that unfairly discounts the plaintiff's testimony of pain, as the original *Mattos* appellate court did,³⁷⁰ should at least rely on the legally significant findings of harm in past cases that would apply to all cases in which that type of force is used.

Regarding *Brooks*, the court examined the quality of the force in the context of a broad application of *Graham* that stresses the totality of the circumstances over the specific government-interest *Graham* factors.³⁷¹ The court thus looks at the quality and nature of the taser use in specific relation to the officers' interest in using such force. The court analyzed the fact that "the officers knew about and considered *Brooks's* pregnancy before tasing her" and the fact that the officers "tased *Brooks* three times over the course of less than one minute."³⁷² The multiple shocks in a short time frame indicate unreasonableness both because they constituted a more significant constitutional intrusion and because they only delayed the governmental interest of effecting the arrest, as they "provided no time for *Brooks* to recover from the extreme pain she experienced, gather herself, and reconsider her refusal to comply."³⁷³ Contextualizing the *Graham* balance by weighing the specific aspects of the taser use is particularly appropriate for nontraditional weapons for which the amount of force used is highly dependent on specific circumstances and choices made by the officer, such as where to apply the taser, how many times, and for how long.

However, because courts generally have failed to apply the distinctive properties of tasers to the *Graham* balancing test, the steps in the right direction taken by the *Mattos/Brooks* en banc court were only first steps, stopping well short of an analysis that thoroughly fleshes out the facts and implications of tasers as a use of force. A more thorough application of *Graham* would have meaningfully incorporated factors like emotional distress and fear, provided an explanation of how pain is operationalized as a Fourth Amendment intrusion factor, considered the risk of unintended

369. *Mattos*, 661 F.3d at 438, 443.

370. *See supra* Part III.B.

371. *Mattos*, 661 F.3d at 441.

372. *Id.* at 445.

373. *Id.*

severe harm³⁷⁴ as a salient reasonableness factor (particularly for the pregnant Brooks),³⁷⁵ and analyzed the muscle paralysis and collapse³⁷⁶ that accompany being tased in dart mode as distinct harms implicating Fourth Amendment values of physical bodily integrity as well as privacy in and autonomy over one's body. The court notes most of these salient facts but then fails to examine how they specifically alter the value put on either side of the *Graham* balance. This is especially true for Brooks, who the court said "has not experienced any lasting injuries from the tasing."³⁷⁷ The court does not explain why Brooks's permanent burn scars are outside the category of lasting injury. Nor does the court ever mention Brooks's emotional distress stemming from fear of harm to the fetus, much less explain why that is not a lasting injury.³⁷⁸

C. Assessing Qualified Immunity

1. Qualified Immunity and New Police Weapons Technology

The court's discussion of qualified immunity illustrates the uniquely prohibitive barriers for plaintiffs in cases featuring evolving and poorly understood police technology, as discussed in Part II.A.3. For example, in analyzing whether the law was clearly established regarding Brooks, the court discusses three out-of-circuit cases involving tasers and, because they are all markedly different from *Brooks*, finds that the law was not clearly established.³⁷⁹ Yet no cases are discussed presenting similar facts but involving a weapon other than a taser. This might be defended on the

374. In *Mattos*, consideration of the risks of unintended harm from tasers might closely resemble the court's consideration of the risks of danger facing police officers responding to domestic violence calls. See *id.* at 450; *id.* at 457 (Kozinski, J., concurring in part and dissenting in part). As part of the totality of the circumstances analysis, the court would be justified in considering general information about both risks for suspects accompanying taser use and risks for officers accompanying domestic violence situations because they are risks about which a reasonable officer would be aware. The court implies a pro-defendant bias by only considering the latter, particularly given that the force used was against the alleged victim of the domestic violence.

375. Cf. *id.* at 453 (Schroeder, J., concurring) ("[T]he focus should be on whether the officers had properly taken into account the risk of harm to the child in using the taser.").

376. "As many as thirteen percent of taser targets are injured by falls." *McKenney v. Harrison*, 635 F.3d 354, 363 (8th Cir. 2011).

377. *Mattos*, 661 F.3d at 438.

378. See Plaintiff/Appellee's Responsive Brief, *supra* note 338 ("Brooks is distressed that she and her daughter may suffer some future illness or disability from the effects of the taser. Brooks is also concerned that she may suffer a future heart ailment because she experienced tachycardia . . . after she was arrested.").

379. See *Mattos*, 661 F.3d at 446–48.

notion I have previously put forth, that tasers and similar weapon technologies have distinctive properties and should be given particularized assessment. This, though, is where qualified immunity in relation to the *Graham* analysis is the most logically inverted.

Under *Graham*, the inquiries into the extent of the injury and the countervailing governmental interest are necessarily highly fact specific. For example, on the intrusion side in taser cases, a precedent involving pepper spray will fail to shed much light on the type of pain suffered and the range of potential unintended effects. On the governmental interest side, it will fail to shed light on the usefulness of taser deployment to subdue the threat at issue. In a qualified immunity analysis, however, it seems fair—and obvious—to assume that police officers understand the knowable effects of the use of force they are deploying.³⁸⁰ Tasing a man on a ledge in dart mode would violate clearly established law even if there were no precedents involving tasers.³⁸¹ This is not because of the obviousness of the rights violation³⁸² but rather because there is plentiful case law on deadly force.

In this way, a precedent involving pepper spray or another use of force could carry great weight in a principled qualified immunity inquiry, as the question should be whether it is clearly established that, in that circumstance, it is unreasonable to cause a suspect to fatally fall off the ledge, not whether it is clearly established that it is unreasonable to shoot the suspect with a taser. Yet, by relying on three cases using the word “taser,” the *Brooks* court adopts this latter approach to shield the defendant officers from liability.

380. This argument assumes that a use of force behaves as should be expected, which includes the little-understood risks attending certain variables. That is, it should be assumed that an officer understands the risk of tasing a suspect on certain stimulants, even if those effects are not well understood, as distinguished from an officer who has no reason to know that her taser will malfunction and release twice the voltage it is supposed to.

381. A variation on this hypothetical situation in which an officer tases a man in dart mode as he is running toward the ledge, however, may not be so easy. See *McKenney*, 635 F.3d 354 (finding no constitutional violation where an officer deployed his taser in dart mode as the suspect ran toward a window, incapacitating the suspect’s body while he plummeted to the ground, resulting in fatal injuries).

382. Cf. *Hope v. Pelzer*, 536 U.S. 730, 731 (2002) (considering the obviousness of the right in its denial of qualified immunity). *Hope* is likely an insubstantial entry in the development of qualified immunity jurisprudence, particularly outside its prison context, due to its politically charged facts and ugly imagery (involving guards in the deep south shackling a shirtless prisoner to a hitching post for hours under the hot sun) and the subsequent tightening of the qualified immunity doctrine by cases like *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011). Though the *Mattos/Brooks* en banc court cited *Hope*’s proposition that qualified immunity can be denied “even in novel factual circumstances” when summarizing the general law, the court showed no intention of actually relying on this precedent and did not discuss it at all in relation to either *Mattos* or *Brooks*. *Mattos*, 661 F.3d at 442 (internal quotation marks omitted).

Looking ahead, qualified immunity will likely be implicated by the court's decision not to determine "what level of force is used when a taser is deployed in drive-stun mode,"³⁸³ as the Ninth Circuit had previously done in *Bryan* regarding dart mode.³⁸⁴ On the one hand, this decision, attributed to an insufficient record for making such a determination, should not matter much—excessive force cases are highly fact specific, and the facts Brooks alleged were found to state a constitutional violation, regardless of how tasers in drive-stun mode are classified. But on the other hand, after *al-Kidd*, courts are likely to look hard for reasons to defer to officers' judgment and hold that the law was not clearly established.

2. Qualifying *Graham*: Qualified Immunity as Compromise?

The preceding Subpart described the concern that a plaintiff's lawsuit will be dismissed on qualified immunity grounds because the use of force in question is too modern or poorly understood to have generated law meeting the "clearly established" threshold. But there is a less obvious concern that may be more significant for the law generally: In a case like *Mattos/Brooks*, the qualified immunity doctrine may be a tool for compromise, resulting in distortion that pervades the court's findings and conclusions.

This proposition necessarily contests the conception of the constitutional question and the "clearly established" question as two distinct inquiries, as mandated by *Saucier v. Katz*³⁸⁵ and clearly demonstrated by *Pearson v. Callahan*,³⁸⁶ which permitted cases to be resolved on either inquiry without ever reaching the other. In *Mattos/Brooks*, these inquiries may have a more complicated relationship if one accepts that a majority of judges had the goal of compromise via qualified immunity, a presumption that can be inferred from the strong disagreement among many of the district and appellate judges involved throughout the *Mattos*, *Brooks*, and *Bryan* cases³⁸⁷ as well as from the Supreme Court's admonishment to the Ninth Circuit in *Ashcroft v. al-Kidd*.³⁸⁸ If this is the case, qualified immunity as a form of

383. *Mattos*, 661 F.3d at 443.

384. See *Bryan v. MacPherson*, 630 F.3d 805, 810 (9th Cir. 2010) (designating tasers in dart mode as an "intermediate, significant level of force").

385. 533 U.S. 194 (2001).

386. 555 U.S. 223 (2009).

387. See *supra* Part III (describing the complicated procedural history of the cases and the various dissents); *infra* notes 409–413 (describing the sharply worded and conflicting opinions among the judges on the *Mattos/Brooks* en banc panel).

388. 131 S. Ct. 2074, 2084 (2011) ("We have repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality." (citation omitted)).

compromise functioned not only to grant summary judgment to the defendant officers, but perhaps to distort the *Graham* balance.

Using Mattos's claims as an example, an adequate examination of both sides of the *Graham* balance—which, as I have argued, properly takes into account the distinctive properties of tasers and the plaintiff's actual experience of harm—should lead to the conclusion that every police officer should know that it is unreasonable to, without warning, subject a nonsuspect, who posed no threat, to extreme pain and temporary paralysis on the basis that she reflexively put her hands up as a belligerent officer aggressively flushed his body against her breasts.³⁸⁹ However, given the vehement opposition from a minority of Ninth Circuit judges³⁹⁰ and the fear of Supreme Court reversal after *al-Kidd*,³⁹¹ the en banc majority may have perceived that finding the defendant officers entitled to qualified immunity was the safest way also to find that they violated Mattos's Fourth Amendment right against excessive force. Thus, this type of compromise, likely to arise in cases involving new police technologies, demonstrates how the *Graham* and qualified immunity inquiries may not be distinct but rather connected, contingent, and adaptable to reconcile judges' desire to shield officers from liability with the egregious facts specific to the case. On this understanding, the en banc court reached the desired compromise by calibrating the *Graham* balance to justify finding a constitutional violation while plausibly maintaining that the law was not clearly established such that a reasonable officer should know that the tasing would be a constitutional violation.

Whether qualified immunity after cases like *al-Kidd* and *Pearson* will impede the development of clearly established law has received much attention, but the above discussion further posits that the qualified immunity doctrine can impede the development of clearly established facts, thus distorting the *Graham* balance and its precedential value. In a case like *Mattos*, fleshing out the facts and their Fourth Amendment implications would demonstrate a stark imbalance between the quality and nature of

Notably, the notion of compromise here is in the judicial context—in the context of the plaintiffs, it is unlikely that they view the years of litigation and ultimate decision to deny them the opportunity for a trial as a compromise.

389. See *supra* Part III.B.

390. See *supra* notes 225, 309–321, 349, 361 and accompanying text (discussing the dissenting opinions in *Bryan* and the *Mattos/Brooks* en banc rehearing).

391. See *Mattos v. Agarano*, 661 F.3d 433, 453 (9th Cir. 2011) (en banc) (Schroeder, J., concurring) (putting forth an argument for denying qualified immunity before stating, “Nevertheless, the Supreme Court’s opinion in *al-Kidd* appears to require us to hold that because there was no established case law recognizing taser use as excessive in similar circumstances, immunity is required.”).

the intrusion and the countervailing governmental interest.³⁹² Finding the officers entitled to qualified immunity on such facts risks exposing qualified immunity as a legal technicality rather than a principle of fairness based on a realistic assessment of whether “a reasonable person would have known” that the alleged conduct violated a clearly established right.³⁹³ In order to grant qualified immunity in a principled way, then, the *Mattos* en banc court’s factual analysis would have to (1) support finding a severe enough constitutional violation to counter the dissent’s warning that holding the force unconstitutional is a “mistake [that] will be paid for in the blood and lives of police and members of the public”;³⁹⁴ and (2) support finding that the constitutional violation was not so severe as to reduce qualified immunity to a legal technicality divorced from the reality of what a reasonable officer should know about the constitutionality of the allegedly excessive force. Thus, what I have framed as an inadequate application of *Graham* in taser cases may be the natural consequence of seeking compromise.

D. A Fairer Approach to *Graham* Balancing in Taser Cases

The foregoing discussions of *Mattos*, *Brooks*, and *Bryan* demonstrate how aspects of excessive force jurisprudence that disadvantage plaintiffs—including telling the story, measuring the Fourth Amendment intrusion, assessing the governmental interests, and applying the qualified immunity doctrine—are particularly acute and observable in cases involving new police technologies like tasers. Such cases also raise the less generalizable question of how courts should determine reasonableness when presenting the distinctive properties of a technologically novel use of force places too high a burden on plaintiffs who already must navigate courts’ frequent unreceptiveness to their factual narratives and claims of injury.³⁹⁵ Below, I propose that, in order to comply with *Graham*, courts in such cases must acquire the information about tasers or similar weapons necessary to understand the quality and nature of the intrusion.

392. *Cf. id.* at 459 (Silverman, J., concurring in part and dissenting in part) (“If *Mattos*’s story is credited and Aikala’s disbelieved, Officer Aikala dropped a nuclear bomb when a BB gun would have sufficed.”).

393. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)) (internal quotation marks omitted).

394. *Mattos*, 661 F.3d at 458 (Kozinski, J., concurring in part and dissenting in part).

395. Such cases demonstrate the unfairness of putting the burden of helping the court understand what tasers actually are on the nonmoving party at summary judgment. This problem reflects the issue of “courts as a whole . . . fail[ing] to develop a uniform approach to burdens of production and persuasion in § 1983 qualified immunity cases.” Ravenell, *supra* note 166, at 136.

While the en banc court appears to have rejected the original *Mattos* panel's claim of not having enough information about tasers or their effects to render confidently a decision on the reasonableness of the force,³⁹⁶ the assertedly inadequate record is never addressed directly. It should be. The expressed difficulty of ascertaining the nature and quality of the force is likely to trouble future courts hearing claims regarding forms of police weapons technology like tasers that usually inflict a large amount of pain without leaving long-term physical injuries—but that can also cause severe unintended harm. This type of problem, though, is not novel for federal courts generally or the Ninth Circuit specifically. For a fairer approach to cases presenting this problem, courts should look to precedents regarding novel technology in contexts such as searches under the Fourth Amendment.

Much attention has been given to reconciling modern police technology and the right against unreasonable searches,³⁹⁷ most influentially by the Supreme Court in *Kyllo v. United States*.³⁹⁸ *Kyllo* originated in the Ninth Circuit, which was tasked with deciding whether the police's use of a novel thermal imaging device to detect heat waves associated with marijuana grow lights constituted a Fourth Amendment search.³⁹⁹ Regarding the intrusiveness of the police technology, the Ninth Circuit court stated:

[T]his inquiry cannot be conducted in the abstract. We must have some factual basis for gauging the intrusiveness of the thermal imaging device, which depends on the quality and the degree of detail of information that it can glean. For example, our analysis will be affected by whether, on the one extreme, this device can detect sexual activity in the bedroom, as [plaintiff's] expert suggests, or, at the other extreme, whether it can only detect hot spots where heat is escaping from a structure.

The district court, however, held no evidentiary hearing and made no findings regarding the technological capabilities of the thermal imaging device used in this case. . . . Without explicit findings, we are ill-equipped to determine whether the use of the thermal imaging device constituted a search within the meaning of the Fourth Amendment. Accordingly, we remand to the district court for findings on the technological capacities of the thermal imaging device used in this case.⁴⁰⁰

396. See *supra* note 319 and accompanying text.

397. The most recent example in the Supreme Court concerned the question of whether police officers' attaching a GPS tracking device to a suspect's vehicle constituted a Fourth Amendment search. See *United States v. Jones*, 132 S. Ct. 945 (2012).

398. 533 U.S. 27 (2001).

399. *United States v. Kyllo*, 37 F.3d 526, 528–30 (9th Cir. 1994).

400. *Id.* at 530–31 (footnote omitted).

The Supreme Court in *Kyllo* further gathered information not just on the effects of the new thermal imaging technology but also on the *potential* effects in different circumstances.⁴⁰¹ The Ninth Circuit should do the same in taser cases, especially when the plaintiff, like the pregnant Brooks, is a member of a group particularly susceptible to severe harm.

This language from the Ninth Circuit and the Supreme Court, with the appropriate adaptation, could have been used in any number of taser cases in which issues regarding drug intoxication, mental health, pregnancy, obesity, age, or the relationship between taser use and pain were present, particularly in light of the number of documented deaths and severe injuries following police tasing.⁴⁰² In making a constitutional evaluation like the original panel was asked to do in *Mattos* regarding new forms of police technology, courts should gather the information necessary to balance adequately the nature and quality of the intrusion as well as the countervailing governmental interest in cases where tasers may have actually made effecting the arrest more difficult.⁴⁰³

While *Kyllo* involved legal questions of reasonableness similar to those posed in taser cases, a more factually apt precedent might be *United States v. Durham*,⁴⁰⁴ in which the Eleventh Circuit considered whether requiring a criminal defendant to wear a “stun belt” violated his constitutional trial rights. To assess this claim, the court took a similar approach to the Ninth Circuit in *Kyllo*:

[S]tun belts plainly pose many of the same constitutional concerns as do other physical restraints, though in somewhat different ways. . . .

Therefore, a decision to use a stun belt must be subjected to at least the same close judicial scrutiny required for the imposition of other physical restraints. Due to the novelty of this technology, a court contemplating its use will likely need to make factual findings about the operation of the stun belt, addressing issues such as the criteria for triggering the belt and the possibility of accidental discharge.

....

. . . [T]he district court did not make any factual findings about the belt’s operation, nor did it explore or consider alternative methods of

401. *Kyllo*, 533 U.S. at 28 (discussing what kind of “intimate details” *could* be detected with the technology and what officers might possibly know about the results of using the technology in advance).

402. *See supra* Part I.B.3.

403. *See supra* notes 239–241 and accompanying text (discussing tasers’ potential physiological effect of making a suspect more dangerous and difficult to subdue).

404. 287 F.3d 1297 (11th Cir. 2002).

restraint. . . . Therefore, the district court abused its discretion in ordering Durham to wear the belt.⁴⁰⁵

In *Kyllo* and *Durham*, the courts found that the constitutional claims could not be properly assessed without a fuller understanding of what the novel technology in question does or can do. In excessive force cases involving tasers and similar weapons, requiring additional factfinding to ascertain such information would benefit all parties and the proper articulation of Fourth Amendment law. This approach regarding recently developed technology is clearly distinguishable from judges' factfinding at summary judgment regarding questions that are properly for a jury to resolve, such as those involving disputed narratives and credibility as discussed in Part II.A.1. When a court's excessive force analysis risks preventing a plaintiff from developing the record and submitting her claims to a jury, *Graham* should be construed as contemplating an adequate understanding of the use of force as a prerequisite to engaging in the balancing test.

Proper *Graham* balancing would also include an understanding of the taser effects discussed in Part I, including the risks of severe unintended harm⁴⁰⁶ posed by tasers and the pain, emotional distress, and fear inflicted by tasers, both as a baseline understanding regarding the use of force generally and as experienced specifically by the plaintiff bringing the Fourth Amendment claim. From a legal perspective, courts must afford due weight to taser claims not resulting in serious injury and must either assess pain, emotional distress, and fear as intrusions into the values protected by the Fourth Amendment or explain why such harms are not legally significant. However, while this legal assessment may not necessarily require additional factfinding, such factfinding is critical from a public policy perspective. Police policymakers should demand that new police weapons technologies undergo significant testing before they are approved for use, as is standard in the United Kingdom

405. *Id.* at 1306, 1309 (citation and internal quotation marks omitted).

406. While this consideration requires a finding of what a reasonable officer would have perceived, officers in many of the Ninth Circuit taser cases were clearly aware of certain conditions that likely elevated the risk of the force. *See, e.g.,* *Bryan v. MacPherson*, 630 F.3d 805, 825 (9th Cir. 2010) (noting that the officer believed that the suspect was mentally ill); *Brooks v. City of Seattle*, 599 F.3d 1018, 1021 (9th Cir. 2010) (finding that the suspect told the officers that she was pregnant); *Bojic v. City of San Jose*, 358 F. App'x 906, 908 (9th Cir. 2009) (finding that the officer was aware that the suspect was mentally ill); *Neal-Lomax v. Las Vegas Metro. Police Dep't*, 574 F. Supp. 2d 1170, 1178, 1184 (D. Nev. 2008) (noting that the officers were aware that the suspect, who died shortly after the incident, was obese and under the influence of a narcotic like PCP, and that the officers further noted the suspect's racing pulse and profuse sweating); *LeBlanc v. City of Los Angeles*, No. CV 04-8250, 2006 WL 4752614, at *13 (C.D. Cal. Aug. 16, 2006) (noting that the officers were aware that the suspect, who died shortly after the incident, was obese and "either mentally ill or under narcotic influence").

and elsewhere.⁴⁰⁷ This testing should include ascertaining facts about the level of pain inflicted by that specific technology and variations among individuals that can make them more likely to be harmed or killed by that specific technology. Such a process would protect the public from avoidable harm, assist police agencies in determining reasonable use-of-force policies,⁴⁰⁸ and allow courts to more readily apply *Graham* balancing in an informed and efficient manner. This policy would likely prevent tragic incidents from occurring, not depend on their occurrence in order to address a clearly looming problem.

CONCLUSION

In his partial dissent to the *Mattos/Brooks* en banc rehearing, Ninth Circuit Chief Judge Kozinski called upon the Supreme Court to grant certiorari and “take a more enlightened view.”⁴⁰⁹ Like Judge Tallman’s accusation that the *Bryan* majority opinion “relies on bad law” and “endangers officers and citizens alike,”⁴¹⁰ Judge Kozinski accused the majority of “get[ting] the law wrong,” a “mistake [that] will be paid for in the blood and lives of police and members of the public.”⁴¹¹ Such rancor is particularly striking given the near-unanimous agreement among Ninth Circuit appellate judges that neither Carl Bryan, Malaika Brooks, nor Jayzel Mattos were entitled to relief or even to present their claims to a jury.⁴¹² In these cases, tasers provide the venue, but not the subject, of judicial conflict. The subject of dispute is the clashing worldviews of a moderate judicial contingent seeking to apply the law strictly, with all its attendant disadvantages for plaintiffs, and articulate evolving Fourth Amendment norms, versus an extreme judicial contingent seeking to establish a regime of virtually complete deference to police authority, a regime that would provide commendations to the officers who tased

407. See Travis, *supra* note 40; *Archive of Home Office Police, Operational Policing*, *supra* note 70 (describing the testing that tasers have undergone in the United Kingdom before being authorized for use by police officers in specified situations).

408. Preliminary testing, government approval, and police department designation of technologies on the use-of-force continuum would alleviate much of the “substantial social costs” underlying the qualified immunity doctrine—costs that include “the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties.” See *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

409. *Mattos v. Agarano*, 661 F.3d 433, 458 (9th Cir. 2011) (en banc) (Kozinski, J., concurring in part and dissenting in part).

410. 630 F.3d 805, 815, 817 (2010) (Tallman, J., dissenting).

411. *Mattos*, 661 F.3d at 458.

412. In the final opinions for these cases, Judges Silverman and Clifton, referring only to Mattos’s claims, were the only two to call for denying summary judgment. See *Mattos*, 661 F.3d at 458–60 (Silverman, J., concurring in part and dissenting in part).

Malaika Brooks.⁴¹³ Tasers and similar technologically advanced police weapons present novel legal questions, but they will be answered in this larger context of competing perspectives.

I have argued that as police weapons technology evolves, so too must excessive force law. However, as plaintiffs' perspectives disappear, with the question of whether they should be compensated for their injuries remaining one of the few uncontroversial subjects among judges in these Ninth Circuit cases, the best hope for fairness for victims of police misconduct is to look backward. Thus, the fairer approach I propose is simply compliance with *Graham v. Connor*⁴¹⁴ and a reality-based application of qualified immunity. Courts do not serve the mandates of *Graham* when they fail to acquire a sufficient understanding of what tasers actually do or of what is still unknown about what they do. In addition to obtaining an understanding of the use of force before deciding whether its use was reasonable, courts should presume that it would be unreasonable for officers to deploy a weapon without understanding its effects. Similarly, neither *Graham* nor fundamental Fourth Amendment principles are served by discounting plaintiffs' experience of pain, emotional distress, and fear. Doing so will effectively turn weapons designed to inflict severe pain while minimizing tissue damage into tools for avoiding legal liability, a role they may already play given developments in qualified immunity doctrine.

To ensure a modicum of fairness to plaintiffs in taser cases, courts must understand and consider the effects and risks posed by tasers and presume that police defendants have done the same. The constantly developing weapon technologies available to police officers are sure to raise new questions and shape the future of Fourth Amendment excessive force law. It should not be surprising, though, if today's Fourth Amendment excessive force law shapes the future of police weapons, designed to inflict what should be considered severe injuries—but not ones detectable by doctors or, most significantly, by judges.

413. *Id.* at 456 (Kozinski, J., concurring in part and dissenting in part) (adding that the officers “deserve our praise”).

414. 490 U.S. 386 (1989).