Power Down: Tasers, The Fourth Amendment, and Police Accountability in the Fourth Circuit*

> "*It has been repeatedly decided that these amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by [the] imperceptible practice of courts . . . .*"[1]

INTRODUCTION

It may look like a gun. It may fire like a gun. Police have been known to confuse it with a gun.[2] At one point in the not-too-distant past, it even used gunpowder to fire projectiles at those unfortunate enough to find

1. Henderson v. United States, 12 F.2d 528, 529 (4th Cir. 1926) (referencing the Fourth and Fifth Amendments).

2. *See, e.g.*, Henry v. Purnell, 652 F.3d 524, 528 (4th Cir.) (en banc) (explaining that the defendant officer shot the plaintiff with his pistol because he " 'had grabbed the wrong weapon' "), *cert. denied*, 132 S. Ct. 781 (2011); Johnson v. Bay Area Rapid Transit, 790 F. Supp. 2d 1034, 1061 (N.D. Cal. 2011) ("[Defendant officer] intended to tase [plaintiff], but mistakenly drew his pistol."); Atak v. Siem, CIV. 04-2720DSDSRN, 2005 WL 2105545, at *1 (D. Minn. Aug. 31, 2005) (["Defendant officer] alleges that he mistook his Glock for his Taser."); Torres v. City of Madera, CIVFF02-6385AWILJO, 2005 WL 1683736, at *2 (E.D. Cal. July 11, 2005) (explaining that the defendant officer was "involved in another incident in which she had confused her [Taser] and her Glock service weapon"), *aff'd sub nom.* Torres v. Taser Int'l, Inc., 277 F. App'x 684 (9th Cir. 2008); Yount v. City of Sacramento, 183 P.3d 471, 476 (Cal. 2008) ("[After shooting an arrestee, the officer] looked down at the weapon in his hand and saw he had mistakenly grabbed his pistol.").

themselves in its path.[3] Despite the similarities, however, the Thomas A. Swift Electric Rifle—or "taser"[4] as it is better known—is no firearm. The replacement of gunpowder with high-tech nitrogen cartridges was enough to free its manufacturer, TASER International, from the regulatory grip of the Bureau of Alcohol, Tobacco & Firearms (ATF), opening the door to its enthusiastic adoption by law enforcement agencies across the country.[5]

Loaded with cartridges that shoot a pair of small hooked metal electrodes, the taser can hit a target at a distance of thirty-five feet.[6] Upon impact, its hooks lodge into the target's skin, delivering a charge of 1,200 volts of electricity at a rate of nineteen pulses per second.[7] The standard cycle delivers five seconds of continuous electrical current for each pull of the trigger,[8] but some versions of the device are designed to allow the user to deliver a continued charge for an essentially unlimited period of time.[9] In close contact situations, the taser can be administered in what is known as "drive-stun" mode, permitting an officer to deliver electric shocks by holding the device directly against a suspect's skin or clothing.[10]

The taser temporarily paralyzes its subject by interrupting "the command and control systems of the body to impair muscular control."[11] It is, by a large margin, the most popular form of stun gun on the market and the preferred choice of law enforcement agencies, which have used the

3. Wayne Adam, *Police Use of Tasers*, EHOW, http://www.ehow.com/about_5305054_police-use-tasers.html (last visited Jan. 4, 2013); *see also Taser TF-76*, FORTRESS TACTICAL, LLC, http://shop.fortresstactical.com/TASER-Systems-TF-76-p/tf-76.htm (last visited Jan. 4, 2013) (featuring images of the original taser and related ATF regulations).

4. There appears to be no consensus among courts, including the Fourth Circuit, regarding the capitalization of the word "taser." *Compare Henry*, 652 F.3d at 527 (using "Taser"), *with* Orem v. Rephann, 523 F.3d 442, 444 (4th Cir. 2008) (using "taser"). Although the word is technically an acronym, it is rarely treated as such, and in recent years it "has become synonymous" with electro-muscular incapacitation devices in general. Thompson v. Carrollton Twp. Police Dep't, No. 283772 2009 WL 1564529, at *1 n.2 (Mich. Ct. App. June 2, 2009) (per curiam). For the sake of simplicity, this Comment adopts the convention of not capitalizing the word.

5. Michelle E. McStravick, *The Shocking Truth: Law Enforcement's Use and Abuse of Tasers and the Need for Reform*, 56 VILL. L. REV. 363, 365–66 (2011).

6. *Law Enforcement Technology: Versatile Solutions for Your Force*, TASER INT'L, http://www.taser.com/products/law-enforcement (last visited Jan. 4, 2013).

7. MICHAEL BRAVE, TASER X26—ELECTRICAL DEMONSTRATIONS 2, 4 (Oct. 24, 2006), http://www.ecdlaw.info/outlines/TASER%20X26%20demos%2010-24-06%20005.pdf (discussing the "TASER X26," TASER International's best-selling device).

8. *Id.* at 2.

9. *Id.* (noting that each battery can sustain up to 195 five-second discharges without replacement).

10. *See* Cockrell v. City of Cincinnati, 468 F. App'x 491, 492 (6th Cir. 2012) (describing the use of tasers in drive-stun mode).

11. *TASER X26 ECD*, TASER INT'L, http://www.taser.com/products/law-enforcement/taser-x26-ecd#features (last visited Jan. 4, 2013).

device with ever increasing frequency in recent years.[12] Studies suggest that tasers have been remarkably effective in reducing injuries to both law enforcement officers and criminal suspects alike.[13] In some cases, tasers undoubtedly save lives. This is most commonly illustrated in those situations in which police succeed in disabling armed and dangerous individuals without having to resort to using their firearms. For this reason, calls for their abandonment are unlikely to ever gain much currency, as the law enforcement community has assembled considerable evidence of their life-saving ability.[14]

Taser critics, which include the human rights organization Amnesty International[15] and the United Nations Committee Against Torture,[16] lodge two principal objections to law enforcement's use of the device. These groups highlight the high number of in-custody deaths that have been associated with tasers—a number that, depending on the system of accounting, has been estimated to approach, or even exceed, 500 total deaths in the United States alone.[17] They also point to the unique potential of the device to be used excessively against criminal suspects in the course

12. Brian Wolf & Joseph De Angelis, *Tasers, Accountability, and Less Lethal Force: Keying In on the Contentious Construction of Police Electroshock Weapons*, 4 INT'L J. CRIMINOLOGY & SOC. THEORY 657, 657 (2011) ("Tasers . . . have recently gone from a relatively obscure novelty to a widely adopted police restraint technology. Indeed, the Government Accounting Office (GAO) estimate[d in a 2005 report that] almost half of law enforcement agencies in the U.S. have adopted some form of electroshock device.").

13. *See, e.g.*, BRUCE TAYLOR ET AL., POLICE EXEC. RESEARCH FORUM, COMPARING SAFETY OUTCOMES IN POLICE USE-OF-FORCE CASES FOR LAW ENFORCEMENT AGENCIES THAT HAVE DEPLOYED CONDUCTED ENERGY DEVICES AND A MATCHED COMPARISON GROUP THAT HAVE NOT: A QUASI-EXPERIMENTAL EVALUATION (2009), *available at* http://www.policeforum.org/library/use-of-force/CED%20outcomes.pdf.

14. *See generally* AM. MED. ASS'N, COUNCIL ON SCI. & PUB. HEALTH, REPORT 6: USE OF TASERS BY LAW ENFORCEMENT AGENCIES (2009) [hereinafter USE OF TASERS], *available at* http://www.ama-assn.org/ama1/pub/upload/mm/443/csaph-rep6-a09-exec-summ.pdf (summarizing the medical and policy literature on police use of tasers, including the use of tasers in place of firearms).

15. AMNESTY INT'L, 'LESS THAN LETHAL'? THE USE OF STUN WEAPONS IN US LAW ENFORCEMENT 1–5 (2008) [hereinafter LESS THAN LETHAL], *available at* http://www.amnesty.org/en/library/asset/AMR51/010/2008/en/530be6d6-437e-4c77-851b-9e581197ccf6/amr510102008en.pdf.

16. *U.N.: Tasers Are a Form of Torture*, CBS NEWS (Feb. 11, 2009, 3:49 PM), http://www.cbsnews.com/stories/2007/11/25/national/main3537803.shtml.

17. LESS THAN LETHAL, *supra* note 15, at 20 (collecting 334 cases as of August 31, 2008); *532 Taser-Related Deaths in the United States Since 2001*, ELECTRONIC VILLAGE, http://electronicvillage.blogspot.com/2009/05/taser-related-deaths-in-united-states.html (last updated Sept. 14, 2012) (providing an unofficial list of alleged taser-related fatalities in the United States); *758+ Dead After Taser* Use, TNT–TRUTH . . . NOT TASERS (Apr. 25, 2011, 9:15 AM) [hereinafter TNT], http://truthnottasers.blogspot.com/2008/04/what-follows-are-names-where-known.html (providing an unofficial database maintained by the family of a taser victim chronicling over 700 instances in North America of individuals who died after being tased).

of arrest.[18] Because the continued depression of the trigger on some models delivers an uninterrupted shock,[19] the device affords officers an opportunity to administer a great deal of pain to suspects while seeking to secure their compliance.

The United States Department of Justice (DOJ) recommended in 2011 that tasers only be used "against subjects who are exhibiting active aggression or who are actively resisting in a manner . . . likely to result in injuries to themselves or others."[20] The Maryland Attorney General's Office has similarly said that tasers "should not be used . . . to counter passive noncompliance, absent an imminent threat of physical harm"[21] and that the "act of fleeing or destroying evidence, in and of itself, should not justify [their] use."[22] Nevertheless, although "[e]xperts and advocates alike agree that Tasers should be used only where there is active aggression by a subject or a documented threat of physical harm to another person,"[23] use of the device against non-violent, passive arrestees is not uncommon.[24]

The taser is distinguished from the more traditional tools at an officer's disposal in that it leaves significantly less in the way of visible injuries. Use of a baton, for example, tends to leave significant bruising;

18. *Tasers—Potentially Lethal and Easy to Abuse*, AMNESTY INT'L (Dec. 16, 2008) [hereinafter *Easy to Abuse*], http://www.amnesty.org/en/news-and-updates/report/tasers-potentially-lethal-and-easy-abuse-20081216 ("The problem with Tasers is that they are inherently open to abuse, as they are easy to carry and easy to use and can inflict severe pain at the push of a button, without leaving substantial marks.").

19. Neal-Lomax v. Las Vegas Metro. Police Dep't, 574 F. Supp. 2d 1170, 1176 (D. Nev. 2008) (describing the popular X26z taser and noting that "if the person using the Taser holds down the trigger, the device will continue to discharge until he releases the trigger or the battery runs out" (internal quotation marks omitted)).

20. U.S. DEP'T OF JUSTICE & POLICE EXEC. RESEARCH FORUM, 2011 ELECTRONIC CONTROL WEAPON GUIDELINES 20 (2011), http://cops.usdoj.gov/Publications/e021111339-PERF-ECWGb.pdf.

21. REPORT OF THE MARYLAND ATTORNEY GENERAL'S TASK FORCE ON ELECTRONIC WEAPONS 3 (2009), *available at* http://www.oag.state.md.us/Reports/ECWReport.pdf.

22. *Id.*

23. N.Y. CIVIL LIBERTIES UNION, TAKING TASERS SERIOUSLY: THE NEED FOR BETTER REGULATION OF STUN GUNS IN NEW YORK 19 (2011) [hereinafter NYCLU REPORT], *available at* http://www.nyclu.org/files/publications/nyclu_TaserFinal.pdf.

24. *See id.* ("In 35 percent of incident reports reviewed, . . . the subject was only engaged in defensive or passive resistance . . . . This misuse appears to be widespread."); MARK SILVERSTEIN, TASERS: EVALUATING CLAIMS OF EXCESSIVE FORCE 4 (Oct. 19, 2006), http://www.acluvt.org/issues/tasers/evaluating_excessive_force_claims.pdf (presented at the National Police Accountability Project Skills Seminar) ("[I]n over one-third of the cases in which police officers have discharged tasers, the reported level of resistance is 'verbal non-compliance.' " (citation omitted)); Andrew Wolfson, *Tasers Help Save Lives But Use Also Criticized*, LOUISVILLE COURIER-JOURNAL, Oct. 2, 2006, at A1, *available at* http://www.courier-journal.com/article/20070221/NEWS01/102210002/Tasers-help-save-lives-use-also-criticized (noting that in a survey of 344 taser incidents, police "used the weapons in dozens of situations in which neither they nor others appeared to be at risk").

excessive use of pepper spray visibly irritates the skin and can cause chemical burns.[25] These weapons thus provide a natural incentive for officers to minimize their use, lest they expose themselves to civil action and departmental reprimand.[26] Tasers, by contrast, are in this respect considerably more ripe for abuse,[27] as a protracted application can easily leave as little physical evidence on a suspect's body as a routine five-second cycle.[28] It is perhaps in part for this reason that an increasing number of arrestees have reported being tased far beyond their complete physical capitulation.[29] Many have described the experience as the most painful of their lives, an opinion widely shared among law enforcement officers themselves, many of whom are subjected to a controlled five-second application in the course of their mandatory training exercises.[30]

The rules that govern how and when a taser may be deployed are largely determined locally. Only the state of Florida, which for a time was among the leaders in taser-related fatalities, has set meaningful statutory limitations on the circumstances in which the device can be used against

25. *Arrests Made During Occupy Protest At UC Davis*, KCRA.COM (Nov. 18, 2011, 11:30 PM), http://www.kcra.com/r/29809851/detail.html.

26. *See* Jason Dearen, *UC Davis Pepper Spray Incident Prompts Suspension of Officers*, HUFFINGTON POST (Nov. 20, 2011, 5:03 PM), http://www.huffingtonpost.com/2011/11/20/uc-davis-pepper-spray-inc_n_1104104.html.

27. NAT'L INST. OF JUSTICE, NIJ RESEARCH IN BRIEF: POLICE USE OF FORCE, TASERS AND OTHER LESS-LETHAL WEAPONS 15 (2011), *available at* https://ncjrs.gov/pdffiles1/nij/232215.pdf (noting that tasers' "ease of use and popularity among officers raise the specter of overuse"); *see also* AMNESTY INT'L, EXCESSIVE AND LETHAL FORCE? AMNESTY INTERNATIONAL'S CONCERNS ABOUT DEATHS AND ILL-TREATMENT INVOLVING POLICE USE OF TASERS 67 (2004) [hereinafter POLICE USE OF TASERS], *available at* http://www.hopenetworks.org/Taser_report.pdf ("[E]lectro-shock weapons are inherently open to abuse as they can inflict severe pain at the push of a button without leaving substantial marks, and can further be used to inflict repeated shocks.").

28. *See Easy to Abuse*, *supra* note 18 (observing that "[m]any [people are] subjected to repeated or prolonged shocks" and stating that one of the "problem[s] with Tasers is that they . . . can inflict severe pain at the push of a button, without leaving substantial marks").

29. Interview with C. Scott Holmes, Partner, Brock, Payne & Meece, P.A., in Durham, N.C. (June 13, 2011) (on file with the *North Carolina Law Review*) [hereinafter Holmes Interview]. Holmes has, since 2006, represented plaintiffs in taser-related lawsuits brought under 42 U.S.C. § 1983. *See Civil Litigation*, BROCK, PAYNE & MEECE, P.A., http://www.bpm-law.com/practice-areas/civil-litigation/ (last visited Jan. 4, 2013).

30. *See, e.g.*, POLICE USE OF TASERS, *supra* note 27, at 5–6 (quoting police officers in various media reports describing the experience as "the most profound pain I have ever felt," "like getting punched 100 times in a row," "like a finger in a light socket many times over," and "the longest five seconds of their life"); DURHAM POLICE DEP'T, TASER TECHNOLOGY REPORT 1 (2007), *available at* http://durhamnc.gov/ich/op/DPD/Documents/Taser%20Report%204%2026%2007%20Final%20Report%20_2_.pdf (describing a police offer's description of being tased as "a very painful experience"); Joshua Young, *MPs Give Marines, Sailors Shocking Experience*, DEF. VIDEO & IMAGERY DISTRIBUTION SYS. (Sept. 30, 2011), http://www.dvidshub.net/news/77875/mps-give-marines-sailors-shocking-experience#.UE1KxKRYuXQ (quoting police officer describing a taser as "probably the most pain you can experience within five seconds of your life").

criminal suspects.[31] The ATF's classification has excluded the weapon from federal oversight.[32] The DOJ's suggestion that the weapon be classified as "less lethal" and located just below deadly force on the use-of-force continuum[33] is not binding on state, county, or municipal law enforcement agencies, many of which authorize use of the device at the level of verbal non-compliance.[34] With very little substantive regulation to complicate matters, sales have been strong. TASER International reports having filled purchase orders from more than 16,575 different "public safety agencies";[35] revenues for the quarter ending June 30, 2012 exceeded $28 million.[36] The mainstreaming of the device into police arsenals has had the transformative effect of normalizing the infliction of pain in situations that would have been unthinkable just ten years ago.[37]

In North Carolina, the most populated state in the Fourth Circuit,[38] police enjoy unusually wide discretion to use tasers[39] and are authorized to

31. *See* FLA. STAT. ANN. § 943.1717 (West 2006) ("A decision by a law enforcement officer, correctional officer, or correctional probation officer to use a dart-firing stun gun must involve an arrest or a custodial situation during which the person who is the subject of the arrest or custody escalates resistance to the officer from passive physical resistance to active physical resistance and the person: (a) Has the apparent ability to physically threaten the officer or others; or (b) Is preparing or attempting to flee or escape."). New Jersey has banned the use of stun guns by law enforcement officers outright, and Georgia has a very broadly worded and arguably inconsequential statute on the books. *See* N.J. STAT. ANN. § 2C:39-3(h) (West 2011); GA. CODE ANN., § 35-8-26 (2012).

32. *See generally* JEFFREY DIEBEL, MINN. HOUSE OF REPRESENTATIVES RESEARCH DEP'T, TASERS IN MINNESOTA: HOW ENERGY-CONDUCTED WEAPONS ARE REGULATED 5 (2009), *available at* http://www.house.leg.state.mn.us/hrd/pubs/taserreg.pdf (discussing lack of federal oversight and noting that "[s]ince the Bureau of Alcohol, Tobacco, Firearms and Explosives no longer classifies ECWs as firearms, federal regulations . . . do not apply to ECWs").

33. Letter from Steven H. Rosenbaum, U.S. Dep't of Justice Civil Rights Div., to Alejandro Vilarello, City Attorney, City of Miami, Fla. 10 (Mar. 13, 2003), *available at* http://www.justice.gov/crt/about/spl/documents/miamipd_techletter.pdf.

34. *See* sources cited *supra* note 24.

35. News Release, TASER Int'l, Inc., TASER International Reports Second Quarter Results (July 26, 2012), *available at* http://investor.taser.com/phoenix.zhtml?c=129937&p=irol-newsArticle&ID=1719100.

36. *Id*.

37. *See* Rep. of the Human Rights Comm'n, 87th Sess., July 10–28, 2006, U.N. Doc. CCPR/C/USA/CO/3/Rev.1; GAOR, 60th Sess., Supp. No. 40 (2006) [hereinafter U.N. Human Rights Rep.] ("The Committee is concerned in particular by the use of so-called less lethal restraint devices, such as electro-muscular disruption devices (EMDs), in situations where lethal or other serious force would not otherwise have been used."); *see also id.* (expressing concern that "police have used tasers against unruly schoolchildren; . . . elderly people; pregnant women; . . . and people who argue with officers or simply fail to comply with police commands").

38. *See State Rankings—Statistical Abstract of the United States: Resident Population—July 2009*, U.S. CENSUS BUREAU, http://www.census.gov/compendia/statab/2012/ranks/rank01.html (last visited Jan. 4, 2013).

39. *See* REBECCA C. HEADEN & IAN A. MANCE, THE N.C. TASER SAFETY PROJECT, NOT THERE YET: THE NEED FOR SAFER TASER POLICIES IN NORTH CAROLINA 11 (April 2008),

deploy them in a broad array of circumstances. The device has been used by police in the state as a disciplinary device against even *non-arrestees*, from recipients of parking citations[40] to young public school children.[41] In one twelve-month period spanning from 2006 to 2007, "the state had the unfortunate distinction of having the third-highest number of TASER-proximate deaths" in the country, trailing only the much more populous states of California and Florida.[42] Arrestees are frequently tased as a precursor to being handcuffed for exhibiting mere verbal disagreement,[43] and even when they are cuffed and restrained, many North Carolina departments still permit officers to use the device to compel further compliance.[44] In many of the district courts that periodically review such conduct,[45] little weight is accorded to the Supreme Court's famous admonition in *Graham v. Connor*[46]—a case that overturned a Fourth Circuit excessive force decision[47] and set the standard for all future abuse claims. In *Graham*, the Court held that, when evaluating the reasonableness of an officer's use of force, courts must pay "careful attention to . . . the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[48]

available at http://www.acluofnc.org/files/NotThereYet.pdf (concluding from a survey of all 100 North Carolina sheriffs' offices that the state "lags significantly behind the national norms with respect to nearly every facet of TASER regulation"); *see also id.* at 4 ("North Carolina . . . lags almost 50% behind the national average, with only 42.9% of TASER-deploying counties reporting restrictions on use against pregnant women in the 2007 survey."); *id.* at 8 ("[O]nly 18.6% of TASER-deploying counties report[ed] in 2007 that they restricted or prohibited the practice [of tasing passive resisters] in their use of force policies.").

40. Denise Sherman, *Knightdale Police Chief Exonerates Officer in Tasing*, E. WAKE NEWS, Mar. 23, 2011, http://www.easternwakenews.com/2011/03/23/10390/knightdale-police-chief-exonerates.html (describing how a North Carolina officer repeatedly tased a non-arrestee, who had committed a parking infraction, resulting in hospitalization).

41. *See, e.g.*, Gloria Lopez, *Police Stand Behind Use of Tasers in Wake County Schools*, CBS NEWS-WRAL RALEIGH (Sept. 28, 2005), http://www.wral.com/news/local/story/120194; Ken Ward, *Girl Tasered at School*, ABC NEWS-WTVD (Jan. 13, 2006), http://abclocal.go.com/wtvd/story?section=news/local&id=3806891.

42. HEADEN & MANCE, *supra* note 39, at 1.

43. *See* SILVERSTEIN, *supra* note 24, at 5.

44. *See, e.g.*, HEADEN & MANCE, *supra* note 39, at 9 ("69.1% of sheriffs nationwide have adopted policies restricting the use of TASERs against people in handcuffs or restraints. In North Carolina, a mere 20% of counties have taken similar steps.").

45. *See infra* Part V.

46. 490 U.S. 386 (1989). *See infra* note 196 for further discussion as to why the "severity of the crime" prong of the *Graham* inquiry is sometimes accorded so little weight in the context of Fourth Amendment taser claims.

47. Graham v. City of Charlotte, 827 F.2d 945, 950 (4th Cir. 1987), *vacated sub nom. Graham*, 490 U.S. at 399.

48. *Graham*, 490 U.S. at 396.

This absence of regulation with respect to the circumstances under which the device can be used has had significant financial consequences for TASER International in North Carolina. In 2011, a federal jury in Mecklenburg County returned a $10 million dollar verdict against the company in a case brought by the family of seventeen-year-old Darryl Turner, who died after being tased by a Charlotte police officer during a tense, but otherwise non-violent, confrontation.[49] As of 2012, it stands as only the second time in 127 attempts that the company has lost in court.[50] The verdict, however, reflected the jury's judgment that the company erred in failing to warn police that the device could cause heart problems if it struck near the chest;[51] it did not speak to the ultimate reasonableness of the officer's decision to use the device against the teenager. For the various reasons explained below,[52] scrutiny of such decisions by juries in the Fourth Circuit remains exceedingly rare.[53]

Upon hearing the verdict, Charlotte City Attorney Mac McCarley, who had earlier settled with the teenager's family out of court for $625,000 without admitting any wrongdoing,[54] told the *Charlotte Observer* it would have no effect on the city's taser policies and continued to characterize the device as "nonlethal."[55] Within just a few hours, however, another Charlotte man, twenty-one-year-old Lareko Williams, died after being tased by police officers attempting to take him into custody.[56] The next day, Charlotte police suspended use of the device.[57]

Charlotte took the uncommon step of ultimately regulating itself. It made a unilateral decision to re-examine its practices despite the fact that it operates in a federal circuit that has yet to explicitly proscribe the sort of conduct that led to Darryl Turner's death. However, the practice of using

49. Gary L. Wright & Cleve R. Wootson, Jr., *17-Year-Old's Family Wins $10 Million in Taser Verdict*, CHARLOTTE OBSERVER, July 21, 2011, at A1.

50. Michaela L. Duckett, *Qcity Lawyer Ken Harris Talks About $10 Million Taser Verdict*, QCITY METRO (July 28, 2011), http://www.qcitymetro.com/news/articles/qcity_lawyer_ken_harris_talks_about_10_million_taser_verdict091448534.cfm.

51. *See* Wright & Wootson, *supra* note 49.

52. *See infra* Parts II–V.

53. *See infra* Part V.

54. *See* Wright & Wootson, *supra* note 49 ("The city of Charlotte paid $625,000 to Turner's family in 2009, though the city denied wrongdoing. It was the largest police-related claim the city had paid out in nearly a decade.").

55. *Id.*

56. Cleve R. Wootson, Jr., & Gary L. Wright, *Police Shelve Tasers for Now After Another Suspect Dies*, CHARLOTTE OBSERVER, July 22, 2011, at A1.

57. *Id.* The Charlotte-Mecklenburg Police Department would later lift the suspension after spending $1.83 million to purchase new tasers outfitted with special safety features to limit each electrical charge to five seconds. *See* Cleve R. Wootson, Jr., *Newer Taser Model Joins CMPD Arsenal*, CHARLOTTE OBSERVER, Jan. 26, 2012, at B1.

tasers to inflict pain against non-violent arrestees to secure their compliance has certainly not been without its critics on the bench in other parts of the country. Many federal courts have taken steps in recent years to push back against the practice of police treating tasers as a weapon of first resort.[58] And, as one Texas state judge recently observed:

> [I]t is easy to say that [tasers have] proved effective. So too would a cane and club be effective if used enough times. The problem, however, is that our United States Supreme Court [has] condemned beatings and whippings as a means of obtaining evidence. Given that those measures and the application of a taser are founded upon the concept of compliance through pain and the rather accurate premise that the more inflicted the greater the chance of compliance, it would be reasonable to view the two . . . as alike . . . . [B]oth can be quite brutal depending upon the manner of and circumstances surrounding their application.[59]

This Comment focuses its attention on the phenomenon of taser abuse in the states that comprise the Fourth Circuit: Maryland, North Carolina, South Carolina, Virginia, and West Virginia. It assesses the state of the law as presented to genuine victims of police abuse who wish to vindicate their right to be free of excessive force under 42 U.S.C. § 1983,[60] the federal

58. *See, e.g.*, Oliver v. Fiorino, 586 F.3d 898, 907, 908 (11th Cir. 2009) (denying an officer qualified immunity for repeatedly tasing a suspect, despite the lack of case law on point, because "the force employed was so utterly disproportionate to the level of force reasonably necessary"); Landis v. Baker, 297 F. App'x 453, 463 (6th Cir. 2008) ("Even without precise knowledge that the use of the taser would be a violation of a constitutional right, the officers should have known based on analogous cases that their actions were unreasonable.").

59. Hereford v. State, 302 S.W.3d 903, 910–11 (Tex. App.) (citation omitted), *aff'd*, 339 S.W.3d 111 (Tex. Crim. App. 2011). The Chief Justice of the Seventh Court of Appeals of Texas opened the opinion with a rhetorical device designed to emphasize the gravity of the force used:

> One thousand-one, one thousand-two, one thousand-three, one thousand-four, one thousand-five, one thousand-six, one thousand-seven, one thousand-eight, one thousand-nine, one thousand-ten, one thousand-eleven, one thousand-twelve, one thousand-thirteen, one thousand-fourteen, one thousand-fifteen, one thousand-sixteen, one thousand-seventeen, one thousand-eighteen, one thousand-nineteen, one thousand-twenty. That was the amount of time Officer Arp initially tased Anthony G. Hereford, Jr., according to the instrument's log.

Id. at 904.

60. The statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (2006).

statute under which plaintiffs can seek relief for violations of their constitutional rights by state actors. This Comment has been informed by a comprehensive review of the existing case law in the circuit; conversations and correspondence with all 100 sheriff's departments in North Carolina regarding their taser policies;[61] meetings with more than a dozen alleged victims of taser abuse and the families of those deceased;[62] and the experiences of those litigating taser-related civil rights actions on their behalf.[63] The Comment briefly examines the positive developments with respect to taser accountability as represented by the Fourth Circuit's recent decisions in *Henry v. Purnell*[64] and *Orem v. Rephann*.[65] Despite some encouraging language in both opinions, however, the Comment contends that neither does much to substantively improve the condition of those most likely to find themselves subject to taser abuse. As the case law discussed in this Comment demonstrates, arrestees are among those most likely to be tased by police. And, as the court made clear in *Orem*, police conduct against them—as opposed to conduct against pretrial detainees—is, at least in the Fourth Circuit, to be evaluated exclusively under the Fourth Amendment's guarantees against unreasonable seizure.[66] Unlike many of its sister circuits,[67] however, the Fourth Circuit has yet to meaningfully consider a claim of excessive force by taser under the Fourth Amendment.[68] This fact, combined with the lack of any meaningful regulatory oversight, has meant that the task of restraining improper use of the device against arrestees has fallen almost exclusively to the federal district courts. Civil actions brought by the victims themselves are, in effect, the beginning and the end of police accountability when it comes to tasers.

In the federal district courts of the Fourth Circuit, however, this lack of proper guidance has made accountability in cases of genuine abuse hard to come by, despite clear signals from other circuits as to the proper scope

61. HEADEN AND MANCE, *supra* note 39, at 2.

62. Some of these individuals were victims met in preparation of the report cited, *supra* note 39, which was co-authored by the author of this Comment. *See id.* Others were clients met while the author was employed at various law firms.

63. Between 2006 and 2012, the author worked with a number of attorneys actively litigating taser claims in the circuit.

64. 652 F.3d 524 (4th Cir. 2011).

65. 523 F.3d 442 (4th Cir. 2008).

66. *Id.* at 446.

67. *See infra* note 167 and accompanying text.

68. *See* Meyers v. Balt. Cnty., 814 F. Supp. 2d 552, 561 n.10 (D. Md. 2011) (noting that the Fourth Circuit's most prominent taser case, *Orem*, was "analyzed under the Fourteenth Amendment rather than the Fourth Amendment, [and] do[es] not speak authoritatively on the issue"); Thompson v. City of Danville, No. 4:10CV00012, 2011 WL 2174536, at *8 (W.D. Va. June 3, 2011) ("The Fourth Circuit has examined an officer's use of a Taser under the Fourteenth Amendment . . . but not the Fourth Amendment."), *aff'd*, 457 F. App'x. 221 (4th Cir. 2011).

of the inquiry. This need not be the case. In recent years, a burgeoning body of taser law has emerged outside the Fourth Circuit, placing reasonable limitations upon—and enunciating important considerations with respect to—law enforcement's use of the device.[69] Courts should give fuller effect to the rule—set out by the Supreme Court and expressly acknowledged by the Fourth Circuit—that "[a] clear violation of federal law may occur when . . . a consensus of cases from other circuits[] puts [an] officer on notice that his conduct is unconstitutional."[70] For the sake of public safety, courts must begin to enforce reasonable restrictions on the use of a device linked to more than fifty deaths[71] and, presumably, countless more injuries, within the circuit in recent years.

Analysis proceeds in five parts. Part I summarizes the Fourth Circuit's general treatment of tasers thus far. Part II explains how the federal district courts in the Fourth Circuit have yet to join many federal courts outside the circuit in recognizing the crucial distinction between volitional and non-volitional non-compliance that lies at the heart of many legitimate taser claims. Part III explains how the Fourth Circuit's past imposition of a de minimis[72] injury threshold in excessive force claims may have the pernicious effect of encouraging rogue officers to abuse the device, given its unique ability to inflict "torment without marks."[73] Part IV discusses Fourth Circuit doctrine that may incentivize the filing of unwarranted resisting-arrest charges against genuine taser victims, in turn insulating officers from civil liability. Part V then examines how the qualified immunity doctrine has contributed to an erosion of the Fourth Amendment's reasonableness standard in the context of evaluating the use of tasers and other forms of pain compliance techniques. This Comment looks to the more effective approaches to the issue taken in other circuits and concludes by making several recommendations for the Fourth Circuit to take into account when it ultimately considers its first Fourth Amendment taser claim.

69. *See infra* Part II (discussing how other circuits have explicitly proscribed unnecessary taser use and taken judicial notice of tasers' ability to cause involuntary non-compliance); *infra* Part III (noting how most circuits do not include a de minimis injury inquiry into Fourth Amendment excessive force tests); *infra* Part V (discussing other courts' recognition that the pain of being tased can be easily underestimated due to the nature and design of the device).

70. Altman v. City of High Point, 330 F.3d 194, 210 (4th Cir. 2003) (citing Wilson v. Layne, 526 U.S. 603, 604 (1999)).

71. *See* TNT, *supra* note 17.

72. The phrase "*de minimis non curat lex*" translates to "The law does not concern itself with trifles." BLACK'S LAW DICTIONARY 496 (9th ed. 2009).

73. Orem v. Rephann, 523 F.3d 442, 448 (4th Cir. 2008) (quoting Hickey v. Reeder, 12 F.3d 754, 757 (8th Cir. 1993)).

Among these recommendations is that the Fourth Circuit join other courts in taking judicial notice of the taser's unique capacity to strip a person of his motor faculties in such a way that complying with an officer's orders becomes difficult, if not impossible.[74] Many victims of taser abuse are people who, after the device's initial application, genuinely want to surrender but find themselves physiologically incapable of following officers' orders. Because of this, the Comment argues that courts should be careful not to reflexively conclude, in cases where the plaintiff has been convicted of resisting arrest, that her claims for abuse by taser are barred by the *Heck* doctrine.[75] The Comment also suggests that the Fourth Circuit should join the majority of circuits in explicitly rejecting the practice of imposing a de minimis injury threshold in Fourth Amendment actions under § 1983.[76] To the extent the doctrine retains vitality in the Fourth Amendment context, it poses danger to genuine victims of taser abuse, who often do not bear much in the way of visible injuries on their bodies, but whose experiences are often as or more painful than those of excessive force plaintiffs whose claims commonly survive summary judgment. This Comment argues that the Fourth Circuit should recognize, as other circuits have, that it is the need for force that should rest at the heart of such claims, not the extent to which a plaintiff can or cannot demonstrate a persisting injury.

I. THE FOURTH CIRCUIT AND TASERS: *OREM* AND *HENRY*

The emerging issues surrounding police tasers and what they mean for excessive force jurisprudence have not gone unnoticed by the Fourth Circuit. Twice in the last five years, the court has heard and considered cases involving tasers and allegations of excessive force against criminal suspects.[77] Although on both occasions members of the court appeared to accord some weight to the unique dangers posed by the device and seemed to treat its potential for abuse seriously, neither case presented the issue of gratuitous use to the court in the context of the Fourth Amendment. Because this is the standard under which most taser abuse claims are likely to be reviewed,[78] lower courts have continued to lament the lack of clear

74. *See* cases cited *infra* notes 173–76, 180.

75. *See* discussion *infra* note 246.

76. *See* Bryan N. Georgiady, *An Excessively Painful Encounter: The Reasonableness of Pain and De Minimis Injuries for Fourth Amendment Excessive Force Claims*, 59 SYRACUSE L. REV. 123, 137 (2008).

77. Henry v. Purnell, 652 F.3d 524, 527–28 (4th Cir.) (en banc), *cert. denied*, 132 S. Ct. 781 (2011); *Orem*, 523 F.3d at 443–44.

78. Tasers are most often used in the course of taking a suspect into custody. The Supreme Court has instructed that "*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen

authority assessing allegations of excessive force relating to taser use in the course of arrests.[79]

A. Orem v. Rephann

In the 2008 case of *Orem v. Rephann*, the Fourth Circuit had its first opportunity to consider an excessive force claim brought by an arrestee alleging abuse by taser. Sonja Orem sued West Virginia police officer Matt Rephann, who had tased and arrested her "for disrupting and assaulting an officer after being served with a Family Protective Order."[80] Although prior to arriving at the Fourth Circuit the case had been litigated as a Fourth Amendment excessive force claim, the court began its analysis by holding that the district court had misapplied the law,[81] thus stripping the case of much of its precedential value for Fourth Amendment purposes. Because Orem had been tased while secured in the backseat of Rephann's cruiser, restrained by both handcuffs and a "hobbling device" around her feet, the court reasoned that the officer's actions were properly analyzed under the *Fourteenth* Amendment, rather than the Fourth.[82]

The court ultimately ruled against Officer Rephann, who had sought qualified immunity for his actions,[83] but the predictive value of *Orem* and its implications for a Fourth Amendment analysis of similar conduct are debatable. Aside from the fact that the analysis itself proceeds quite differently from the Fourteenth Amendment, there is the inescapable fact that, on the spectrum of people who are tased, Sonja Orem was decidedly among the more acutely vulnerable. The court made a point of emphasizing Orem's small stature ("about 100 pounds"),[84] the fact that she was fully restrained in leg and arm shackles,[85] the location of her wounds ("underneath [her] left breast and inner thigh"),[86] and the fact that she

should be analyzed under the Fourth Amendment and its 'reasonableness' standard." Graham v. Connor, 490 U.S. 386, 395 (1989); *see also Orem*, 523 F.3d at 446 ("[T]he Fourth Amendment [only] governs claims of excessive force during the course of an arrest, investigatory stop, or other 'seizure' of a person." (quoting Riley v. Dorton, 115 F.3d 1159, 1161 (4th Cir. 1997) (en banc), *abrogated by* Wilkins v. Gaddy, 130 S. Ct. 1175 (2010) (per curiam))).

79. *See supra* note 68.

80. *Orem*, 523 F.3d at 443–44.

81. *Id.* at 446.

82. *Id.* ("The point at which Fourth Amendment protections end and Fourteenth Amendment protections begin is often murky. But here, Orem's excessive force claim arises during her transport to [jail], after she was arrested. While she had not been formally charged, her status as an arrestee requires application of the Fourteenth Amendment to her claim.").

83. *Id.* at 449 ("Deputy Rephann used the taser to punish or intimidate Orem—a use that is not objectively reasonable, is contrary to clearly established law, and not protected by qualified immunity.").

84. *Id.* at 447.

85. *Id.*

86. *Id.*

sustained permanent disfigurement from the taser (a "sunburn-like scar").[87] It is unclear if the court was merely being descriptive for the purposes of illustrating the horror of Orem's experience or because it considered those facts, at least in their totality, to be determinative as to the reasonableness of the officer's use of the taser.[88] In any event, as discussed in the pages that follow, *Orem* did little to crack the door for subsequent arrestees bringing Fourth Amendment actions for abuse by taser.

B. Henry v. Purnell

More recently, in *Henry v. Purnell*, before the court for the fourth time in six years,[89] an en banc panel denied qualified immunity to a Maryland police officer who, intending to pull his taser, instead pulled his firearm and accidentally shot a fleeing suspect wanted for failure to pay child support.[90] The court relied on the Supreme Court's central holding in *Tennessee v. Garner*[91] that "[a] police officer who shoots a fleeing suspect without 'probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others' violates that suspect's Fourth Amendment rights."[92] Although the bullet did not kill Henry, and although Officer Purnell did not intend to discharge his firearm, the Fourth Circuit characterized the officer's actions as "deadly force"[93] and denied him qualified immunity.[94] The court expressly declined to decide, however, whether the officer's *intended action*—using a taser to stop the fleeing suspect—would have been objectively reasonable under a Fourth Amendment analysis.[95] The dissenting judges strongly suggested

87. *Id.*

88. A number of courts appear to have given considerable weight to Orem's vulnerability. *See, e.g.*, Carter v. James, No. 1:08CV101, 2010 WL 3522219, at *5 (M.D.N.C. Sept. 7, 2010) (awarding an officer qualified immunity and noting that "the facts in Orem differ greatly from those presented here" and that Orem "was a 100–pound woman" and was "tased . . . in sensitive areas"); Simpson v. Kapeluck, Civil Action No. 2:09–cv–00021, 2010 WL 1981099, at *7–8 (S.D.W. Va. May 14, 2010) (awarding summary judgment to a defendant officer and distinguishing the case from *Orem*, emphasizing the location of Orem's injury and her small stature), *aff'd*, 402 F. App'x 803 (4th Cir. 2010), *cert. denied*, 131 S. Ct. 1501 (2011).

89. *See* 619 F.3d 323 (4th Cir. 2010); 501 F.3d 374 (4th Cir. 2007); 119 F. App'x 441 (4th Cir. 2005).

90. Henry v. Purnell, 652 F.3d 524, 536–37 (4th Cir.) (en banc), *cert. denied*, 132 S. Ct. 781 (2011).

91. 471 U.S. 1 (1985).

92. *Henry*, 652 F.3d at 531–32 (quoting *Garner*, 471 U.S. at 3).

93. *Id.* at 536.

94. *Id.*

95. *See id.* at 537 (citations omitted) (Davis, J., concurring) ("The dissent (in some passages) seems to be in agreement with the *en banc* majority (and the parties) that this case does not present the hypothetical issue of whether the intentional use of the Taser by Deputy Purnell under the circumstances *would have* comported with the Fourth Amendment.").

that it would, characterizing Purnell's use of the gun as "a mistake in . . . execution of an otherwise proper action."[96] In an opinion that gave some hope to advocates of taser reform, however, Judge Davis concurred with the majority and attacked the dissent's "transparent confidence that the intentional use of a Taser . . . under the circumstances in the case . . . would have comported with the Fourth Amendment."[97] In Judge Davis's view, the Fourth Amendment's "developing law on taser use must consider the unique nature of this type of weapon."[98]

Judge Davis also noted critically that, like most exercises of state power, "tasers require[] sufficient justification for their use to be reasonable,"[99] and non-violent non-compliance might not meet the Fourth Amendment's reasonableness threshold.[100] Although this may seem an otherwise unremarkable proposition, in truth, and as discussed below, the fact that the court itself has yet to make such an explicit recognition has had significant real-world consequences for those seeking to vindicate their rights under the Fourth Amendment.[101] However, despite opening the door for dialogue on what has been an underdeveloped legal issue in the circuit, Judge Davis ultimately expressed his doubts that a workable approach could be reached, and the threshold inquiry for evaluating the reasonableness of taser use against non-violent arrestees was once again left for another day.[102]

C. Treatment of Tasers by the Federal District Courts of the Fourth Circuit

In a recent law review article,[103] Jeff Fabian summarized the approaches taken by various federal courts around the country to assess the reasonableness of an officer's decision to employ a taser to effect an arrest.[104] Fabian's survey of the case law across the federal appellate courts suggests "that active resistance weighs heavily in the Fourth Amendment reasonableness analysis"[105] of many courts. However, "unlike active

96. *Id.* at 552 (Shedd, J., dissenting).

97. *Id.* at 537 (Davis, J., concurring).

98. *Id.* at 539 (quoting McKenney v. Harrison, 635 F.3d 354, 361 (8th Cir. 2011) (Murphy, J., concurring)).

99. *Id.* at 540 (quoting *McKenney*, 635 F.3d at 364 (Murphy, J., concurring)).

100. *Id.* (observing that courts have held that it is "unreasonable to 'discharge [a] Taser because of insolence,' especially given the tremendous pain tasers cause") (quoting *McKenney*, 635 F.3d at 361 (Murphy, J., concurring)).

101. *See infra* Part II.

102. *Henry*, 652 F.3d at 540–41 (Davis, J., concurring).

103. Jeff Fabian, *Don't Tase Me Bro!: A Comprehensive Analysis of the Laws Governing Taser Use by Law Enforcement*, 62 FLA. L. REV. 763 (2010).

104. *Id.* at 776–89.

105. *Id.* at 781.

resistance," Fabian observed, "*passive* resistance may not overcome other factors such as whether the plaintiff is in a vulnerable class of persons, whether the plaintiff is already restrained by the police, or whether the use of force was disproportionate to the underlying crime."[106] Fabian's survey, comprehensive as it is, does not include any discussion or analysis of Fourth Circuit taser law.

A review of the case law in the lower district courts suggests that a genuine victim of taser abuse by police in the Fourth Circuit will face more difficulty vindicating his right to be free of excessive force than he would in most other jurisdictions.[107] Even those persons subjected to an excessive assault in the context of an arrest for the most insignificant of infractions[108] may encounter significant difficulties in holding their abuser accountable. As explored in the pages below, in the federal district courts of the Fourth Circuit, one's mere verbal non-compliance,[109] sporadic movement (even if involuntary),[110] lack of dramatic physical injury,[111] or conviction for resisting arrest[112] may prove decisive in the court's analysis in cases involving allegations of taser abuse.

This analysis will, more often than not, take place in the context of a pre-trial qualified immunity analysis. In 1982, the Supreme Court introduced the doctrine of qualified immunity to American jurisprudence in *Harlow v. Fitzgerald*,[113] replacing the previous practice of inquiring into the subjective motivations of government officials.[114] The doctrine,

106. *Id.* at 783 (emphasis added) (citations omitted).

107. *See infra* Parts II–V.

108. In 2001, the Supreme Court, in a narrow five-to-four opinion, held that "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001). The opinion was "roundly criticized" by legal commentators, Wayne R. LaFave, *The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1847 n.15 (2004) (collecting criticism), as well as by the four dissenting justices, who lamented that the majority had given "police officers constitutional carte blanche to effect an arrest whenever there is probable cause to believe a fine-only misdemeanor has been committed." *Atwater*, 532 U.S. at 365–66 (O'Connor, J., dissenting). While the dissenters argued that the decision to afford officers "[s]uch unbounded discretion" had created a "grave potential for abuse," they did so largely in the context of discussing "racial profiling" and general police harassment. *Id.* at 372. But *Atwater* was also notable for the way it quietly expanded the universe of people potentially subjected to police force, since "the right to make an arrest . . . necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." Graham v. Connor, 490 U.S. 386, 396 (1989).

109. *See* HEADEN & MANCE, *supra* note 39, at 8; SILVERSTEIN, *supra* note 24, at 5.

110. *See infra* Part II.

111. *See infra* Part III.

112. *See infra* Part IV.

113. 457 U.S. 800 (1982).

114. *Id.* at 817–18.

premised on a test of objective reasonableness,[115] operates to shield government officials from lawsuits relating to their discretionary functions, including those actions which may later be found unlawful, so long as such actions do not violate "clearly established" law.[116] While all victims of police abuse face the obstacle of overcoming an officer's assertion of qualified immunity, the hurdle sits at varying heights from circuit to circuit.[117] The problem it presents to plaintiffs depends on the extent to which a court requires a "clearly established" right to be free from force in a given situation to be embodied in the decisional law, as well as the scope of the decisions to which a court considering the immunity question will look.[118] In the Fourth Circuit, commentators have observed that the doctrine is applied more generously to police officers than perhaps anywhere else.[119] Consequently, a plaintiff's case may well be over before it even begins, in effect denying her the *opportunity* to make a case before a judge or jury that the officer's actions were excessive and unreasonable.

Ask a plaintiff's lawyer practicing in the Fourth Circuit, and he will tell you that there is no shortage of people being tased.[120] Very few, however, are recovering in court. This tends to hold true even in the case of people wanted for minor offenses who lose their lives on the receiving end of a police taser.[121] Successful examples of Fourth Amendment excessive force cases are rare enough to dissuade many lawyers from even considering bringing suit in a circuit known for being deferential to police.[122] Some point to the relative lack of dramatic injuries as compared to more traditional police-brutality plaintiffs—although some taser victims

115. *Id.* at 818.

116. *Id.* at 817–18.

117. *See* Karen M. Blum, *Qualified Immunity: A User's Manual*, 26 IND. L. REV. 187, 203–05 (1993).

118. *See* Linda Ross Meyer, *When Reasonable Minds Differ*, 71 N.Y.U. L. REV. 1467, 1510–11 (1996).

119. *See, e.g.*, J. Michael McGuinness, *A Primer on North Carolina and Federal Use of Force Law: Trends in Fourth Amendment Doctrine, Qualified Immunity, and State Law Issues*, 31 CAMPBELL L. REV. 431, 439 (2009) ("The United States Court of Appeals for the Fourth Circuit has emerged as perhaps the leading circuit court in curtailing alleged excessive force litigation by frequent summary judgment dispositions that are often premised upon qualified immunity for the officer."); *see also id.* at 439 n.48 (listing the numerous "cases [that] have granted qualified immunity to officers and reaffirmed the deferential standards applicable to officers").

120. *See* Holmes Interview, *supra* note 29.

121. *See, e.g.*, Gray v. Frederick Cnty, No. WDQ 08 1380, 2012 WL 2871624, at *6 (D. Md. July 11, 2012).

122. *See* McGuinness, *supra* note 119, at 439–40 & n.48 (comparing treatment of excessive force cases in the Fourth Circuit to the other circuits); *see also* Orem v. Rephann, 523 F.3d 442, 450 (4th Cir. 2008) (Shedd, J., concurring) ("Generally, we have recognized . . . that law enforcement officers must be accorded 'due deference' . . . . " (quoting Grayson v. Peed, 195 F.3d 692, 696–97 (4th Cir. 1999))).

do bear permanent scarring[123]—and suggest that judges and juries are prone to undervaluing the pain and trauma that can be associated with the experience of being tased. Part of that may be attributable to the fact that TASER International has done a good job of marketing the device as safe and, in some cases, decidedly unserious,[124] as well as the fact that the media have often seemed to portray its use as more the stuff of humor than serious contemplation.[125] It is also the case that many people abused by tasers are also charged with resisting arrest,[126] itself a significant obstacle to any sort of recovery.[127] Those that have brought suit will note that it is common for police officers to take the stand and report that they were in full compliance with departmental policies governing use of force. More often than not, they are telling the truth.[128] In many jurisdictions, tasers are permitted to be deployed even absent any physical resistance.[129] Mere verbal disagreement with an officer is enough to get one tased by many police and sheriffs'

123. *See, e.g.*, *Orem*, 523 F.3d at 445 (noting that "a permanent sunburn-like scar was left where the taser had been applied to [plaintiff's] thigh"); TASER INT'L, INC., WARNINGS, INSTRUCTIONS, AND INFORMATION: CITIZEN WARNINGS 3 (2011), *available at* http://www.taser.com/images/resources-and-legal/product-warnings/downloads/citizen_warnings.pdf (acknowledging the device can cause "tear[ing] or other injury to soft tissue").

124. *See, e.g.*, *Taser Unveils Holster with Music Player*, MSNBC (Jan. 7, 2008), http://www.msnbc.msn.com/id/22541041/ns/technology_and_science-tech_and_gadgets/t/taser-unveils-holster-music-player/#.TywhAORmnG4 (detailing a new taser holster with MP3 player and new color schemes "for women who want fashion with a bite").

125. *See, e.g.*, Sarah Lai Stirland, '*Don't Tase Me, Bro!' Jolts the Web*, WIRED (Sept. 19, 2007), http://www.wired.com/threatlevel/2007/09/dont-tase-me-br/ (discussing media sensation surrounding the phrase uttered by tased college student which quickly became "the newest cultural touchstone of our pop-cultural lexicon" and collecting a wide variety of the related media commentary).

126. *See* Holmes interview, *supra* note 29; Ray Gronberg, *Hudson Tosses Lawsuit Against DPD*, HERALD-SUN (Durham, NC) Aug. 17, 2012, at C1, *available at* http://www.heraldsun.com/view/full_story/19837500/article-Hudson-tosses-lawsuit-against-DPD.

127. *See infra* Part IV.

128. *See* U.N. Human Rights Rep., *supra* note 37, at 65 (expressing concern over a wide variety of taser abuse scenarios and observing that "in most cases the responsible officers [were not] found to have violated their departments' policies").

129. *See* Henry v. Purnell, 652 F.3d 524, 540 (4th Cir.) (en banc) (Davis, J., concurring) ("Local law enforcement policies . . . reflect differing views of where the taser fits on the 'force continuum.' Some allow taser use only as an alternative to deadly force, while others call for taser use whenever any force is justified." (quoting McKenney v. Harrison, 635 F.3d 354, 362 (8th Cir. 2011) (Murphy, J., concurring))), *cert. denied*, 132 S. Ct. 781 (2011); *see also* HEADEN & MANCE, *supra* note 39, at 8 (noting that "[c]urrently in most jurisdictions there is nothing that prevents law enforcement officers from deploying a TASER against a completely non-violent individual"); MARK SCHLOSBERG, ACLU OF N. CAL., STUN GUN FALLACY: HOW THE LACK OF TASER REGULATION ENDANGERS LIVES 12–13 (2005), *available at* https://www.aclunc.org/issues/criminal_justice/police_practices/asset_upload_file389_5242.pdf (finding that "of the 54 police departments surveyed, only 8 (15 percent) have any policy prohibiting or regulating the use of Tasers" on passive resisters).

departments.[130] TASER International itself reported at one time that more than a third of all people subjected to the device had exhibited no more than verbal resistance.[131] In the Fourth Circuit, plaintiffs wishing to challenge such practices face an uphill climb, forced to contend with a rather haphazard doctrine in the lower district courts—one that routinely imposes a higher degree of proof on free persons subjected to the device than it does inmates, incentivizes the overcharging of tased arrestees, and ignores crucial and fundamental facts about the unique nature of the weapon and its physical effects on those against whom it is used.

II. VOLITIONAL VERSUS NON-VOLITIONAL NON-COMPLIANCE

In some respects, the recent district court ruling in *Meyers v. Baltimore County*[132] illustrates the inherent difficulty that plaintiffs face in demonstrating the use of excessive force in the context of arrests involving successive applications of a taser. *Meyers* is notable for two reasons. First, it involved a vulnerable decedent—Ryan Meyers, a man known by officers to be suffering from a significant mental illness[133]—whose own family had called the police for assistance.[134] Second, there was material dispute as to whether the decedent was in fact actively resisting as opposed to reacting involuntarily to the shocks of the taser in the moments immediately preceding his death.[135] Although the court found the facts of the case troubling and expressed doubts as to the reasonableness of the officer's conduct,[136] it nevertheless awarded the officer involved qualified immunity, reasoning that he was not "on notice that he must in some circumstances limit the use of his Taser in stun mode [when a] subject continues to struggle."[137]

Notably, the court reached this conclusion at a stage of the proceedings in which deference is, as a rule, supposed to be given to the plaintiff's account.[138] In *Meyers*, this account came from the decedent's

130. *See* HEADEN & MANCE, *supra* note 39, at 8 ("[O]nly 18.6% of TASER-deploying counties [in North Carolina] report[ed] in 2007 that they restricted or prohibited the practice in their use of force policies.").

131. *See* SILVERSTEIN, *supra* note 24, at 5 ("Taser International has confirmed that in over one-third of the cases in which police officers have discharged tasers, the reported level of resistance is 'verbal non-compliance.' ").

132. 814 F. Supp. 2d 552 (D. Md. 2011).

133. *Id.* at 554.

134. *Id.*

135. *Id.* at 556, 560.

136. *Id.* at 560.

137. *Id.* at 561.

138. *See* Saucier v. Katz, 533 U.S. 194, 201 (2001) ("A court required to rule upon the qualified immunity issue must consider . . . this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated

brother, William, a witness to the confrontation, who stood in his brother's stead and maintained that his resistance prior to the final applications consisted of nothing more than "moving his legs"[139] in a manner consistent with the sort of involuntary convulsions brought on by a taser.[140] According to William, his brother was trying to surrender.[141] William Meyers hoped the court would find that the officers should have recognized that these movements—which they had characterized as "active resist[ance]"[142]—were non-volitional and could not form the objective basis for the continued use of force.[143] In making this argument, he effectively put to the court the questions at the heart of many taser suits: To what extent are officers permitted to *continue* using their tasers in circumstances where they are justified in their initial application? If a taser renders a suspect incapable of volitional movement, can his *non*-volitional movements provide a legal basis for further applications of the device? After all, the subjective motivation of a suspect who is making threatening motions is usually irrelevant insofar as it concerns an officer's objective assessment of the threat the suspect may pose.[144] In the case of tasers, however, might the fact that the officer is the one deploying the weapon that could be *causing* such movements factor into the court's assessment?[145] Can an officer plead ignorance about a device's ability to incapacitate when that is the very reason he used it to begin with?

While the Fourth Circuit has typically held that an officer's actions in the moments preceding the fatal application of force are irrelevant for

a constitutional right?"), *rev'd in part on other grounds*, Pearson v. Callahan, 555 U.S. 223, 236 (2009).

139. *Meyers*, 814 F. Supp. 2d at 560.

140. "[N]on-volitional movements, such as kicking of the legs and flailing of the arms are not an uncommon reaction to a taser application . . . ." Marquez v. City of Phoenix, CV-08-1132-PHX-NVW, 2010 WL 3342000, at *2 n.4 (D. Ariz. Aug. 25, 2010).

141. Gadi Dechter, *Man Dies After Hit from Stun Gun*, BALT. SUN, Mar. 18, 2007, *available at* http://articles.baltimoresun.com/2007-03-18/news/0703180023_1_ryan-meyers-william-meyers-anna-meyers (" 'They killed my brother,' said William Meyers Jr. yesterday. After being stunned once, Ryan Meyers cried out, 'I give up, I give up,' said the victim's brother . . . .").

142. *Meyers*, 814 F. Supp. 2d at 560.

143. *See* Complaint at 4–5, *Meyers*, 814 F. Supp. 2d 552 (1:10-cv-00549-BEL) (asserting that the "Officer . . . recycl[ed] . . . his taser numerous times" without "legitimate reason to believe that Ryan Meyers posed a threat" and as a consequence of police having "not [been] trained in procedures concerning multiple tasering"); *see also* Dechter, *supra* note 141 (quoting William Meyers as saying Ryan Meyers was trying to surrender).

144. *See* Graham v. Connor, 490 U.S. 386, 396 (1989) ("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."); Elliott v. Leavitt, 99 F.3d 640, 642 (4th Cir. 1996) ("[T]he question is whether a reasonable officer in the same circumstances would have concluded that a threat existed justifying the particular use of force.").

145. *See* Fabian, *supra* note 103, at 784 ("[S]uccessive Taser shocks may actually frustrate an officer's attempt to secure suspect compliance.").

purposes of assessing the reasonableness of his conduct at the moment he uses force,[146] there is at least some reason to believe that the Meyers family nevertheless had a valid complaint. Although it went unmentioned in the *Meyers* opinion, the 2002 Fourth Circuit case of *Clem v. Corbeau*[147] would have appeared to provide the plaintiffs in *Meyers* a colorable argument with respect to the officer's continued use of the taser in the moments preceding Ryan Meyers's death. In *Clem*, the court broke with its traditional approach[148] when confronted with a similar instance that involved a mentally disturbed man who was shot by police responding to his family's call for assistance.[149] The Fourth Circuit held that "it would require no improper second-guessing, or the application of '20–20 . . . hindsight,' to conclude that Officer Corbeau violated [the plaintiff's] Fourth Amendment right to be free from excessive police force"[150] where his supposedly threatening "movements [which prompted the officer to shoot were] consistent with his recent subjection to pepper spray."[151] In that case, the court refused to construe the plaintiff's physical reactionary movements to being pepper-sprayed as active resistance or voluntary non-compliance that would justify using additional force in a Fourth Amendment analysis.[152] As a result, the plaintiff was afforded a day in court and an opportunity to make his case that the officer's actions had been objectively unreasonable.[153]

Consistent with the approach taken by many other district courts in cases involving tasers,[154] however, and unlike the court in *Clem*, the court

146. *See* Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 COLUM. HUM. RTS. L. REV. 261, 279, 281–82 (2003).

147. 284 F.3d 543 (4th Cir. 2002).

148. *See* Avery, *supra* note 146, at 280–82 (citing *Elliott*, 99 F.3d 640, Drewitt v. Pratt, 999 F.2d 774 (4th Cir. 1993), Greenidge v. Ruffin, 927 F.2d 789 (4th Cir. 1991)). *But see* Rowland v. Perry, 41 F.3d 167, 173 (4th Cir. 1994) ("The better way to assess the objective reasonableness of force is to view it in full context, with an eye toward the proportionality of the force in light of all the circumstances.").

149. *Clem*, 284 F.3d at 545–46.

150. *Id.* at 552 (quoting Graham v. Connor, 490 U.S. 386, 396 (1989)).

151. *Id.* at 548.

152. *Id.* ("Although Corbeau now asserts that Clem rapidly 'charged' him, both officers originally told police investigators that Mr. Clem was 'not running,' but rather 'stomping' forward . . . with his hands open and waving in front of him, *movements consistent with his recent subjection to pepper spray*." (emphasis added)); *id.* at 552 ("[V]iewed in the light most favorable to Clem, the evidence is that Corbeau shot a mentally disabled, confused older man, obviously unarmed, who was stumbling toward the bathroom in his own house with pepper spray in his eyes, unable to threaten anyone.").

153. *See id.* at 554–55.

154. *See, e.g.*, Griffin v. Catoe, Civ.A. No. 9:07-1609-JFA-GCK, 2008 WL 4558495, at *1–7 (D.S.C. Aug. 11, 2008) (failing to consider the voluntary or involuntary nature of the non-

in *Meyers* gave little consideration to this distinction between volitional and involuntary non-compliance. Instead, it relied on a concurring opinion from *Henry* which observed that "the objective reasonableness of the use of Tasers continues to pose difficult challenges to . . . courts"[155] in granting qualified immunity to the officer involved.[156] The court noted its inability to locate any "clearly established legal princip[le] . . . offering guidance as to the point at which continued tasings become excessive when the suspect is actively resisting"[157]—implicitly construing Meyer's last movements as volitional in character. Thus, despite the recognition in the same concurring opinion that the *Meyers* court relied on that "a Taser is designed to incapacitate *instantly*"[158] by "inflict[ing] a painful and frightening blow [that] . . . render[s] the victim helpless,"[159] the fact that Meyers continued "moving his legs"[160] after being tased nearly a dozen times[161] was thought sufficient justification for keeping the issue of the reasonableness of the officer's conduct from reaching a jury.[162]

It is at this point that the *Meyers* court's approach to qualified immunity, consistent though it is with other federal district courts within the Fourth Circuit, is most problematic and seems to diverge from the

compliance), *report and recommendation adopted in part*, C/A 0:07-1609-JFA, 2008 WL 4458947 (D.S.C. Sept. 26, 2008).

155. Meyers v. Balt. Cnty., 814 F. Supp. 2d 552, 561 (D. Md. 2011) (quoting Henry v. Purnell, 652 F.3d 524, 539 (4th Cir. 2011) (Davis, J., concurring)). Interestingly, the concurring opinion from which *Meyers* quoted is replete with language that raises considerable doubt, but never outright reaches a conclusion, as to the reasonableness of tasing a non-compliant but non-violent suspect. It may in fact be the strongest language anywhere in the circuit questioning the constitutionality of the device against such persons under the Fourth Amendment. *See Henry*, 652 F.3d at 537–38 (Davis, J., concurring) (criticizing the dissent's conclusion that "the intentional use of a Taser [against the nonviolent arrestee] . . . *would have* comported with the Fourth Amendment").

156. *See Meyers*, 814 F. Supp. 2d at 561–62.

157. *Id.* at 561.

158. *Henry*, 652 F.3d at 539 (Davis, J., concurring) (emphasis added) (quoting McKenney v. Harrison, 635 F.3d 354, 360 (8th Cir. 2011) (Murphy, J., concurring)).

159. Orem v. Rephann, 523 F.3d 442, 448 (4th Cir. 2008) (quoting Hickey v. Reeder, 12 F.3d 754, 757 (8th Cir. 1993)). A number of the lower district courts appear to have given little weight to this characterization. *See, e.g.*, White v. Smereka, No. 3:09-cv-00257-W, r2010 WL 2465552, at *4 (W.D.N.C. June 14, 2010) (citing Draper v. Reynolds, 369 F.3d 1270, 1278 (11th Cir. 2004)) (characterizing the taser as something that can be used "to *calm* a belligerent [arrestee]" (emphasis added)), *aff'd*, 410 F. App'x 714 (4th Cir. 2011). *Draper* was a controversial Eleventh Circuit opinion that minimized the experience of being tased and upheld the use of the device against a belligerent but nonthreatening suspect who "repeatedly refused to comply with . . . verbal commands" to retrieve his proof of insurance and other documents. 369 F.3d at 1278. This case has been cited at least seventeen times by the circuit's lower district courts, including at least eleven times since *Orem* was decided.

160. *Meyers*, 814 F. Supp. 2d at 560.

161. *Id.*

162. *See id.* at 562.

larger body of Fourth Amendment doctrine in which it is subsumed. While the Fourth Circuit has held that "force justified at the beginning of an encounter is not justified *even seconds later* if the justification for the initial force has been eliminated,"[163] as *Meyers* and other cases illustrate, this principle can ring hollow for plaintiffs seeking to vindicate their right to seek redress for taser use that, though initially reasonable, crosses a line and becomes wholly excessive or even fatal. In this respect, taser cases deviate both from other "less lethal weapon" cases[164] and the principle, articulated by the Fourth Circuit on a number of occasions, that the fact that a suspect was "the original aggressor . . . does not necessarily entail the further conclusion that [officers] did not respond with excessive force."[165]

Although taser use is no longer the rare occurrence it once was, many of the federal district courts in the Fourth Circuit have persisted in effectively treating allegations of gratuitous applications in the context of arrests as an issue of first impression, noting that *Orem*, the circuit's most notable taser case to date, was "analyzed under the Fourteenth Amendment rather than the Fourth Amendment, [and] do[es] not speak authoritatively on the issue."[166] This parochial approach to an issue that has, in fact, received considerable treatment in federal appellate courts across the country in recent years,[167] gives little or no weight to the rule that a "clear

163. Waterman v. Batton, 393 F.3d 471, 481 (4th Cir. 2005) (emphasis added); *see also* Hope v. Pelzer, 536 U.S. 730, 743 (2002) ("[P]hysical abuse directed at [a] prisoner *after* he terminate[s] his resistance to authority would constitute an actionable eighth amendment violation." (second and third alterations in original) (quoting Ort v. White, 813 F.2d 318, 324 (11th Cir. 1987))).

164. *See infra* note 183.

165. *See, e.g.*, Ridley v. Leavitt, 631 F.2d 358, 359 (4th Cir. 1980) (citing Williams v. Liberty, 461 F.2d 325, 328 (7th Cir. 1972)); *cf.* Kane v. Hargis, 987 F.2d 1005, 1008 (4th Cir. 1993) (stating that state court proceedings determining that the arrestee impeded an officer will not estop the arrestee from bringing an excessive force claim in federal court).

166. Meyers v. Balt. Cnty., 814 F. Supp. 2d 552, 561 n.10 (D. Md. Sept. 28, 2011); *see also* Thompson v. City of Danville, No. 4:10CV00012, 2011 WL 2174536, at *8 (W.D. Va. June 3, 2011) (noting lack of Fourth Amendment precedent in the Fourth Circuit regarding the use of tasers).

167. *See, e.g.*, Bryan v. MacPherson, 630 F.3d 805, 832–33 (9th Cir. 2010) (holding that tasing an unarmed, non-compliant, mentally disturbed suspect stopped for a minor offense violated the Fourth Amendment); Kijowski v. City of Niles, 372 F. App'x 595, 601 (6th Cir. 2010) (finding the "use of a Taser on a non-resistant subject" to violate the Fourth Amendment); Oliver v. Fiorino, 586 F.3d 898, 907 (11th Cir. 2009) ("[R]epeated tasering . . . beyond [a suspect's] complete physical capitulation . . . establishe[s] a violation of the Fourth Amendment."); Brown v. City of Golden Valley, 574 F.3d 491, 499 (8th Cir. 2009) (finding "it was unlawful to Taser a nonviolent, suspected misdemeanant who was not fleeing or resisting arrest"); Parker v. Gerrish, 547 F.3d 1, 9 (1st Cir. 2008) (affirming a district court denial of officer's post-trial motions and judgment in favor of tased arrestee who brought Fourth Amendment claim under § 1983); Landis v. Baker, 297 F. App'x 453, 463 (6th Cir. 2008) ("[G]ratuitous or excessive use of a taser would violate a clearly established constitutional right."); Casey v. City of Fed. Heights, 509 F.3d 1278, 1286 (10th Cir. 2007) ("[I]t is excessive to

violation of federal law may [also] occur when . . . a consensus of cases from other circuits[] puts [an] officer on notice that his conduct is unconstitutional."[168] As a consequence, qualified immunity often leaves true victims of taser abuse with little recourse. Such a consensus arguably exists already outside the Fourth Circuit for the proposition that the Fourth Amendment is violated, and plaintiffs are entitled to their day in court, when officers tase a suspect beyond the point where the threat justifying the initial application of the device has been neutralized.[169] And, though it may be true that the issue of taser abuse is still a relatively new phenomenon, there is nevertheless ample precedent, particularly in the Eighth Amendment context, for the notion that merely gratuitous use of electric weapons by government officers offends the Constitution.[170] In any

use a Taser to control a target without having any reason to believe that a lesser amount of force—or a verbal command—could not exact compliance."); *cf.* Livingstone v. N. Belle Vernon Borough, 91 F.3d 515, 531 (3d Cir. 1996) (characterizing application of a stun gun to genitalia as "an outrageous instance of police abuse"); Titran v. Ackman, 893 F.2d 145, 148 (7th Cir. 1990) (describing as unreasonable police officers' deliberate restraint and jolting of nonviolent plaintiff).

168. Altman v. City of High Point, 330 F.3d 194, 210 (4th Cir. 2003) (citing Wilson v. Layne, 526 U.S. 603, 617 (1999)); *see also* Owens *ex rel.* Owens v. Lott, 372 F.3d 267, 280 (4th Cir. 2004) ("[W]e may look to 'a consensus of cases of persuasive authority' from other jurisdictions, if such exists." (quoting *Wilson*, 526 U.S. at 617)); Amaechi v. West, 237 F.3d 356, 363 (4th Cir. 2001).

169. *See* cases discussed *supra* note 167.

170. *See* Hudson v. McMillian, 503 U.S. 1, 13–14 (1992) (Blackmun, J., concurring) (describing the practice of "shocking [inmates] with electric currents" as "state-sponsored torture . . . ingeniously designed to cause pain but without a telltale 'significant injury' "); Brown v. Hughes, 894 F.2d 1533, 1538 (11th Cir. 1990) ("Deliberately inflicted pain, as with an electric cattle prod, does not become unimportant and unactionable under the eighth amendment simply because the pain produced is only momentary."); Titran v. Ackman, 893 F.2d 145, 148 (7th Cir. 1990) (noting that if "officers intentionally . . . jolted [plaintiff with an 'XR 5000 cattle prod'] without physical provocation . . . , their behavior was unreasonable"); Michenfelder v. Sumner, 860 F.2d 328, 335 (9th Cir. 1988) (noting that the "Supreme Court has said that administering electric shocks to prisoners as punishment for misconduct was 'unusual' " (citing Hutto v. Finney, 437 U.S. 678, 682 n.5 (1978) (describing the so-called " 'Tucker telephone,' a hand-cranked device . . . used to administer electrical shocks to various sensitive parts of an inmate's body"))); Johnson v. Garraghty, 57 F. Supp. 2d 321, 323 (E.D. Va. 1999) (considering whether officers who "shocked [inmate's] face with [an] electric shield, sending painful and visible electrical currents through his face and eyes" should receive qualified immunity). For more recent cases within the Fourth Circuit, see also Jackson v. Fletcher, No. 7:09CV00408, 2011 WL 197954, at *9 (W.D. Va. Jan. 18, 2011) (finding that "the misuse of . . . a shocking device . . . [is] conduct that a reasonable jury could find 'repugnant to the conscience of mankind,' regardless of whether [subject] suffered any severe or disabling injuries"); Malik v. Ward, No. 8:08–1886–RBH–BHH, 2010 WL 1010023, at *8 (D.S.C. Feb. 4, 2010) ("[U]nwarranted use of an electric shield . . . constitue[s] [sic] [an] act[] 'repugnant to the conscience of mankind,' regardless of the extent of damage inflicted. . . . [This] implicate[s] basic issues of human 'dignity.' " (quoting Hope v. Pelzer, 536 U.S. 730, 738 (2002))), *report and recommendation adopted by* No. 8:08–CV–01886–RHB, 2010 WL 936777 (D.S.C. Mar. 16, 2010)); Johnson v. Warner, No. 7:05CV00219, 2008 WL 619302, at *2 (W.D. Va. Mar. 5, 2008) (denying qualified immunity

case, it "is not [always true] that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful."[171] As the Supreme Court has noted, "a general constitutional rule already identified in the decisional law may apply with obvious clarity to [certain] conduct . . . , even though 'the very action in question has [not] previously been held unlawful.' "[172]

Implicit in nearly every award of qualified immunity in such cases thus seems to be a weighty assumption, one which is rarely stated explicitly, that courts are simply not well-positioned to second-guess officers' continued applications of force against suspects whose purported resistance may indeed be involuntary.[173] This approach significantly undervalues the taser's capacity to cause temporary muscle paralysis that functionally "prevent[s] the type of coordinated motion that is required to fight"[174] and gives too little consideration to the fact that "after being tased, a suspect may be dazed, disoriented, and experience vertigo"[175] such that complying with an officer's orders is not always possible.[176] The lower district courts similarly seem to underestimate the competency of

where inmate was, among other abuses, "attacked by defendants . . . while they were armed with two 50,000-volt electric shields").

171. Hope v. Pelzer, 536 U.S. 730, 739 (2002) (citing Mitchell v. Forsyth, 472 U.S. 511, 535 n.12 (1985)); *see also* Ridpath v. Bd. of Governors of Marshall Univ., 447 F.3d 292, 313 (4th Cir. 2006) (explaining that " 'officials can still be on notice that their conduct violates established law even in novel factual circumstances' " (quoting *Hope*, 536 U.S. at 731)).

172. United States v. Lanier, 520 U.S. 259, 271 (1997) (third alteration in original) (quoting Anderson v. Creighton, 483 U.S. 635 (1987)).

173. For one of the more frank and extended discussions of the issue, see *Armbruster v. Marguccio*, No. Civ.A. 05-344J, 2006 WL 3488969, at *6 (W.D. Pa. Dec. 4, 2006) ("[V]iewing the so-called involuntary movements made by Plaintiff, the officers could have reasonably interpreted Plaintiff's movements as aggressive behavior and a refusal to comply, and could have reasonably believed that . . . even the second, third and fourth use of the taser were all necessary to get Plaintiff to comply . . . ."); *see also* Marquez v. City of Phoenix, No. CV-08-1132-PHX-NVW, 2010 WL 3342000, at *10 (D. Ariz. Aug. 25, 2010) ("Had the officers known that [a suspect] was simply flailing in response to the taser and yet continued to tase him, this factor would weigh in favor of [the suspect's estate]. However, . . . a reasonable officer could have concluded that [suspect] was actively resisting arrest.").

174. McDonald v. Pon, No. C05-1832-JLR-JPD, 2007 WL 4868270, at *2 (W.D. Wash. Oct. 15, 2007), *adopted in part, rejected in part*, No. C05-1832JLR, 2007 WL 4420936 (W.D. Wash. Dec. 14, 2007)

175. Beaver v. City of Fed. Way, 507 F. Supp. 2d 1137, 1144 (W.D. Wash. 2007), *aff'd*, 301 F. App'x 704 (9th Cir. 2008).

176. *See, e.g.*, Mattos v. Agarano, 661 F.3d 433, 445 (9th Cir. 2011) ("Three tasings in . . . rapid succession provided no time for [plaintiff] to recover from the extreme pain she experienced, gather herself, and reconsider her refusal to comply."), *cert. denied*, 132 S. Ct. 2681, 2682, 2684 (2012).

professional law enforcement officers to make responsible judgments with a weapon they have been specifically trained to use.[177]

Granting immunity to officers who "continuously used a taser on an unarmed, *involuntarily* non-compliant suspect, who kept moving only because he was suffering from physical spasms beyond his control"[178] thus has opened a legal loophole of sorts for future abuses by protecting those willing to plead ignorance to something that should typically be obvious to someone with proper training[179]—the difference between willful non-compliance and a genuine inability to physically comply.[180] In five years of meeting with people who claimed to be victims of taser abuse, the author of this Comment has encountered multiple arrestees who insisted they wanted nothing more than to put their hands up and spare themselves the pain (and in some cases, permanent scarring) of additional tasings, only to find themselves rendered physically incapable of complying with the order as a result of the device's powerful lingering effects. Unless officers are restricted by their own departmental policies from firing the device in rapid succession without limit—and few are[181]—there exists very little in the way

177. *See* Aaron Sussman, *Shocking the Conscience: What Police Tasers and Weapon Technology Reveal About Excessive Force Law*, 59 UCLA L. REV. 1342, 1407 (2012) (noting that "it seems fair—and obvious—to assume that police officers understand the knowable effects of the use of force they are deploying"). Taser training regularly involves subjecting the trainee officer to a controlled application of the taser—an experience that is not itself without danger. *See* Eric Nagourney, *In Stun Gun Training, Officer's Spine is Fractured*, N.Y. TIMES, Sept. 18, 2007, at F7 (reporting that a healthy thirty-eight-year-old North Carolina police officer suffered numerous spinal fractures from a *single* five-second taser discharge during a training exercise).

178. Wargo v. Mun. of Monroeville, 646 F. Supp. 2d 777, 786 (W.D. Pa. 2009) (discussing Armbruster v. Marguccio, No. Civ.A. 05-344J, 2006 WL 3488969, at *6 (W.D. Pa. 2006)).

179. Of course, just because an officer once sat through a taser training course does not necessarily mean he paid attention. *See* Parker v. City of South Portland, No. 06-129-P-S, 2007 WL 1468658, at *12 (D. Me. May 18, 2007) ("Officers are . . . instructed to consider the subject's 'active resistance' or any attempt to evade arrest by flight . . . . Although 'active resistance' is a common term in law enforcement, [the defendant officer] indicated that he did not know or use this term."), *aff'd*, No. 06-129-P-S, 2007 WL 2071815 (D. Me. July 18, 2007).

180. *See* Salinas v. City of San Jose, No. C 09-04410 RS, 2010 WL 7697467, at *2 (N.D. Cal. Nov. 24, 2010) ("[T]he uncontrollable rigidity of the muscles caused by the Taser's pulsating electrical current makes it . . . impossible for the subject to comply with officer commands to 'stop resisting' or '[p]ut your arms behind your back.' " (last alteration in original)); Marquez v. City of Phoenix, No. CV-08-1132-PHX-NVW, 2010 WL 3342000, at *2 n.4 (D. Ariz. Aug. 25, 2010) ("Taser's director of training[] testified that non-volitional movements, such as kicking of the legs and flailing of the arms are not an uncommon reaction to a taser application . . . .").

181. In North Carolina, for example, of the state's 100 counties, according to the most recent available statistics, only three—Anson, Montgomery, and Sampson—explicitly limit the number of times a taser may be deployed against a single suspect (to three, two, and three times, respectively). HEADEN & MANCE, *supra* note 39, at 14–15. Use-of-force policies, however, only place limits on officers' conduct to the extent that they are enforced *within* the department. "It is . . . settled law that a violation of departmental policy does not equate with constitutional unreasonableness." Abney v. Coe, 493 F.3d 412, 419 (4th Cir. 2007) (citing Davis v. Scherer, 468 U.S. 183, 193–96 (1984)).

of meaningful deterrent to guard against abuse where the first application is justified and the suspect thereafter ceases actively resisting.

It is this circumstance for which the law in the Fourth Circuit does not yet adequately account. While the court purports to recognize criminal suspects' "right to be free of 'seizures effectuated by excessive force,' "[182] the right has proven exceptionally difficult to vindicate in the context of challenging taser abuse. Much like the district courts' treatment of other purportedly "less lethal"[183] or "less than lethal weapons," judicial treatment of taser use has generally afforded officers quite a considerable degree of deference. It is notable, however, that courts in the circuit have typically recognized at least some limits on officers' abilities to employ other forms of less lethal force.[184] Moreover, several factors unique to the taser would seem to advise against subjecting them to any lesser standard and might in fact suggest the appropriateness of closer judicial scrutiny. Tasers are, in many ways, quite different than pepper spray, and their effect is fundamentally different than a baton. The analogies to other types of so-called less-lethal weapons in fact miss the mark in a number of respects. The rate of taser-associated fatalities alone[185]—relative to other police

182. Henry v. Purnell, 652 F.3d 524, 531 (4th Cir. 2011) (en banc) (quoting Schultz v. Braga, 455 F.3d 470, 476 (4th Cir. 2006)), *cert. denied*, 132 S. Ct. 781 (2011).

183. *See, e.g.*, United States v. Mohr, 318 F.3d 613, 623 (4th Cir. 2003) (observing that "use of a K-9 would be considered 'less lethal force' and 'would fall in the same area' as 'an intermediate weapon,' such as a baton").

184. *See, e.g.*, Iko v. Shreve, 535 F.3d 225, 239–40 (4th Cir. 2008) (holding that spraying an inmate several times after he tried to comply "supports a finding that the [officer] violated [the plaintiff's] constitutional right to be free from excessive force"); Park v. Shiflett, 250 F.3d 843, 852–53 (4th Cir. 2001) (holding that the use of pepper spray was excessive when used to restrain unarmed individual who posed no threat); Johnson v. Prince George's Cnty., No. DKC 10-0582, 2011 WL 806448, at *6 (D. Md. Mar. 1, 2011) ("Even in the more permissive Eighth Amendment context, '[i]t is generally recognized that it is a [constitutional] violation . . . to use mace, tear gas, or other chemical agents in quantities greater than necessary.' " (alterations in original) (quoting Williams v. Benjamin, 77 F.3d 756, 763 (4th Cir. 1996))); Walters v. Prince George's Cnty., No. AW-08-711, 2010 WL 2858442, at *8 (D. Md. July 19, 2010) ("Reasonable jurors could . . . conclude that [an officer's] repeated spraying of [an arrestee] at close[] range . . . served no legitimate law enforcement purpose . . . ."), *appeal dismissed*, 438 F. App'x 208 (4th Cir. 2011); Sykes v. Wicomico Cnty., No. CCB-05-2846, 2007 WL 1073607, at *10–11 (D. Md. Mar. 30, 2007) (denying summary judgment to defendant officers who struck and pepper sprayed an unarmed trespassing suspect); McDerment v. Browning, 18 F. Supp. 2d 622, 627 (S.D. W. Va. 1998) (finding that "the objective unreasonableness, and indeed the unlawfulness and excess, of the officers' conduct should have been apparent to a reasonable law enforcement official" where plaintiff, "known by law enforcement officials to be mentally and physically handicapped . . . was knocked from his ATV with both physical force and pepper spray . . . [and] sprayed again while flailing his arms and trying to regain his sight").

185. *See generally* LESS THAN LETHAL, *supra* note 15, at 20 (chronicling 334 deaths in the United States of people who were struck with police tasers between June 2001 and August 2008).

weapons[186]—would certainly seem to demand a higher degree of caution than is currently evident in the existing case law. In addition, "[u]nlike other police weapons, tasers can be fatally confused with guns, which further distinguishes them from older technologies."[187] Perhaps most importantly, however, is the fact that people who have been tased do not retain the same control of their faculties as individuals subjected to other forms of "less lethal" force.[188] Tasers thus augment the traditional order/comply dichotomy that plays out in a typical arrest scenario, something explicitly acknowledged by courts in other circuits[189] but virtually ignored by those in the Fourth Circuit.

To the extent officers remain incapable of recognizing the distinction between voluntary and involuntary movements, courts would seem well advised to approach the use of the weapon with *more* caution, given its high potential for abuse and the greater risk of causing an accidental fatality compared to other purported less-than-lethal weapons in police

186. *See* EVALUATION AND INSPECTIONS DIV., U.S. DEP'T OF JUSTICE, REVIEW OF THE DEPARTMENT OF JUSTICE'S USE OF LESS-LETHAL WEAPONS, at i–ii (2009) [hereinafter LESS-LETHAL WEAPONS], *available at* http://www.justice.gov/oig/reports/plus/e0903/final.pdf ("There have been no reported fatalities resulting from the use of [batons, pepper spray, bean bag rounds, or rubber projectiles] by Department components. However, fatalities have occurred at the state and local level, particularly following the use of conducted energy devices."); NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, THE EFFECTIVENESS AND SAFETY OF PEPPER SPRAY 1 (2003), *available at* www.ncjrs.gov/pdffiles1/nij/195739.pdf (stating that "exposure to pepper spray was a contributing cause of death in 2 of the 63 fatalities [that occurred in-custody where pepper spray was used during the arrest], and both cases involved people with asthma").

187. McKenney v. Harrison, 635 F.3d 354, 362 (8th Cir. 2011) (Murphy, J., concurring); *see also* cases cited *supra* note 2.

188. *See McKenney*, 635 F.3d at 362 ("[T]he newer tasers . . . [are] somewhat unique in that they render even the most pain tolerant individuals utterly limp."); LeBlanc v. City of L.A., No. CV 04-8250 SVW (VBKx), 2006 WL 4752614, at *16 (C.D. Cal. Aug. 16, 2006) (noting that "[u]nlike weapons that rely on blunt force—such as guns, batons, knives, or beanbag shots—Taser is an energy-based weapon whose inner workings and physiologic impact are not obvious").

189. *See, e.g.*, Cyrus v. Town of Mukwonago, 624 F.3d 856, 862–63 (7th Cir. 2010) ("[A]lthough [police] characterize[d] [suspect]'s barrel-roll down the driveway as an attempt to flee, a jury might . . . reasonably conclude that the barrel-roll was an involuntary reaction to the second Taser shock."); Greenfield v. Tomaine, No. 09 Civ 8102(CS)(PED), 2011 WL 2714221, at *4–5 (S.D.N.Y. May 10, 2011) ("Defendants have presented no evidence to indicate what the alleged 'struggle' entailed, . . . or whether Plaintiff's 'struggle' was merely an adverse, and perhaps involuntary, reaction to being hit in the chest with a taser."), *report and recommendation adopted*, No. 09-CV-8102 (CS)(PED), 2011 WL 2714219 (S.D.N.Y. July 12, 2011); Beaver v. City of Fed. Way, 507 F. Supp. 2d 1137, 1145–46 (W.D. Wash. 2007) ("The defendants confuse involuntary non-compliance with active resistance. . . . Involuntary actions cannot form the basis of active resistance."), *aff'd*, 301 F. App'x 704 (9th Cir. 2008); McDonald v. Pon, C05-1832-JLR-JPD, 2007 WL 4868270, at *2 (W.D. Wash. Oct. 15, 2007) ("The involuntary muscle contractions [caused by a taser] prevent the type of coordinated motion that is required to fight or flee."), *report and recommendation adopted in part and rejected in part*, No. C05-1832JLR, 2007 WL 4420936 (W.D. Wash. Dec. 14, 2007).

arsenals.[190] Moreover, the rationale for according such deference under Fourth Amendment analysis to officers charged with abusing the device has grown increasingly tenuous in light of the Fourth Circuit's Fourteenth Amendment analysis in *Orem*[191] and ample Eighth Amendment precedent suggesting that unnecessary use of the device offends the Constitution.[192] Typically, officers are given greater leeway in using more force in controlling those who have been adjudicated guilty and are held in state custody[193]—a standard evaluated under the Eighth Amendment[194]—than they are in taking into custody those who have merely been suspected of crimes, conduct which is governed by a Fourth Amendment reasonableness

190. *See* LESS-LETHAL WEAPONS, *supra* note 186, at i–ii; *see also McKenney*, 635 F.3d at 361 (Murphy, J., concurring) (noting that "developing law on taser use must consider the unique nature of this type of weapon and the increased potential for possibly lethal results").

191. *See* 523 F.3d 442, 449 (4th Cir. 2008) (holding that use of a "taser to punish or intimidate . . . is not objectively reasonable, is contrary to clearly established law, and [is] not protected by qualified immunity").

192. *See, e.g.*, Hudson v. McMillian, 503 U.S. 1, 13–14 (1992) (Blackmun, J., concurring) (observing that the Constitution does not protect "abuse[s] . . . designed to cause pain but without a telltale 'significant injury' " such as "shocking . . . with electric currents"); Williams v. Benjamin, 77 F.3d 756, 762 (4th Cir. 1996) ("Mankind has devised some tortures that leave no lasting physical evidence of injury. . . . [T]he [Eighth Amendment's] objective component can be met by 'the pain itself,' even if an inmate has no 'enduring injury.' " (quoting Norman v. Taylor, 25 F.3d 1259, 1263 n.4 (4th Cir. 1994) (en banc), *abrogated by* Wilkins v. Gaddy, 130 S. Ct. 1175, 1179 (2010))); Jackson v. Fletcher, No. 7:09CV00408, 2011 WL 197954, at *9 (W.D. Va. Jan. 18, 2011) ("[T]he misuse of . . . a shocking device . . . [is] conduct that a reasonable jury could find 'repugnant to the conscience of mankind,' regardless of whether [subject] suffered any severe or disabling injuries . . . .").

193. Here it is important to acknowledge that the respective interests of the people being tased and law enforcement officers using the taser are somewhat different in the Fourth versus Eighth Amendment contexts. In the field, where use of the taser during the course of effecting an arrest is evaluated according to the guarantees of the Fourth Amendment, the person being tased is presumed innocent of a crime—a factor that, when contrasted with inmates, against whom use of force is evaluated according to the Eighth Amendment, would seem to weigh in favor of arrestees. On the other hand, as Jay M. Zitter has explained,

> [U]nlike the situation where an arresting officer has to be constantly vigilant to make sure the suspect is not reaching for a weapon, and thus a tasering may be reasonable, in most, although not all, cases of inmate taserings, there is no issue of the inmate being possibly armed. Similarly, while prisoners do occasionally break out of jails, stopping an arrestee from fleeing is much more important in the case of taserings during arrests than in inmate taserings. On the other hand, keeping order in a jail is of overriding importance, because a disturbance by one prisoner, if not quelled immediately, can lead to a prison-wide riot. This is the case, of course, regardless of the seriousness of the tasered inmate's crime, while what particular crime the arrestee was alleged to have committed is certainly a major factor in determining whether a tasing was reasonable.

Jay M. Zitter, *When Does Use of Taser Constitute Violation of Constitutional Rights*, 45 A.L.R. 6th 1, 23 (2009).

194. *See* Wilkerson v. Utah, 99 U.S. 130, 136 (1878) (holding that the Eighth Amendment forbids "unnecessary cruelty").

standard[195] that takes into account the severity of the suspect's alleged offense.[196] With tasers, however, this general rule[197] has, in some respects, been turned on its head. Federal courts have disapproved of tasing restrained inmates and recently arrested detainees.[198] But when such

195. There is a notable circuit split as to precisely when the Fourth Amendment stops controlling and the Fourteenth Amendment takes over. The Fourth Circuit "agree[s] with the Fifth, Seventh, and Eleventh Circuits[, and not the Second, Sixth, and Ninth,] that the Fourth Amendment does not embrace a theory of 'continuing seizure' and does not extend to the alleged mistreatment of arrestees or pretrial detainees in custody." Riley v. Dorton, 115 F.3d 1159, 1163–64 (4th Cir. 1997), *abrogated by Wilkins*, 130 S. Ct. 1175. Thus, an officer's conduct in seizing and searching an individual while taking the individual into custody is evaluated under the Fourth Amendment; but once a person is secured in custody, such as in the back of a squad car, as was the case in *Orem*, it is the Fourteenth Amendment that controls. *See* Orem v. Rephann, 523 F.3d 442, 446 (4th Cir. 2008).

196. In *Graham v. Connor*, 490 U.S. 386 (1989), one of the key Supreme Court opinions on police use of force, the court laid out a three-prong test to assess the lawfulness of police actions. This required "careful attention to . . . the severity of the crime at issue." *Id.* at 396. This idea has long been a part of Fourth Amendment law, *see* Tennessee v. Garner, 471 U.S. 1, 8–11 (1985), and also has roots in the common law. *See* Holloway v. Moser, 193 N.C. 185, 187, 136 S.E. 375, 376 (1927) (noting that under the common law, "[i]t was thought that to permit the life of one charged with a mere misdemeanor to be taken, when not resisting, but only fleeing, would, aside from its inhumanity, be productive of more evil than good"), *disapproved of by Garner*, 471 U.S. at 12. The fact that this prong seems to be accorded so little weight in taser jurisprudence was perhaps plainest to see in *Buckley v. Haddock*, 292 F. App'x 791 (11th Cir. 2008), in which the plaintiff, destitute, despondent, and tearful about being given a traffic ticket, refused to sign his citation and was arrested. *Id.* at 792. He then sat on the ground and refused to enter the patrol car. *Id.* The arresting officer warned him that he would be tased if he did not comply. *Id.* When the plaintiff did not move, he was tased, issued another warning, and then tased again. *Id.* at 792–93. The incident was captured on videotape, *id.* at 792 n.1, and widely broadcast in the national media after one of the judges, in a dissenting opinion, "suggest[ed] it be published together with this opinion." *Id.* at 799 (Martin, J., dissenting). "The court refused but the . . . suggestion prompted someone to post the video to YouTube . . . ." Joe Hodnicki, *Dissenting Judge's Suggestion that Police Video Introduced into Evidence Be Published Leads to Video's YouTube Upload*, LAW LIBR. BLOG (Sept. 22, 2008), http://lawprofessors.typepad.com/law_librarian_blog/2008/09/dissenting-judg.html. Many police reform advocates anticipated that the videotape would essentially force the Supreme Court to address the exponential increase of use of tasers against suspects accused of minor offenses. *See, e.g.*, Press Release, ACLU of Fla., To Tase or Not to Tase: ACLU Asks U.S. Supreme Court to Answer the Question for the First Time (Feb. 5, 2009), *available at* http://www.aclufl.org/news_events/index.cfm?action=viewRelease&emailAlertID=3696&print=true. However, despite receiving considerable media attention and perhaps more organizational support than any other taser case until that time, the Supreme Court denied certiorari. Buckley v. Rackard, 129 S. Ct. 2381 (2009). The case illustrated the device's transition from being a weapon of just-short-of-last-resort to becoming many officers' first and primary option for dealing with even mildly non-compliant subjects.

197. *See Graham*, 490 U.S. at 398–99 (contrasting Fourth and Eighth Amendment protections and describing the Eighth as "the less protective . . . standard [which] applies 'only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions' " (quoting Ingraham v. Wright, 430 U.S. 651, 671 n.40 (1977))).

198. *See, e.g.*, Orem v. Rephann, 523 F.3d 442, 446 (4th Cir. 2008) (holding that a "use of the taser was unnecessary and excessive given that [plaintiff] was handcuffed and in foot restraints"); Crihfield v. City of Danville Police Dep't, Nos. 4:07CV00010, 4:07CV00011, 2007 WL

conduct is directed against an equally immobile subject in the field, endeavoring to recover from the effects of being struck with a taser, courts have been hesitant to let a jury evaluate the reasonableness of an officer's actions.[199] This discrepancy in treatment illustrates how the *illusion of volition* (i.e., continued physical movement absent corresponding intent)—a factor somewhat unique to the taser—when combined with the regular absence of an immediately apparent injury, has empowered officers to use the device with relative impunity, little meaningful review, and in circumstances which, absent ready access to the device, would often not have resulted in any use of force whatsoever.[200]

III. THE FOURTH AMENDMENT AND THE DE MINIMIS INJURY DOCTRINE

The courts' inclination to focus on the extent of a plaintiff's injury is particularly problematic for taser plaintiffs in the Fourth Circuit. Often bearing little in the way of visible injuries, for years they have seen their cases defeated by the court's de minimis injury doctrine,[201] under which a

3003279, at *3 (W.D. Va. Oct. 11, 2007) (denying motion to dismiss by officer alleged to have "tased [plaintiff] up to 20 times after [he had] been handcuffed and placed under arrest" (internal quotation marks omitted)); Shelton v. Angelone, 183 F. Supp. 2d 830, 835 (W.D. Va. 2002) (holding that "repeatedly shock[ing an inmate] with a stun gun without justification while restrained in leg irons and handcuffs . . . would be 'repugnant to the conscience of mankind,' . . . and would not require proof of any permanent, serious physical effect" (quoting Whitley v. Albers, 475 U.S. 312, 327 (1986))).

199. *See infra* Part V.

200. *See* U.N. Human Rights Rep., *supra* note 37, at 9.

201. *See, e.g.*, Chisolm v. VonDoran, No. 4:08-cv-03242-RBH, 2010 WL 625381, at *6 (D.S.C. Feb. 19, 2010) ("Even . . . [use of] the taser . . . for 15–20 seconds . . . fail[s] to establish . . . injuries [that are] more than *de minimis.*"); Benson v. DeLoach, C/A No. 8:09-00041GRA-BHH, 2009 WL 3615026, at *2, *8 (D.S.C. Oct. 28, 2009) (finding plaintiff's injuries from four taser strikes and the subsequent staph infection they allegedly caused to be de minimis and granting summary judgment to officers); Barnes v. Dedmondt, C/A No. 4:08-0002-MBS, 2009 WL 3166576, at *10 (D.S.C. Sept. 29, 2009) (explaining that "the *circumstances* must be examined in determining whether the use of the taser . . . results in more than a *de minimis* injury," but failing to explain how external circumstances are probative of the extent of physical or psychological injury—an entirely separate issue from whether circumstances may have justified the infliction of force and any consequent injury (emphasis added) (citing Orem v. Rephann, 523 F.3d 442, 448 (4th Cir. 2008))), *aff'd*, 395 F. App'x 928 (4th Cir. 2010), *cert. denied*, 131 S. Ct. 2154 (2011)); Henderson v. Gordineer, C.A. No. 3:06-1425-TLW-JRM, 2007 WL 840273, at *7 (D.S.C. Mar. 14, 2007) (holding inmate who alleged excessive force by taser "fail[ed] to show that his Fourteenth Amendment rights were violated because any injuries received were de minimis"); Wallace v. Thomas, C.A. No. 3:06-261-HMH-JRM, 2007 WL 397486, at *5 (D.S.C. Jan. 31, 2007) (granting defendant officers summary judgment and noting that "there is no indication that Plaintiff suffered anything more than de minimis injury as a result of the . . . use of tasers"); Tate v. Anderson, C.A. No. 8:05-3085-HMH-BHH, 2007 WL 28982, at *4 (D.S.C. Jan. 3, 2007) (holding that an inmate who was tased for not following a verbal order "fail[ed] to show that his Fourteenth Amendment rights were violated because any injuries he received were de minimis"); Gilchrist v. Reid, No. CIVA 3:05-3338 PMD, 2006 WL 2927436, at *1 (D.S.C. Oct. 11, 2006) (finding plaintiff's injury de minimis and insufficient to state a claim

de minimis injury constitutes "conclusive evidence that de minimis force was used."[202] This problem has now been somewhat mitigated, at least with respect to inmates, by *Wilkins v. Gaddy*,[203] a 2010 case in which the Supreme Court explicitly rebuked the circuit for its overreliance on the doctrine in the Eighth Amendment context. In *Wilkins*, the Court's per curiam opinion—which drew no dissenters—held that, "[i]n requiring what amounts to a showing of significant injury in order to state an excessive force claim, the Fourth Circuit has strayed from the clear holding of this Court."[204]

While the doctrine should no longer bar inmates from bringing suit, a few of the federal district courts in the circuit appear to take the view that a taser does not generally inflict a type of injury cognizable by the Fourth Amendment.[205] That the de minimis doctrine had grown to be so commonly invoked, such that Supreme Court intervention was even necessary in the Eighth Amendment context, is itself a somewhat confusing quirk of history. When *Wilkins* was decided, it had been over thirty years since the Court first observed that "mental and emotional distress . . . is compensable under § 1983."[206] And, as recently as fifteen years ago, the Fourth Circuit

where plaintiff was tased and alleged "heart problems . . . [and having] to go to the hospital" as a result), *aff'd*, 209 F. App'x 353 (4th Cir. 2006); *cf.* Simpson v. Kapeluck, No. 2:09-cv-00021, 2010 WL 1981154, at *6 (S.D.W. Va. Feb. 4, 2010) (finding that "use of a taser does not carry any risk of lasting injury to the subject" (internal quotations marks omitted)), *report and recommendation rejected*, No. 2:09-cv-00021, 2010 WL 1981099, at *9 (S.D.W. Va. May 14, 2010) (holding that the tasing still was not excessive force), *aff'd*, 402 F. App'x 803 (4th Cir. 2010), *cert. denied*, 131 S. Ct. 1501 (2011).

202. Norman v. Taylor, 25 F.3d 1259, 1262 (4th Cir. 1994) (citation omitted), *abrogated by* Wilkins v. Gaddy, 130 S. Ct. 1175 (2010) (per curiam).

203. 130 S. Ct. 1175 (2010) (per curiam).

204. *Id.* at 1178.

205. *See, e.g.*, Fordham v. Doe, No. 4:11-CV-32-D, 2011 WL 5024352, at *6 (E.D.N.C. Oct. 20, 2011) (dismissing notion that "any improper taser use equates to an excessive use of force"); White v. Smereka, No. 3:09-CV-00257-W, 2010 WL 2465552, at *4 (W.D.N.C. June 14, 2010) (citing Draper v. Reynolds, 369 F.3d 1270, 1278 (11th Cir. 2004) (holding that a single use of a taser against a nonthreatening suspect was not excessive force where the plaintiff suffered no serious injury)), *reconsideration denied*, No. 3:09-CV-00257-W, 2010 WL 2640554 (W.D.N.C. June 29, 2010), *aff'd*, 410 F. App'x 714 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 460 (2011); c*f.* Dunbar v. New Ellenton Police Dep't, Civil Action No. 9:08-2436-HFF-BM, 2010 WL 1073152, at *6 (D.S.C. Feb. 24, 2010) ("[A]bsent the most extraordinary circumstances, a plaintiff cannot prevail on a claim for violation of a constitutional right if his injury [is] de *minimis* . . . ." (citing Norman v. Taylor, 25 F.3d 1259, 1263 (4th Cir. 1994) (en banc)), *adopted sub nom*. Dunbar v. Allentown Police Dep't, Civil Action No. 9:08-2436-HFF-BM, 2010 WL 1007475 (D.S.C. Mar. 18, 2010); Byrd v. Hopson, 265 F. Supp. 2d 594, 613 (W.D.N.C. 2003) ("[A]llegations of pain . . . without some evidence of more permanent injury are insufficient to support a claim of excessive force." (quoting Crumley v. City of St. Paul, 324 F.3d 1003, 1008 (8th Cir. 2003)) (internal quotation marks omitted)), *aff'd*, 108 F. App'x 749 (4th Cir. 2004).

206. Carey v. Piphus, 435 U.S. 247, 264 (1978); *see also* Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 307 (1986) (discussing that mental and emotional distress are compensable under § 1983).

itself appeared to explicitly disclaim the requirement that plaintiffs in excessive force suits show more than a de minimis *physical* injury.[207] Despite these developments, the Supreme Court's 1992 decision in *Hudson v. McMillian*[208] gave the doctrine new life in the circuit. The Fourth Circuit, unlike other circuits, read *Hudson* as instructing courts to "us[e] injury as a proxy for force" in assessing excessive force claims.[209] And although this view was later deemed "not defensible"[210] by the Supreme Court, it nevertheless carried the day in the circuit for nearly fifteen years.[211] It continues to live on in the circuit's Fourth Amendment jurisprudence,[212] the law by which most taser claims are evaluated.

207. *See* Williams v. Benjamin, 77 F.3d 756, 762 (4th Cir. 1996) (observing that psychic pain has been held to satisfy the Eighth Amendment's objective component). The *Williams* court noted that "courts should be wary of finding uses of force that inflict 'merely' pain but not injury to be *de minimis*." *Id.* at 762 n.2.

208. 503 U.S. 1 (1992).

209. Wilkins v. Gaddy, 130 S. Ct. 1175, 1179 (2010) (characterizing the Fourth Circuit approach).

210. *Id.*

211. *See* Douglas B. McKechnie, *Don't Daze, Phase, or Lase Me, Bro! Fourth Amendment Excessive-Force Claims, Future Nonlethal Weapons, and Why Requiring an Injury Cannot Withstand a Constitutional or Practical Challenge*, 60 U. KAN. L. REV. 139, 156–58 (2011).

212. *See, e.g.*, Sellers v. Waring, 141 F. App'x 121, 122 (4th Cir. 2005) (affirming dismissal of plaintiff's Fourth Amendment § 1983 claim because of failure to allege more than de minimis injury); Housley v. Holquist, No. L-10-1881, 2011 WL 3880467, at *6 n.8 (D. Md. Aug. 30, 2011) (granting "summary judgment on [a] chokehold claim . . . [because the] force was de minimis, the hold lasted for no more than a few seconds, and no lasting injuries were caused"); Dunn v. Vanmeter, No. 5:09-CV-00085, 2010 WL 3154972, at *6 (W.D. Va. Aug. 9, 2010) ("Under Fourth Circuit precedent, th[e] lack of any significant injury . . . counsels in favor of a finding that the force used . . . was not unreasonable under the Fourth Amendment."); Cohen v. Cannon, No. 2:08-3327-HMH-RSC, 2009 WL 2207814, at *4–5 (D.S.C. July 22, 2009) ("Determining whether the force used to carry out a particular arrest is 'unreasonable' under the Fourth Amendment requires . . . consider[ation] [of] the extent of the injuries caused to the plaintiff."); Andrews v. Elkins, 227 F. Supp. 2d 488, 493 (M.D.N.C. Oct. 24, 2002) ("[A] *de minimus* [sic] injury does not rise to the level of a constitutional violation [under the Fourth Amendment]."), *aff'd*, 60 F. App'x 498 (4th Cir. 2003); Newman v. Green, 198 F. Supp. 2d 664, 668 (D. Md. April 29, 2002) (discussing the "wealth of . . . Fourth Circuit authority dealing with excessive force claims and, specifically the need for a plaintiff to show more than an insubstantial injury to sustain an excessive force claim" under the Fourth Amendment (citing Brown v. Gilmore, 278 F.3d 362, 369 (4th Cir. 2002), and Carter v. Morris, 164 F.3d 215, 219 n.3 (4th Cir. 1999))); Wilkerson v. Hester, No. 1:99CV130-T, 2000 WL 33422753, at *12 (W.D.N.C. Aug. 18, 2000) ("More than *de minimis* injury is essential to moving forward to a jury a claim under the fourth amendment for excessive use of force."), *report and recommendation adopted*, 114 F. Supp. 2d 446 (W.D.N.C. 2000); Drake v. Higgins, No. CIV.A. 97-0143-C, 1999 WL 462987, at *5 (W.D. Va. June 10, 1999) ("The court may also consider the degree of harm caused by the application of force in determining whether it was excessive . . . ."); *see also* McKechnie, *supra* note 211, at 158 n.137 (2011) (collecting cases). It should be noted, however, that not every district court has adhered to this interpretation. *See* Clark v. Balt. Cnty., No. BPG-08-2528, 2009 WL 2913453, at *2 n.4 (D. Md. Sept. 1, 2009) ("[T]he *de minimis* injury rule does not apply to claims of excessive force during the course of an arrest, for those claims assert a violation of the arrestee's Fourth Amendment right to be free from unreasonable seizures." (citing Bibum v.

While most circuits have rejected a requirement that plaintiffs demonstrate an actual physical injury to state a claim for excessive force under the Fourth Amendment,[213] the Fourth, Fifth, Eighth, and Eleventh Circuits have not.[214] The Fourth Circuit is the doctrine's pioneer—the first of the four circuits to recognize the exception, at least in Eighth Amendment claims.[215] Two cases often cited by the federal district courts[216] as embodying this principle in the Fourth Amendment context—*Brown v. Gilmore*[217] and *Carter v. Morris*[218]—were each authored by Judge Wilkinson, and both involved relatively minor claims of excessive force arising out of allegations that officers applied handcuffs too tightly.[219] Given the ubiquitous role handcuffs play in nearly every arrest, however, it would seem more appropriate for lower courts to read those cases narrowly as evidence of the circuit's intent to circumscribe only a *particular* type of excessive force claim. The opinions' language about "de minimis" injuries, while unattributed, mirror an unpublished 1996 opinion, *Ritchie v. Jackson*,[220] in which the court granted the defendant officers summary judgment in another Fourth Amendment claim for tight handcuffing.[221] In that case, the court concluded that the plaintiffs had "allege[d] no more

Prince George's Cnty., 85 F. Supp. 2d 557, 562–63 (D. Md. 2000))); Bartram v. Wolfe, 152 F. Supp. 2d 898, 907–08 (S.D.W. Va. 2001).

213. Georgiady, *supra* note 76, at 137; *see also* Bastien v. Goddard, 279 F.3d 10, 14 (1st Cir. 2002) ("[A] trialworthy excessive force claim is not precluded merely because only minor injuries were inflicted by the seizure. *That view is widely held*." (alteration in original) (emphasis added) (citations and internal quotation marks omitted)).

214. *See* Georgiady, *supra* note 76, at 137–38; *see also* McKechnie, *supra* note 211, at 151.

215. *See* Taylor v. McDuffie, 155 F.3d 479, 486 (4th Cir. 1998) (Murnaghan, J., dissenting) (observing that the Fourth Circuit "stands alone among all other courts of appeal in holding that *de minimis injury*, without more, is dispositive of an excessive force claim"), *abrogated by* Wilkins v. Gaddy, 130 S. Ct. 1175 (2010); Troy J. Aramburun, *The Role of "De Minimis" Injury in Excessive Force Determination:* Taylor v. McDuffie *and the Fourth Circuit Stand Alone*, 14 BYU J. PUB. L. 313, 315 (2000).

216. *See, e.g.*, Trull v. Smolka, Civil Action No. 3:08CV460-HEH, 2008 WL 4279599, at *5 (E.D. Va. Sept. 18, 2008) ("Plaintiff has failed to allege more than a de minimis injury as required by the Fourth Amendment."), *aff'd*, 411 F. App'x 651 (4th Cir. 2011). Similarly, the Fourth Circuit case *Jones v. Buchanan*, 325 F.3d 520 (4th Cir. 2003), approvingly cited *Brown* for the proposition that "the severity of [a plaintiff]'s injuries provides . . . ground[s] for distinguishing . . . [cases] in which a plaintiff has not established an excessive force claim." *Id.* at 531 (citing Brown v. Gilmore, 278 F.3d 362, 369 (4th Cir. 2002)).

217. 278 F.3d 362 (4th Cir. 2002).

218. 164 F.3d 215 (4th Cir. 1999).

219. *See Brown*, 278 F.3d at 369 ("Brown's allegation of excessive force centers on her assertion that [the officer] handcuffed her, causing her wrists to swell, dragged her to the car and then pulled her into his cruiser."); *Carter*, 164 F.3d at 219 n.3 ("Carter's basis for her excessive force claim [is] that her handcuffs were too tight and that an officer pushed her legs as she got into the police car . . . .").

220. 98 F.3d 1335 (4th Cir. 1996).

221. *Id.* at 1335.

than de minimis injury; therefore, their claims of excessive force are without merit."[222] It cited as authority a 1990 Eighth Circuit opinion[223] dismissing a claim by a man who alleged he was improperly handcuffed[224] and unlawfully arrested.[225] Although the doctrine has vitality in the federal district courts,[226] its paper trail is thin.

Certainly if the Fourth Circuit had wished to establish the bright line rule that lower courts have taken the published opinions to stand for, it could have been much more unequivocal. The language of each opinion suggests a concern for signaling any sort of receptiveness to claims born out of a police practice as routine as handcuffing.[227] To grant relief to the plaintiffs in either case might have opened the door for their claims to be easily duplicated by a multitude of aggrieved arrestees. This was, after all, one of the principal concerns that animated the de minimis doctrine in the Eighth Amendment context.[228] The Fourth Circuit worried a contrary rule could pose docket management problems for the courts and represent an improper level of micromanagement of local law enforcement authorities.[229] Now that the de minimis threshold is off the table in Eighth Amendment claims, inmates—the population perhaps most predisposed to filing frivolous suits against officers[230]—are free to mount constitutional challenges to inflictions of force previously deemed beyond the purview of the law.[231] Consequently, the rationale for the Fourth Circuit's adherence to the doctrine in Fourth Amendment jurisprudence has lost much of its force.

222. *Id.*

223. *Id.* (citing Foster v. Metro. Airports Comm'n, 914 F.2d 1076, 1082 (8th Cir. 1990)).

224. *Foster*, 914 F.2d at 1077.

225. *Id.* at 1078.

226. *See supra* note 205.

227. *See, e.g.*, Brown v. Gilmore, 278 F.3d 362, 369 (4th Cir. 2002) ("She alleges no injury of any magnitude. . . . [A] standard procedure such as handcuffing would rarely constitute excessive force where the officers were justified, as here, in effecting the underlying arrest."); Carter v. Morris, 164 F.3d 215, 219 n.3 (4th Cir. 1999) ("Carter's . . . handcuffs [claim] . . . is so insubstantial that it cannot as a matter of law support her claim under . . . the Fourth Amendment . . . .").

228. *See* Georgiady, *supra* note 76, at 162 n.258 (noting that "the Fourth Circuit warned that repealing de minimis injury thresholds would 'swamp the federal courts with questionable excessive force claims' " (quoting Riley v. Dorton, 115 F.3d 1159, 1167 (4th Cir. 1997), *abrogated by* Wilkins v. Gaddy, 130 S. Ct. 1175 (2010) (per curiam))).

229. *See Riley*, 115 F.3d at 1167 ("[S]uch a rule . . . would . . . constitute an unwarranted assumption of federal judicial authority to scrutinize the minutiae of state detention activities.").

230. *See* Anderson v. XYZ Corr. Health Serv., Inc., 407 F.3d 674, 676 (4th Cir. 2005) (noting congressional concern that frivolous "prison-condition lawsuits . . . were threatening to overwhelm the capacity of the federal judiciary").

231. *See, e.g.*, Gilchrist v. Reid, CIVA 3:05-3338 PMD, 2006 WL 2927436, at *3, *4 (D.S.C. Oct. 11, 2006) (awarding summary judgment to detention officers who tased inmate who "disobeyed orders" to move, finding "an excessive force claim should not lie where a prisoner's injury is de minimis"), *aff'd*, 209 F. App'x 353 (4th Cir. 2006).

Although many would regard it as somewhat of a paradox, an incarcerated inmate or pretrial detainee who is tased for refusing a direct order may now have a stronger argument in court[232] than a free person who fails to comport with a similar order during the course of an otherwise routine encounter with police on the street.[233] To understand why, it is important to establish that "the Fourth Circuit has determined that the analysis of Fourteenth Amendment excessive-force claims is no different than . . . analysis of Eighth Amendment claims."[234] These amendments govern excessive force claims brought by pretrial detainees and inmates, respectively.[235] For each, the touchstone of analysis is the *necessity* of force.[236] Specifically, the inquiry looks to whether a defendant "inflicted unnecessary and wanton

232. *See* Bragg v. Hackworth, No. 1:10CV693 (GBL/IDD), 2012 WL 508596, at *6 (E.D. Va. Feb. 13, 2012) (refusing to dismiss an Eighth Amendment "claim of excessive force against . . . defendants [who] urge[d] the Court to find their use of [tasers] was justified because plaintiff was being 'uncooperative,' 'combative' and 'refusing to follow instructions' "). Numerous courts have observed that prison officials are limited in their ability to use electric weapons simply to compel compliance with jail or prison policies or officer orders. *See, e.g.*, Orem v. Rephann, 523 F.3d 442, 448 (4th Cir. 2008) (citing with approval *Hickey v. Reeder*, 12 F.3d 754, 759 (8th Cir. 1993), a case involving an inmate tased for disobeying an order to clean his cell, which held that "[t]he law does not authorize the day-to-day policing of prisons by stun gun . . . [or the] use [of] summary physical force to compel compliance with all legitimate rules"); Simpson v. Kapeluck, Civil Action No. 2:09-cv-00021, 2010 WL 1981099, at *8 n.2 (S.D.W. Va. May 14, 2010) (same), *aff'd*, 402 F. App'x 803 (4th Cir. 2010); Shelton v. Angelone, 183 F. Supp. 2d 830, 835 (W.D. Va. 2002) (same); Davis v. Lester, 156 F. Supp. 2d 588, 593 (W.D. Va. 2001) (same); Velasco v. Head, 166 F. Supp. 2d 1100, 1104 (W.D. Va. 2000) (same); *see also* Davidson v. City of Statesville, No. 5:10-CV-00182-RLV-DSC, 2012 WL 1441406, at *1, *3 (W.D.N.C. Apr. 26, 2012) (denying defendant's motion for summary judgment referring to "potentially needless means of restraining [inmate] as a general matter" where the inmate "passively resisted the officers by refusing to walk"); Malik v. Ward, Civil Action No. 8:08-1886-RBH-BHH, 2010 WL 1010023, at *8 (D.S.C. Feb. 4, 2010) ("The Court believes that . . . [the] *unwarranted* use of an electric shield against a defenseless inmate constitute[s] [an] act[] 'repugnant to the conscience of mankind,' regardless of the extent of damage inflicted. . . . [and] implicate[s] basic issues of human 'dignity.' " (emphasis added) (citations omitted)), *report and recommendation adopted*, Civil Action No. 8:08-CV-01886-RBH, 2010 WL 936777 (D.S.C. Mar. 16, 2010).

233. *See, e.g.*, Fordham v. Doe, No. 4:11-CV-32-D, 2011 WL 5024352, at *8 (E.D.N.C. Oct. 20, 2011) (dismissing plaintiff's taser claim, explaining that because he "refused to comply with the other officer's instructions . . . taser use was reasonable"); Meyers v. Balt. Cnty., 814 F. Supp. 2d 552, 560 (D. Md. 2011) ("Courts have . . . found that use of a Taser can be reasonable even as against restrained or nonviolent subjects who resist arrest and refuse to comply with lawful police commands."); Blair v. Cnty. of Davidson, No. 1:05CV00011, 2006 WL 1367420, at *8 (M.D.N.C. May 10, 2006) (observing that "courts have held that officers may use a taser devise [sic] . . . to subdue a belligerent or unruly arrestee").

234. McKechnie, *supra* note 211, at 142 (citing Orem v. Rephann, 523 F.3d 442, 446–48 (4th Cir. 2008)).

235. *Orem*, 523 F.3d at 446.

236. *See* Whitley v. Albers, 475 U.S. 312, 319 (1986) (discussing the Eighth Amendment); Wernert v. Green, 419 F. App'x 337, 340 (4th Cir. 2011) (discussing the Fourteenth Amendment).

pain and suffering" on the plaintiff.[237] The standard governing the use of tasers against inmates, most of whom police have probable cause to believe have committed a crime, may thus be more favorable to plaintiffs than the standard for tased non-arrestees and people being taken into custody, since it focuses on the *necessity* of the taser's use.[238] The Fourth Amendment, by contrast, is, in the Fourth Circuit, generally forgiving of some measure of excessive force so long as it is directed against someone who is not entirely compliant—even if that force is, objectively, wholly unnecessary.[239]

As it stands, only the most egregious of Fourth Amendment taser suits—those in which the tased person either died[240] or was deemed acutely vulnerable[241]—have succeeded in surviving even the qualified immunity stage, and those cases are themselves few and far between. In light of the increasingly common use of tasers in everyday law enforcement and the ever growing number of taser-related deaths—currently numbering in the hundreds[242]—there is reason to think that the approach taken by the federal district courts in the Fourth Circuit of granting only the rarest plaintiff the opportunity to make his case is inadequate for dealing with the very real issue of taser-related police brutality. It indeed makes little sense that people who are not incarcerated should face a higher evidentiary hurdle than a convicted inmate would in challenging the lawfulness of the very same conduct.[243]

237. Taylor v. McDuffie, 155 F.3d 479, 483 (4th Cir. 1998) (quoting Whitley, 475 U.S. at 320), *abrogated on other grounds by* Wilkins v. Gaddy, 130 S. Ct. 1175, 1179 (2010) (per curiam).

238. *See, e.g.*, Davidson v. City of Statesville, 5:10-CV-00182-RLV, 2012 WL 1441406, at *3 (W.D.N.C. Apr. 26, 2012) (finding "a genuine issue as to the reasonableness . . . of the officers' potentially needless means of restraining" plaintiff in a jail taser-case).

239. *See supra* notes 212, 215, and accompanying text.

240. *See, e.g.*, Gray v. Torres, Civ. No. WDQ-08-1380, 2009 WL 2169044, at *1 (D. Md. July 17, 2009) (denying an officer qualified immunity where he was alleged to have repeatedly tased the plaintiff, who later died, when the plaintiff may have been trying to surrender).

241. *See, e.g.*, Jackson v. City of Hyattsville, Civil Action No. 10-CV-00946-AW, 2010 WL 5173787, at *1 (D. Md. Dec. 13, 2010) (denying motion to dismiss excessive force claims against officer alleged to have tased praying woman in the breast); Dent v. Montgomery Cnty. Police Dep't, 745 F. Supp. 2d 648, 652–53, 664 (D. Md. Sept. 17, 2010) (denying officers qualified immunity for allegedly tasing a resisting woman whom they sought to have medically evaluated); Williams v. Smith, C/A No. 3:08-2841-JFA, 2009 WL 4729975, at *1, *4 (D.S.C. Dec. 3, 2009) (denying summary judgment to officers alleged to have repeatedly tased man who was bound at both hands and feet); Crihfield v. City of Danville Police Dep't, Nos. 4:07CV00010, 4:07CV00011, 2007 WL 3003279, at *1 (W.D. Va. Oct. 11, 2007) (denying qualified immunity to officers alleged to have tased man over a dozen times after he was handcuffed).

242. *See* LESS THAN LETHAL, *supra* note 15, at 20 (chronicling 334 deaths in the United States of people who were struck with police tasers between June 2001 and August 2008).

243. As the Fourth Circuit's Judge Butzner explained more than twenty years ago in his dissenting opinion in *Graham*, a case that would later be overturned by the Supreme Court in perhaps the most significant modern decision relating to police abuse, "[t]he reason for distinguishing between a convict and a free citizen is clear. The police are not privileged to inflict

IV. THE PROPHYLACTIC EFFECT OF OVERCHARGING

Challenging as they can be for plaintiffs, the doctrinal problems posed by non-volitional movement and so-called de minimis injuries are not the only difficulties taser victims may face in seeking redress for genuine instances of abuse. Those arrestees who find themselves charged with an offense arising out of the act of being taken into custody may face an additional burden. Although the Fourth Circuit ostensibly recognizes the right of even those who are resisting arrest to be free of excessive force and permits them in some circumstances to recover under § 1983 for their injuries,[244] the right is one of which would-be plaintiffs may not easily avail themselves. The unique nature of the taser and its effect on the human body suggest that victims of taser abuse may experience this difficulty more acutely than others.[245] This is because, where an officer's use of a taser causes a suspect to "actively" resist in a way that satisfies a state's criteria for resisting a lawful arrest, and a conviction is later secured, the arrestee may be barred in the Fourth Circuit from bringing a federal action under § 1983.[246] Some courts take the view that a person who complies with officer directives to submit would not be found guilty or plead to resisting arrest, and that there is thus nothing inequitable about barring them from bringing an excessive force action.[247] As has been discussed, however, the

any punishment on a free citizen." Graham v. City of Charlotte, 827 F.2d 945, 950 (4th Cir. 1987) (Butzner, J., dissenting), *vacated sub nom.* Graham v. Connor, 490 U.S. 386 (1989).

244. *See, e.g.*, Riddick v. Lott, 202 F. App'x 615, 616 (4th Cir. 2006) (per curiam) ("Without knowing the factual basis for [plaintiff's criminal] plea, we cannot determine whether his claim of police brutality would necessarily imply invalidity of his earlier conviction for assaulting an officer while resisting arrest."); Packer v. Hayes, 79 F. App'x 573, 574 (4th Cir. 2003) (per curiam) (holding that the plaintiff was "not collaterally estopped from bringing an excessive force claim against Defendants merely because she was convicted of assaulting [the same officer] . . . in state court").

245. Beaver v. City of Fed. Way, 507 F. Supp. 2d 1137, 1145–46 (W.D. Wash. 2007) ("[D]efendants maintain that because [suspect] had not complied with Officer['s] . . . commands [to submit to handcuffs immediately after being tased], he was actively resisting arrest and further tasing was warranted. The defendants confuse involuntary non-compliance with active resistance."), *aff'd*, 301 F. App'x 704 (9th Cir. 2008).

246. Bolden v. Rushing, 407 F. App'x 693, 694 (4th Cir. 2011) (holding that the plaintiff's "assertion[] that the district court improperly . . . determined that his conviction in state court rendered Defendant's [use of taser] objectively reasonable [was] without merit"); *see also Riddick*, 202 F. App'x at 616 (interpreting Heck v. Humphrey, 512 U.S. 477 (1994)). *Heck v. Humphrey* arguably precludes excessive force suits brought by plaintiffs convicted of resisting a lawful arrest where the force complained of arose out of the same actions giving rise to the conviction. *See* Heck v. Humphrey, 512 U.S. 477, 487 n.6 (1994). However, not all federal appellate courts appear to have taken this view. *See* Wells v. Bonner, 45 F.3d 90, 95 (5th Cir. 1995) ("[W]e . . . assume, without deciding, that a finding of excessive force would not 'imply the invalidity' of [a] conviction for resisting a search." (quoting *Heck*, 512 U.S. at 487)).

247. *See, e.g.*, Bolden v. Rushing, C/A No. 6:07-CV-2985-GRA, 2009 WL 1160938, at *2 (D.S.C. Apr. 28, 2009), *aff'd*, 407 F. App'x 693 (4th Cir. 2011). It is important to note, however, that some resisting arrest statutes do not require that a suspect engage in any actual affirmative

courts of the Fourth Circuit have yet to recognize, as other courts have, that a suspect's perceived uncooperativeness after being tased "may . . . [be] as much a reaction to being tased as an intentional effort to resist arrest."[248] In other words, tasers can, in some cases, render a suspect effectively incapable of *not resisting*.[249] Civil rights attorneys representing taser victims have argued that this practice gives officers who excessively tase arrestees—whether because they fail to recognize this fact or because they intend to inflict gratuitous pain—a perverse incentive to take advantage of the prophylactic effect of overcharging them with resisting arrest or other crimes.[250]

In a recent Fourth Amendment taser case, the Fourth Circuit appeared to endorse the reasoning of a district court[251] that relied on the plaintiff's resisting arrest conviction to dismiss his excessive force claim.[252] The decision stands in contrast to cases from several other federal circuits that do not take the view that a resisting arrest conviction mandates the dismissal of an action for excessive force by taser.[253] The court's decision

resistance in order to be found guilty; merely delaying an officer in his duties can be enough for a conviction. *See, e.g.*, N.C. GEN. STAT. § 14-223 (2011) ("If any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a Class 2 misdemeanor."). In the cases of people charged under such statutes, a conviction should not automatically serve as a bar to suit.

248. *Beaver*, 507 F. Supp. 2d at 1145.

249. *Id.* at 1145–46; *see also* cases cited *supra* notes 173, 175, 178, 180, and accompanying text.

250. *See, e.g.*, Holmes Interview, *supra* note 29; Gronberg, *supra* note 126 (quoting plaintiff's attorney in a civil rights action for abuse by taser discussing the filing of resisting arrest and other "cover charges . . . intended to help justify the officer's actions" (internal quotation marks omitted)). In the Fourth Circuit, the incentive to overcharge may be even greater, as a number of lower district courts assessing taser abuse allegations have taken the view that the doctrine bars, not just plaintiffs convicted of resisting arrest, but also those convicted of assault-related offenses. *See, e.g.*, Eaglin v. Metts, C/A No. 0:08-2547-TLW-PJG, 2010 WL 1051177, at *5 (D.S.C. Feb. 16, 2010) (holding that plaintiff "cannot . . . recover damages in a § 1983 action" brought under the Fourteenth Amendment for taser abuse due to his conviction for assault arising out of same encounter), *report and recommendation adopted*, Civil Action No. 0:08-2547-TLW-PJG, 2010 WL 1051155 (D.S.C. Mar. 22, 2010); Parker v. Broadfoot, No. 7:06-CV-00169, 2006 WL 1288311, at *2 (W.D. Va. May 8, 2006) (finding Fourth Amendment taser "excessive force . . . claims for monetary damages for conduct that allegedly contributed to [assault] convictions . . . [not] actionable under § 1983"). This approach is not followed in every circuit. *See, e.g.*, Swangin v. Cal. State Police, 1999 U.S. App. LEXIS 3147, at *6 (9th Cir. 1999) ("It is entirely possible . . . that [a plaintiff's] assault conviction could coexist with a finding that [an officer] used excessive force."); Copus v. City of Edgerton, 151 F.3d 646, 648 (7th Cir. 1998) (discussing whether, under *Heck*, "Fourth Amendment claims . . . imply a conviction is invalid, so in all cases these claims can go forward.").

251. Bolden v. Rushing, 407 F. App'x 693, 694 (4th Cir. 2011).

252. *Bolden*, 2009 WL 1160938, at *2.

253. *See, e.g.*, Greenfield v. Tomaine, No. 09 Civ 8102(CS)(PED), 2011 WL 2714221, at *7 (S.D.N.Y. May 10, 2011) (denying summary judgment for second of two taser applications and noting that "[i]n the Second Circuit, it is 'well established than [sic] an excessive force claim does

to issue only a brief, unpublished, per curiam opinion might have evinced its reluctance to engage too deeply with an opinion that rested on highly questionable assumptions but that had a conclusion with which the court otherwise agreed. Strangely, the lower court opinion not only characterized the use of the taser as a necessity in what the court itself said was a non-violent situation, but it also held that the arrestee's subsequent guilty plea to resisting arrest itself somehow retroactively justified the officer's decision to use a taser against him:

> [T]he officers told the plaintiff to submit to the arrest . . . . The plaintiff did not fight back[;] however, he would not allow the officers to handcuff him. In order to get the plaintiff to submit to the arrest, *the officers had to use a Taser*. . . . The use of the Taser caused the plaintiff to fall and break his ankle. *The plea of guilty to the resisting arrest charge constitutes an admission of the resistance. Therefore, the officers were entitled to use [the taser] to subdue the plaintiff.*[254]

Of course, as the Supreme Court has recognized, people may plead guilty for purely pragmatic reasons, irrespective of their actual culpability.[255] In the case of resisting arrest charges, a defendant often discovers his defense amounts to little more than putting his word against that of an officer—one who, in many cases, is in a position to bring forth evidence relating to criminal offenses unconnected to the resistance charge and which nonetheless cast the defendant in an unfavorable light. Although the burden should theoretically lie with the state, in practice, courts view police officers as having less incentive to lie than a criminal defendant and they often enjoy their testimony being accorded more weight.[256] Of course, as *Bolden* and the other cases demonstrate, officers in some taser cases have

not usually bear the requisite relationship under *Heck* to mandate its dismissal' " (quoting Smith v. Fields, No. 95 Civ. 8374, 2002 U.S. Dist. LEXIS 3529, at *3 (S.D.N.Y. Mar. 4, 2002)), *report and recommendation adopted*, No. 09-CV-8102 (CS)(PED), 2011 WL 2714219 (S.D.N.Y. July 12, 2011); *id.* at *8 (noting that "[s]everal other Circuits [citing the Eleventh, Third, Ninth, and Fifth], despite challenges under *Heck*, have upheld excessive force claims in the context of searches and arrests").

254. *Bolden*, 2009 WL 1160938, at *1–2 (emphasis added).

255. *See* North Carolina v. Alford, 400 U.S. 25, 37 (1970) (observing that even if appellee "disbelieved his guilt . . . he had absolutely nothing to gain by a trial and much to gain by pleading").

256. *See, e.g.*, Jackson v. United States, No. Civ. PJM 07-1326, 2008 WL 5083701, at *3 (D. Md. Nov. 25, 2008) ("Experts and police officers tend to have less incentive to lie because they have no personal stake in a case. Moreover, attacking the credibility of law enforcement officers, who are typically well-respected by lay jurors, carries the risk that it will backfire . . . .").

just as much incentive to mischaracterize the arrest as the arrestee himself.[257]

V. PAIN COMPLIANCE AND THE EROSION OF THE REASONABLENESS STANDARD

Given the dearth of federal or state laws regulating tasers,[258] the public has never been afforded a meaningful opportunity to grapple with the difficult questions presented by their increasing use.[259] In the Fourth Circuit, this remains true as well with juries, which have historically played an important role in evaluating allegations of excessive force under the Fourth Amendment, a constitutional provision designed in many respects to give voice to society's widely shared expectations[260] about personal autonomy.[261] The reluctance of courts to put taser use to a jury may reflect a fear that a verdict against an individual officer or department could be perceived as a verdict against the weapon itself, dissuading future officers[262] from using a device that in many cases has *saved* lives.[263] If this is the case, the reasoning is unpersuasive. When juries are given taser cases, they are not asked to make a blanket assessment as to the device's utility as a whole. Rather, they are tasked with determining whether the

257. *See, e.g.*, Mayes v. Swift, Civil Action No. 6:10-2991-TMC-KFM, 2011 WL 7281938, at *3 (D.S.C. Dec. 12, 2011) (holding that an excessive force claim was barred by *Heck* where plaintiff claimed he was tased until "he could not breathe" after trying to surrender), *report and recommendation adopted*, CA No. 6:10-2991-TMC, 2012 WL 463528 (D.S.C. Feb. 13, 2012).

258. *See* discussion *supra* note 31 and accompanying text. Since Florida passed its statute, no other states appear to have taken similar action, and the prospect of that changing seems unlikely. *See* Katherine N. Lewis, *Fit to Be Tied? Fourth Amendment Analysis of the Hog-Tie Restraint Procedure*, 33 GA. L. REV. 281, 281 (1998) (noting the tendency of "politicians to shy away from proposing laws that might restrict police in arrest situations").

259. Most of the national dialogue surrounding tasers has been more in the vein of jokes than that of serious contemplation. The title of an excellent recent law journal article—*Don't Tase Me Bro!: A Comprehensive Analysis of the Laws Governing Taser Use By Law Enforcement*—directly alludes to the fact that invoking the device by name has become almost a running punch line in some quarters. Fabian, *supra* note 103.

260. *See, e.g.*, Georgia v. Randolph, 547 U.S. 103, 111 (2006) ("The constant element in assessing Fourth Amendment reasonableness in the consent cases, then, is the great significance given to widely shared social expectations, which are naturally enough influenced by the law of property, but not controlled by its rules."); Bond v. United States, 529 U.S. 334, 338–39 (2000) (explaining that in a Fourth Amendment analysis, "a court inquires whether the individual's expectation of privacy is one that society is prepared to recognize as reasonable" (internal quotation marks omitted)).

261. *See* Horton v. California, 496 U.S. 128, 133 (1990) (describing a seizure as "depriv[ing] the individual of dominion over his or her person or property" (citing United States v. Jacobsen, 466 U.S. 109, 113 (1984))).

262. *See* Brown v. Gilmore, 278 F.3d 362, 369 (4th Cir. 2002) ("For courts to fine-tune the amount of force used in a situation . . . would undercut the necessary element of judgment inherent in a constable's attempts to control a volatile chain of events.").

263. *See* USE OF TASERS, *supra* note 14.

officer's decision to use such force was consistent with the actions of a reasonable officer, in light of the importance of his objective, and the threat, if any, posed by the person against whom the taser was used—including the extent to which that person was or was not resisting.[264]

In routinely denying juries the opportunity to answer this question, the reflexive position of the federal district courts in the Fourth Circuit may also reflect how, as an Eighth Circuit judge recently observed, "the sensation of high voltage electrical shock is outside common experience and can easily be underestimated."[265] This tendency to underestimate a taser's potential effects, reasoned Judge Murphy, makes it all the more necessary that lower courts "consider the increased potential for possibly lethal results" in the context of evaluating an officer's decision to employ the device.[266] The recognition that each pull of the trigger has the potential, however slight, to kill the person on the receiving end can change the reasonableness calculus in some cases,[267] particularly because many of the conditions that make people most vulnerable to the effects of a taser are not easily recognized.[268] A suspect's abnormal heart condition, among other

264. *See, e.g.*, PATTERN JURY INSTRUCTIONS FOR CASES OF EXCESSIVE FORCE IN VIOLATION OF THE FOURTH, EIGHTH AND FOURTEENTH AMENDMENTS FOR THE DISTRICT COURTS OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT 4 (Jan. 24, 2011), *available at* http://www.rid.uscourts.gov/menu/judges/jurycharges/OtherPJI/1st%20Circuit%20Pattern%20Civil%20Jury%20Instructions%20Excessive%20Force.pdf.

265. McKenney v. Harrison, 635 F.3d 354, 362 (8th Cir. 2011) (Murphy, J., concurring).

266. *Id.* at 361.

267. *See* Fontenot v. TASER Int'l, Inc., No. 3:10CV125-RJC-DCK, 2011 WL 2535016, at *8 (W.D.N.C. June 27, 2011) ("[A]ssuming . . . that the X26 [taser] current did affect [decedent's] heart rhythms[,] a reasonable jury could conclude that a different warning would have resulted in a different outcome."). At trial, the defendant officer testified that he had no reason to believe that tasing a seventeen-year-old in the chest could kill him or cause cardiac arrest. *Id.* at *7.

268. Of course, there is some authority for the proposition that a suspect's medical vulnerabilities should not bear on the determination as to whether an officer's force was reasonable. *See* Thomas v. Kincaid, No. Civ.A. 03-041-AM, 2004 WL 3321472, at *5 (E.D.Va. June 30, 2004) ("[R]easonable force does not become excessive force when the force aggravates (however severely) a pre-existing condition the extent of which was unknown to the officer at the time." (citing Rodriguez v. Farrell, 280 F.3d 1341, 1353 (11th Cir. 2002))). Nevertheless, force from a taser, which carries the possibility of severe injury or death, when used against suspects whose actions do not *necessitate* the use of any physical force at all is arguably not force that is being applied in "good faith." In addition, unlike the plaintiff's injuries in *Thomas*, which were unique to him as an individual and which a reasonable officer could not have known, officers are aware, and are advised, of the taser's potential to produce lethal results, just as they are aware that a not-insignificant percentage of the population is afflicted with heart and respiratory ailments. *See* TASER INT'L, TRAINING BULLETIN, 15.0 MEDICAL RESEARCH UPDATE AND REVISED WARNINGS 2 (2009), http://www.ecdlaw.info/outlines/10-15-09%20TASER%20ECD%20Trng%20Memo%20w%20Trng%20Bulletin%20and%20Warnings.pdf (warning officers of the "risk of an adverse cardiac event related to a TASER ECD discharge" and noting that "Sudden Cardiac Arrest . . . is a leading cause of death in the United States"); *see also id.* at 8 (describing a revision to product warning to include instruction that "users should . . . avoid

vulnerabilities, can transform an otherwise mildly contentious encounter into an in-custody fatality in a matter of seconds.[269] When courts require police to at least account for this reality, tasers are less likely to be used in situations in which they are unnecessary.

Nevertheless, a survey of the case law in the Fourth Circuit suggests courts are simply not giving the same weight to the extreme pain and heightened risk of lethality attendant to taser use as their counterparts in other circuits. Both the court of appeals[270] and the district courts have repeatedly declined to meaningfully address the Fourth Amendment implications of taser policies that explicitly authorize the infliction of pain against non-violent arrestees.[271] And what little they have said on the matter gives reason for concern,[272] even if *Henry* and *Orem* both represent steps—albeit incremental ones—in the right direction. While strong arguments have been advanced that "the application of 'pain compliance' [techniques] on a passively resisting arrestee fails to pass the 'objectively reasonable' *Graham* test under the fourth amendment,"[273] they have yet to be accounted for in the circuit's excessive force jurisprudence,[274] which continues to look more to injury than it does pain.[275] This unwillingness to address an issue

intentionally targeting the chest area"). Consequently, in the context of taser deployment, officers have a much higher level of awareness about the risks involved than the defendants in cases addressing other forms of pre-existing conditions.

269. This point is apparently conceded even by TASER International, which has observed that "it may not be possible to say that a[] [TASER] could never affect the heart." RICK GUILBAULT, TASER INTERNATIONAL'S PREFERRED TARGET ZONES 1, *available at* http://www.taser.com/images/training/training-resources/downloads/taser%20preferred%20target%20zones.pdf.

270. *See, e.g.*, Henry v. Purnell, 652 F.3d 524, 533–34 (4th Cir.) (en banc), *cert. denied*, 132 S. Ct. 781 (2011); Orem v. Rephann, 523 F.3d 442, 446 (4th Cir. 2008) (deciding a taser abuse question on Fourteenth Amendment grounds).

271. *See, e.g.*, SILVERSTEIN, *supra* note 24, at 22 ("Cases that rule against plaintiffs have downplayed the significance or degree of pain.").

272. *See* Bolden v. Rushing, C/A No. 6:07-cv-2985-GRA, 2009 WL 1160938, at *2 n.1 (D.S.C. Apr. 28, 2009) ("[That] the plaintiff was not violent in his actions against the officers . . . does not make the [use of the taser] unreasonable."), *aff'd,* 407 F. App'x 693 (4th Cir. 2011).

273. Benjamin I. Whipple, Comment, *The Fourth Amendment and the Police Use of "Pain Compliance" Techniques on Nonviolent Arrestees*, 28 SAN DIEGO L. REV. 177, 198 (1991); *see also* Headwaters Forest Def. v. Cnty. of Humboldt, 240 F.3d 1185, 1199 (9th Cir. 2000) ("[W]here there is no need for force, *any* force used is constitutionally unreasonable."), *cert. granted and judgment vacated*, 534 U.S. 801 (2001).

274. *See* Redding v. Boulware, C/A No. 0:09-1357-HFF-PJG, 2011 WL 4501948, at *5 (D.S.C. Aug. 9, 2011) ("[T]his court has been unable to find[] case law clearly establishing in 2007 that [serious] force could not constitutionally be used to effect an arrest of a suspect who resists arrest throughout her entire encounter with law enforcement, even if the suspect does not pose an immediate safety threat and is suspected of a minor offense. In fact, subsequent non-binding case law from within the Fourth Circuit suggests the contrary."), *report and recommendation adopted*, Civil Action No. 0:09-01357-HFF-PJG, 2011 WL 4527362 (D.S.C. Sept. 29, 2011).

275. *See supra* Part III.

that confronts criminal suspects on an increasingly regular basis has led to a "gradual depreciat[ion]"[276] of Fourth Amendment protections circuit-wide and empowered police in the circuit to feel comfortable using potentially deadly force in situations that would have been unthinkable just a decade ago.[277]

Aside from the increased dangers born by criminal suspects—and, as the aforementioned cases indicate, even the general public—there is another consequence to the Fourth Circuit's feeble treatment of the issue. As Jeff Fabian has observed regarding the recent proliferation of tasers, the quality of law enforcement itself suffers when police action "runs contrary to many people's expectations about what constitutes reasonable force."[278] When the perception develops that police are routinely evading accountability, "it can spark fear, anger, and even protests that degrade law enforcement's relationship with the community"[279] they are charged with protecting.

A brief review of some of the questions that have evaded the scrutiny of a jury in the federal district courts of the Fourth Circuit illustrates why there may be reason for concern that officers might feel empowered to gratuitously use the device: Does a suspect's failure to immediately accede to officers' demands—even when such compliance is objectively impossible—authorize an officer to tase someone who is not otherwise presenting any sort of threat to the safety of the officers or others?[280] Is it objectively reasonable for officers to repeatedly tase a man they know to be suffering from acute mental illness[281] without first calling in the

276. *See* Henderson v. United States, 12 F.2d 528, 531 (4th Cir. 1926) (warning that "the rights guaranteed by the Fourth Amendment are not to be . . . encroached upon or gradually depreciated by [the] imperceptible practice of courts"); *see also* Henry v. Purnell, 652 F.3d 524, 540 (4th Cir.) (en banc) (Davis, J., concurring) (arguing that courts must guard against "police technology . . . erod[ing] the [rights] guaranteed by the Fourth Amendment" (quoting McKenney v. Harrison, 635 F.3d 354, 364 (Murphy, J., concurring) (8th Cir. 2011)), *cert. denied*, 132 S. Ct. 781 (2011).

277. *See, e.g.*, U.N. Human Rights Rep., *supra* note 37, at 9; Lopez, *supra* note 41 (reporting that a sixteen-year-old student was threatened with a taser for using profanity); Ward, *supra* note 41 (quoting North Carolina public high school principal as saying a taser can be used against students if "they did not obey a specific rule").

278. Fabian, *supra* note 103, at 793.

279. *Id*. at 792–93 (citing Jessica DaSilva, *Protest Attracts Hundreds*, THE INDEPENDENT FLA. ALLIGATOR, Sept. 19, 2007, *available at* http://www.alligator.org/articles/2007/09/19/news/campus/protest.txt; Martin Espinoza, *Rally Targets Stun-Gun Deaths*, PRESS DEMOCRAT, Dec. 27, 2008, *available at* http://www.pressdemocrat.com/article/20081227/NEWS/812270379/1350?Title=Rally_targets_stun_gun_deaths).

280. *See* Fordham v. Doe, No. 4:11-CV-32-D, 2011 WL 5024352, at *1 (E.D.N.C. Oct. 20, 2011) (dismissing the taser claim of man whose hands were raised, where some officers allegedly told him to put his hands up and others told him to get on the ground).

281. *See* Meyers v. Balt. Cnty., 814 Fed. Supp. 2d 552, 558–59 (D. Md. 2011).

department's mental health clinicians, who are specially trained in non-violent de-escalation tactics?[282] Is society comfortable with male officers tasing women in the thighs for resisting public searches that threaten to expose their undergarments?[283] Should officers be able to use tasers simply to compel people to open their mouths?[284] Can they use them to the point of breaking a suspect's bones even when he is "not violent" and "d[oes] not fight back"?[285] Is ignoring an officer and exhibiting an "aggressive demeanor" enough to warrant being tased in the *head*,[286] a tactic that even TASER International advises against?[287] These are a few of the real world questions being raised and dismissed without much consideration under the circuit's current Fourth Amendment taser regime. To draw attention to them is not to say that any given plaintiff should ultimately prevail in her suit; it is only to illustrate the heavy consequences taser victims must endure, live—and sometimes even die—with, without ever having an opportunity to make an argument to a jury that an officer exceeded the bounds of reasonable conduct.

CONCLUSION

This Comment has sought to highlight a number of factors that operate to make vindication of one's right to be free of excessive force by taser particularly difficult in the federal courts of the Fourth Circuit. Other authors have written about the overriding difficulty taser plaintiffs generally face in overcoming qualified immunity and securing an appearance before a jury;[288] this Comment asserts there is reason to think this phenomenon is more pronounced in the Fourth Circuit than elsewhere. This is not necessarily the result of any conscious organized effort by the lower courts to deprive plaintiffs of their day in court. Rather, it would

282. *See Behavioral Assessment Team*, BALT. COUNTY, MD., http://www.baltimorecountymd.gov/Agencies/police/workplace_violence/wvmobilecrisisteam.html (last updated Mar. 6, 2012) (describing functions of Baltimore County's In-Home Intervention Teams, Critical Incident Stress Management Team, and Mobile Crisis Teams).

283. *See* Thompson v. City of Danville, No. 4:10CV00012, 2011 WL 2174536, at *2 (W.D. Va. June 3, 2011), *aff'd*, 457 F. App'x 221 (4th Cir. 2011).

284. *See* McDaniels v. Cleary, Civil Action No. 6:09-1518-TLW-WMC, 2010 WL 1052462, at *2 (D.S.C. Feb. 26, 2010), *report and recommendation adopted*, Civil Action No. 609-1518-TLW-WMC, 2010 WL 1052446 (D.S.C. Mar. 19, 2010).

285. Bolden v. Rushing, C/A No. 6:07-cv-2985-GRA, 2009 WL 1160938, at *1, *2 n.1 (D.S.C. Apr. 28, 2009), *aff'd*, 407 F. App'x 693 (4th Cir. 2011).

286. Griffin v. Catoe, Civ.A. 9:07-1609-JFA-GCK, 2008 WL 4558495, at *2 (D.S.C. Aug. 11, 2008), *report and recommendation adopted in part*, C/A No. 0:07-1609-JFA, 2008 WL 4458947 (D.S.C. Sept. 26, 2008).

287. *See* GUILBAULT, *supra* note 269, at 2 ("TASER International has warned since day one to avoid aiming for the head.").

288. *See, e.g.*, McStravick, *supra* note 5, at 373.

seem that the speed with which the majority of law enforcement agencies adopted tasers, and the frequency with which they began to rely on them, has placed lower courts in a difficult position and forced them to assess the situational propriety of using a device that, in many respects, is without legal analogue.[289] These courts have approached this task with very little direction from the Fourth Circuit,[290] which has for years bucked the practices of the other circuits with respect to excessive force cases.[291] While the Fourth Circuit's treatment of police abuse of tasers in *Orem* did suggest that the court recognized the dangers for abuse the devices posed to criminal suspects,[292] the distinctive context of the holding left many questions unresolved and provided lower courts with little guidance for assessing their use in Fourth Amendment claims.[293] The general approach of the lower district courts to these cases has arguably disregarded the developing body of case law in the other circuits and the Fourth Circuit's own instruction that a "clear violation of federal law may occur when . . . a consensus of cases from other circuits[] puts the officer on notice that his conduct is unconstitutional."[294] For this and the other reasons discussed herein, the time is right for the Fourth Circuit to clarify the law and provide lower courts with meaningful guidance as to excessive force taser claims.

When and if it does, one of the most significant things the court can do to discourage the abusive use of the device against criminal suspects is to take judicial notice of the taser's unique capacity to strip a suspect of his motor faculties. The failure thus far to account for the meaningful distinction between volitional and non-volitional "resistance" has arguably been the deciding factor in a number of the court's qualified immunity analyses, working to deprive plaintiffs of their day in court. Although police are typically expected to respond to the objective conduct of those whom they confront,[295] it is not equitable to taser suspects when officers exacerbate the "resistance" cited to justify a further infliction of force.[296]

289. *See supra* Part II.

290. *See supra* Part I(a)–(b).

291. *See supra* note 215 and accompanying text.

292. *See* Orem v. Rephann, 523 F.3d 442, 446 (4th Cir. 2008) (expressing concern for "use of the taser gun [that is] . . . not a good faith effort to maintain and restore discipline" (internal quotation marks omitted)); *id.* at 448–49 (expressing concern where "the taser gun was not used for a legitimate purpose").

293. *See* cases cited *supra* note 64.

294. Altman v. City of High Point, 330 F.3d 194, 210 (4th Cir. 2003).

295. *See* Cunningham v. Hamilton, 84 F. App'x 357, 358 (4th Cir. 2004) ("[T]he proper inquiry is whether the officers reasonably and objectively believed that their safety was in danger.").

296. *Cf.* Estate of Smith v. Marasco, 318 F.3d 497, 506–08 (3d Cir. 2003) (discussing state created-danger theory of § 1983 liability); Kneipp v. Tedder, 95 F.3d 1199, 1208 (3d Cir. 1996) (adopting the theory).

Those circuits that recognize this distinction have helped level the playing field for plaintiffs at the qualified immunity stage without opening the floodgates to excessive litigation. The Fourth Circuit should join them.

The Fourth Circuit should also reject the practice, common among some of the federal district courts, of imposing a de minimis injury threshold to Fourth Amendment actions brought under § 1983. This requirement operates to deter and dismiss claims brought by genuine victims of taser abuse who often do not bear the same visible evidence of brutality on their bodies as other victims of police abuse, but whose suffering—much of it psychological—is just as real. Although the circuit has poignantly recognized in its Eighth Amendment decisions that "[m]ankind has devised some tortures that leave no lasting physical evidence of injury,"[297] it has been slow to account for this reality in the context of Fourth Amendment claims. Consequently, plaintiffs can face the burden of demonstrating the existence of more than de minimis injuries even in cases where the unnecessary nature of the force applied is self-evident.

Prior to the Supreme Court's decision in *Wilkins*, a similar threshold existed in the circuit for inmates seeking to bring Eighth Amendment claims under § 1983.[298] Its recent abandonment[299] only serves to strengthen the rationale for rejecting the doctrine in the Fourth Amendment context. Although it is not universally applied within the circuit,[300] it is likely pervasive enough to have a deterrent effect. The doctrine has been haphazardly applied to all manner of abuse claims, but its effect is amplified with respect to victims of police taser abuse due to the device's ability to be used repeatedly without leaving much in the way of evidence. Indeed, it was partly for this reason that the United Nations concluded in 2009 that unnecessary use of the device by law enforcement constituted a form of torture in violation of the U.N. Convention Against Torture.[301]

297. Williams v. Benjamin, 77 F.3d 756, 762 (4th Cir. 1996).

298. *See* Norman v. Taylor, 25 F.3d 1259, 1263 (4th Cir. 1994) (en banc) ("[A]bsent the most extraordinary circumstances, a plaintiff cannot prevail on an Eighth Amendment excessive force claim if his injury is *de minimis*.").

299. *See, e.g.*, Hill v. O'Brien, 387 F. App'x 396, 398 (4th Cir. 2010) (recognizing *Wilkins* as overruling *Norman*).

300. *E.g.*, Clark v. Balt. Cnty., Civil Action No. BPG-08-2528, 2009 WL 2913453, at *2 n.4 (D. Md. Sept. 1, 2009); Bibum v. Prince George's Cnty., 85 F. Supp. 2d 557, 562–63 (D. Md. 2000).

301. *See* Matthew B. Stanbrook, *Tasers in Medicine: An Irreverent Call for Proposals*, 178 CAN. MED. ASS'N J. 1401, 1401 (2008), *available at* http://www.cmaj.ca/content/178/11/1401.full.pdf; *U.N.: Tasers Are a Form of Torture*, CBS NEWS (Feb. 11, 2009, 3:49 PM), http://www.cbsnews.com/stories/2007/11/25/national/main3537803.shtml.

Two of the Fourth Circuit opinions most often cited by the lower courts invoking the de minimis doctrine in excessive force cases[302] suggest it is entirely possible there was never any intent to create a rule so at odds with the other circuits.[303] Both opinions, after all, involved allegations of improperly tight handcuffing.[304] Given the ubiquitous role of handcuffs in nearly every arrest,[305] it seems quite possible that the court simply intended to spare officers the trouble of defending allegations relating to this specific injury, which in both cases formed the basis of the Fourth Amendment claim. In the interest of restoring a sense of balance to the circuit's excessive force jurisprudence, the court of appeals should clarify this issue and join the majority of other circuits in recognizing that it is the "need for force"[306] that rests at the heart of such claims—not the extent to which a plaintiff can or cannot demonstrate a persisting physical injury.[307] Until this occurs, genuine victims of abuse bringing Fourth Amendment excessive force claims will continue to experience difficulty challenging the sort of "torment without marks" that so abhorred the *Orem* court.[308] Many of the taser's residual effects are psychological, but that should not render them any less constitutionally cognizable.[309]

Another way the Fourth Circuit might encourage greater professionalism and caution with regard to tasers would be to join the ranks of circuits holding that gratuitous use against an arrestee violates the Fourth Amendment.[310] In *Meyers*, the federal district court in Maryland appeared to endorse the view that a "determin[ation] . . . that officers overstepped the

302. Brown v. Gilmore, 278 F.3d 362 (4th Cir. 2002); Carter v. Morris, 164 F.3d 215 (4th Cir. 1999).

303. *See* Georgiady, *supra* note 76, at 137–38 (identifying the Fourth Circuit as adhering to the minority view of the *de minimus* doctrine).

304. *See Brown*, 278 F.3d at 369; *Carter*, 164 F.3d at 217.

305. Orsak v. Metro. Airports Comm'n Airport Police Dep't, 675 F. Supp. 2d 944, 957 (D. Minn. 2009) ("The use of handcuffs, unlike the use of a taser, is a standard practice in nearly every arrest.").

306. *See* Georgiady, *supra* note 76, at 137 n.100, 138 n.103 (citing Hayes v. N.Y.C. Police Dep't, 212 F. App'x 60, 62 (2d Cir. 2007); Blankenhorn v. City of Orange, 485 F.3d 463, 479–80 (9th Cir. 2007); Calvi v. Knox Cnty., 470 F.3d 422, 428 (1st Cir. 2006); Holland *ex rel.* Overdorff v. Harrington, 268 F.3d 1179, 1195 (10th Cir. 2001); Ingram v. City of Columbus, 185 F.3d 579, 597 (6th Cir. 1999); Sharrar v. Felsing, 128 F.3d 810, 822 (3d Cir. 1997); Lanigan v. Vill. of E. Hazel Crest, 110 F.3d 467, 474 (7th Cir. 1997); Scott v. District of Columbia, 101 F.3d 748, 759–60 (D.C. Cir. 1996)).

307. In the case of handcuffing, the need to apply them in almost every case is of course quite high, since an officer will not wish to transport an unsecured arrestee in his vehicle.

308. Orem v. Rephann, 523 F.3d 442, 448 (4th Cir. 2008) (quoting Hickey v. Reeder, 12 F.3d 754, 757 (8th Cir. 1993)).

309. *Cf.* Willingham v. Crooke, 412 F.3d 553, 562 (4th Cir. 2005) (recognizing non-physical, emotional harm resulting from firearm being pointed at claimant); Williams v. Benjamin, 77 F.3d 756, 762 (4th Cir. 1996) (noting that pain can be inflicted without physical injury).

310. *See* cases cited *supra* note 167.

amount of force strictly necessary to subdue a suspect . . . is rarely more than indulge[nce] in unrealistic second-guessing."[311] With the obvious exception of police officers, this sort of judicial defeatism serves no one—least of all true victims of abuse who have the most to lose from courts that take this approach. To the extent police feel they can use *unnecessary* force to take suspects into custody without the prospect of answering for their actions, the courts have abdicated their responsibility. Experience in other circuits has shown that courts applying the Supreme Court's *Graham* factors have found it entirely possible to distinguish between lawful and excessive applications of the taser, even in cases presenting rapid and successive applications.[312] The taser in fact lends itself to this type of analysis, by recording the time, number, and duration of each pull of the trigger on its internal computer.[313] The alternative, and the approach that currently appears to dominate in the Fourth Circuit, is to ask that the public "accept the proposition that the police should be permitted to use . . . a Taser to shield themselves from any *possibility* of harm and the suspect must suffer the consequences."[314] The Fourth Circuit should join its sister circuits in recognizing that "[t]o accept this proposition would effectively eviscerate the protections of the Fourth Amendment and . . . ignore the teachings of *Graham*."[315] The court should make clear that any unnecessary use of a taser while placing a person under arrest—irrespective of the physical injury incurred by a suspect—violates the Fourth Amendment.[316]

311. Meyers v. Balt. Cnty., 814 F. Supp. 2d 552, 561–62 (D. Md. 2011) (alteration in original) (internal quotation marks omitted) (citing U.S. v. Sharpe, 470 U.S. 675, 686 (1985)).

312. *See, e.g.*, Beaver v. City of Fed. Way, 507 F. Supp. 2d 1137, 1149 (W.D. Wash. 2007).

313. A discrepancy between an officer's account and the taser's computer can say a lot about the reasonableness of an officer's use of force. *See, e.g.*, Cyrus v. Town of Mukwonago, 624 F.3d 856, 862 (7th Cir. 2010) (holding that where officer "testified that he deployed the Taser five or six times," but the "Taser's internal computer . . . registered 12 trigger pulls[,] . . . . the Taser's internal computer record create[d] enough of a factual discrepancy on the degree of force used to preclude summary judgment"). Not all officers will be aware that each pull of the trigger is recorded on the device's internal computer. Where an officer's account is not congruent with the taser's internal record, it may suggest the officer harbored doubts as to the appropriateness of using the taser as frequently as he did.

314. *Beaver*, 507 F. Supp. 2d at 1146 (emphasis added).

315. *Id.*

316. The lack of injury in cases where force was unnecessary might factor into any damages ultimately awarded. *See* Wilkins v. Gaddy, 130 S. Ct. 1175, 1180 (2010) (per curiam). But it should not be dispositive of the defendant's culpability. Thus far, in the few cases where federal courts in the circuit have meaningfully employed the *Graham* analysis to deny a defendant's motion for summary judgment, the injuries alleged have been severe or the facts somewhat anomalous, muddying attempts to discern at what point unnecessary taser use truly becomes actionable. *See, e.g.*, Cook v. Riley, No. 1:11CV24, 2012 WL 2239743, at *12 (M.D.N.C. June 15, 2012) ("[A] reasonable factfinder could conclude that deploying a TASER against someone in a tree stand who either posed no threat to anyone . . . or, at most, posed only a limited threat to himself . . . constitutes excessive force."). In a very welcome development, the United States District Court for the Eastern District of North Carolina recently held that "using a taser against a

Judge Davis appeared ready to adopt this position in his thoughtful concurring opinion in *Henry*, noting that the "dissent's unbridled confidence that use of a Taser would have been permissible . . . [was] unwarranted."[317] Ultimately, however, he adopted a position more resembling that taken by the court in *Meyers*,[318] suggesting there remained good reasons for rejecting a "determination of the reasonableness *vel non* of Taser use by law enforcement officers *in the abstract*."[319]

Although Judge Davis's opinion in *Henry* is helpful for raising consciousness as to the unique dangers of tasers, because the court of appeals has yet to consider an excessive taser claim under the Fourth Amendment, many lower courts will continue to award officers with qualified immunity in every case in which a suspect exhibits *any* degree of resistance, even that which may be involuntary. Thus the cautious approach Judge Davis advocates is not entirely consonant with the result his opinion suggests lower courts should reach: that the Fourth Amendment places objective limits on the manner in which a taser can be used against non-violent, non-threatening arrestees.

The *Henry* decision is also interesting for the insight it provides into how other members of the Fourth Circuit might approach a Fourth Amendment claim alleging excessive use of a taser against a non-violent but resisting arrestee. Judge Shedd, in a dissenting opinion joined by Judges Niemeyer and Agee, appears to suggest several times that the plaintiff's decision to flee, rather than submit to an arrest stemming from a failure to pay child support, would have rendered use of a taser appropriate.[320] The opinion is also interesting for its view that the majority has "change[d] the law in th[e] circuit," and signaled its willingness "to

citizen who is actively attempting to comply with [an] officer's directives is a violation of the citizen's Fourth Amendment right." Boswell v. Bullock, No. 5:11-CV-94-F, 2012 WL 2920036, at *10 (E.D.N.C. July 17, 2012). However, given the fact that tasers often naturally frustrate suspects' attempts to comply, this holding may yet have limited practical effect. Notably, in *Boswell*, the defendant officer's on-the-record version of the disputed events was directly contradicted by a video recording that was made available to the court. *Id.* at *9.

317. Henry v. Purnell, 652 F.3d 524, 539 (4th Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 781 (2011).

318. 814 F. Supp. 2d 552, 561–62 (D. Md. 2011).

319. *Henry*, 652 F.3d at 540–41 (Davis, J., concurring).

320. *See, e.g.*, *id.* at 548 n.8 (Shedd, J., dissenting) ("[H]ad Deputy Purnell decided against using the Taser, his options were either to (1) stop chasing Henry and allow him to get away or (2) chase Henry and risk having to engage him in a physical encounter (assuming he could even catch him). . . . [T]he Fourth Amendment did not require Deputy Purnell to pursue either of these courses of action."); *id.* at 551 ("If, as the majority believes, this was not a dangerous situation, could the deputy have used the Taser at all? Should the deputy have been required to forego use of the Taser and, instead, to chase Henry . . . ?").

second-guess the[] actions [of police] literally on a second-by-second basis."[321]

If this were indeed the case, it would be good news for future taser plaintiffs—even if, as a practice, it might not be especially workable. Fortunately for Judge Shedd, however, this prediction has yet to come true, at least insofar as it concerns the courts' treatment of the broad discretion officers currently enjoy in employing tasers—seemingly one of the objects of his concern.[322] The overriding problem for the officer in *Henry* was that he shot the plaintiff with a *gun*, not that he might have tased him had things gone as planned.[323] Whether Officer Purnell's actions would have been lawful if things had transpired as he intended is a question the court explicitly left for another day.[324] As a consequence, the lower district courts of the circuit will continue to struggle, without much in the way of guidance, to craft an approach that is fair to officers and plaintiffs alike.

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321. *Id.* at 553 (Shedd, J., dissenting).

322. *Id.* at 547 (noting that, if all improper "seizure[s] were to subject police officers to personal liability under § 1983, . . . officers would come to realize that the safe and cautious course was always to take no action" (quoting Gooden v. Howard Cnty., 954 F.2d 960, 967 (4th Cir. 1992) (en banc))).

323. *Id.* at 532 (majority opinion).

324. *Id.* at 534; *id.* at 537, 539 (Davis, J. concurring); *id.* at 548 n.8 (Shedd, J., dissenting).

** This Comment is dedicated to Deborah Blackmon and Deborah Stout, whose advocacy on behalf of their family members spurred the formation of the North Carolina Taser Safety Project. Ms. Blackmon's uncle, Richard McKinnon, burned to death after being tased in the presence of flammable materials in Cumberland County in 2006. Ms. Stout's son, Shannon, died after being surrounded by eight officers and repeatedly tased in Randolph County in 2006.