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Simply Stunning! A Proposed Solution for Regulating the Use of Tasers by Law Enforcement in the Seventh Circuit

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Notes

SIMPLY STUNNING! A PROPOSED SOLUTION FOR REGULATING THE USE OF TASERS BY LAW ENFORCEMENT IN THE SEVENTH CIRCUIT

I. INTRODUCTION

During a routine early morning call in Spaulding, Illinois, animal control was sent to a house to secure an unchained dog.¹ Upon arrival, the dog's twenty-year-old owner, Travis, resisted animal control's attempt to capture the loose dog.² Travis also threatened the animal control officers, saying he would "knock them out," and "kick [their] ass."³ In response, police officers were dispatched to the location.⁴

Despite police presence, the scene continued to escalate with the arrival of Travis's mother, Cindy.⁵ Travis eventually exited the house and was placed under arrest.⁶ Following the arrest, police were transporting Travis, who continued to be uncooperative and caused the transporting officer to back his vehicle into Cindy's vehicle.⁷ Travis pleaded for Cindy "to get him out."⁸ Cindy approached, prompting the officer to exit his

¹ *Abbott v. Sangamon Cnty., Ill.*, 705 F.3d 706, 709 (7th Cir. 2013). Spaulding, Illinois is located roughly about fifteen minutes north of Springfield, Illinois. GOOGLE MAPS, https://maps.google.com/maps?f=d&source=s_d&saddr=Springfield,+IL&daddr=Spaulding,+IL&hl=en&geocode=&authuser=0&aq=&vps=1&sl=41.475425,-87.053415&ssp=0.076012,0.195179&vpsrc=3&mra=ls&ie=UTF8 (last visited Oct. 22, 2013), archived at <https://perma.cc/M8F7-RQKR>. See generally John H. Kelly, *The Seventh Circuit Provides Guidance on False Arrest and the Use of the Taser*, OTTOSEN BRITZ KELLY COOPER GILBERT & DINOLFO, LTD. (2013), available at <http://www.obkcg.com/article.asp?a=692>, archived at <http://perma.cc/9CTA-9H6A> (discussing *Abbott's* potential impact on the Seventh Circuit's analysis of excessive force claims arising from law enforcement's use of a taser).

² *Abbott*, 705 F.3d at 709. Animal control spent over an hour attempting to secure the dog, but their efforts were hindered because Travis was inside the house moving to different locations and calling out windows for the dog to come to that location. *Id.*

³ *Id.* Later, during Travis's arrest, he "yelled to the animal control officers, 'Thanks a lot assholes!'" *Id.* at 710.

⁴ *Id.* at 709.

⁵ *Id.* at 710.

⁶ *Abbott*, 705 F.3d at 710.

⁷ *Id.*

⁸ *Id.* While in the backseat of the police vehicle, Travis was able to wiggle his hands free from behind his back. *Id.* After his hands were free, Travis unhooked his seatbelt. *Id.* These actions posed a threat to the officer because he was unprotected by a "prisoner-transport shield" between the front and back seats. *Id.* at 710. The officer therefore placed his foot on

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vehicle.⁹ The officer gave Cindy both visual and verbal instructions to stop approaching the car; however, she ignored the warnings and proceeded to move toward the officer and Travis, who remained in the backseat.¹⁰ As a result of her noncompliance, the officer discharged his taser, hitting Cindy in the stomach, causing her to fall to the ground on her back.¹¹ Even after being tased and instructed to lay face down, Cindy continued to refuse to honor the officer's instructions.¹² The officer then had two options for securing Cindy after the initial tasing, either: (1) confront her with hand-to-hand tactics and, while doing so, place himself and other officers in danger; or (2) deploy his taser again, allowing Cindy to comply with his instructions, while removing himself and others from a potentially dangerous encounter.¹³

Officers are forced to make decisions like the one above on a daily basis.¹⁴ Unfortunately, they do not have the benefit of clear and consistent rules, guidelines, or statutes governing the use of tasers.¹⁵ The Supreme

the brakes so he could maintain control over Travis. *Abbott*, 705 F.3d at 710. During the struggle, the officer's foot became disconnected from the brakes and caused the accident. *Id.*

⁹ *Id.* While exiting his vehicle the officer believed that "Travis was attempting to escape." *Id.* "According to [Officer] Sweeney, he was concerned that Cindy was trying to help her son escape, for Travis was still 'going nuts' in the backseat of the car." *Id.* at 711.

¹⁰ *See id.* (stating that the officer "held up his hand and twice ordered Cindy to stop, but she continued to move toward the vehicle"); *infra* Part III.C (discussing the importance of an officer being required to give both a visual and verbal warning before deploying a taser).

¹¹ *Abbott*, 705 F.3d at 710-11. Travis was tased in drive stun mode multiple times from officers, in addition to Cindy's tasing, as they attempted to regain control over him. *Id.* at 711-12. Travis "[did] not dispute that he was struggling with [Officer] Sweeney in the back of the police cruiser and at one point was 'out powering' [Officer] Sweeney." *Id.* at 711.

¹² *Id.* at 710. Two officers, including Officer Sweeney, who was responsible for tasing Cindy, gave their recollections of what led to Cindy receiving a second shock. *Id.* at 711. "Sergeant Lawley claims that after the first tasing, Cindy disobeyed [Officer] Sweeney's order to turn over and attempted to get up, so [Officer] Sweeney zapped her a second time." *Id.* Officer Sweeney recalled "that he 'began giving her commands to turn over onto her stomach so that she could be handcuffed,' but she was not responsive so he 'again commanded her and told her if she did not comply that she would be tased again'; Cindy again gave no response . . ." *Abbott*, 705 F.3d at 711.

¹³ *Id.* (explaining the officer's rationale to use his taser on Cindy a second time).

¹⁴ *See infra* Part II.A (providing statistics that show the large number of assaults against officers and the number of officers killed while on duty).

¹⁵ *See* Bailey Jenifer Woolfstead, *Don't Tase Me Bro: A Lack of Jurisdictional Consensus Across Circuit Lines*, 29 THOMAS M. COOLEY L. REV. 285, 287 (2012) ("[m]ost circuits are split on the issue . . ."); Rebecca McCray & Emma Anderson, *Taser No Longer a Non-Lethal Alternative for Law Enforcement*, ACLU (May 3, 2012), <https://www.aclu.org/blog/criminal-law-reform/tasers-no-longer-non-lethal-alternative-law-enforcement>, archived at <https://perma.cc/6VDF-RABY> ("Taser policies vary greatly between police departments, often leading to vague, outdated and inaccurate guidelines that result in misunderstanding about the misuse of these allegedly non-lethal weapons."); Bill Mears, *Justices Decline Case of Political Taser Use on Pregnant Woman*, CNN (May 29, 2012), <http://www.cnn.com/2012/05/29/justice/scotus-taser-shocks>, archived at <http://perma.cc/QLD3-N7PF> ("The Supreme Court . . . has

Court's refusal to rule on the issue, combined with a circuit split, creates uncertainty as to when an officer can lawfully deploy a taser.¹⁶ Had Illinois adopted a statute governing the appropriate use of tasers, the officer in *Abbott v. Sangamon County, Illinois* would have been able to make an informed decision as to whether he could have used a taser to gain control over Cindy, during her ongoing disobedience.¹⁷

Given the current ambiguity, Illinois, Indiana, and Wisconsin should adopt a model statute that resolves the lawful use of tasers by law enforcement. Part II of this Note demonstrates why law enforcement officers need guidance when dealing with tasers in the field and provides an overview of taser regulation at the state level.¹⁸ Next, Part III demonstrates why the legislature needs to rework the current system of taser regulation.¹⁹ Part IV offers a model statute that the states in the Seventh Circuit should adopt to clarify when law enforcement may lawfully utilize tasers.²⁰ Finally, Part V illustrates how the model statute

not yet accepted any cases on the specific use of Tasers . . ."); see *infra* Part II.F (discussing how Arkansas, Florida, Georgia, and New Jersey are the only states that directly address the use of tasers by law enforcement through state statutes).

¹⁶ Woolfstead, *supra* note 15, at 287 ("A small number of circuits and the Supreme Court of the United States have not yet addressed the issue."); Mears, *supra* note 15 ("Hundreds of . . . [t]aser-related lawsuits have been working their way through lower state and federal courts, but the Supreme Court so far has refused to address the issue of what the officers call a useful pain technique." (internal quotation marks omitted)).

¹⁷ See *infra* Part II.E (establishing that Illinois is not one of the four states that currently has a statute in place regulating the use of tasers by law enforcement); *infra* Part IV.A (drafting a model statute for Illinois, Indiana, and Wisconsin to adopt). If Illinois, Indiana, and Wisconsin all adopted the same statute, or at least very similar statutes, then it would not only improve regulation of taser use by law enforcement at the state level, but it would also help eliminate some of the federal issues with taser regulations. See Woolfstead, *supra* note 15, at 287 ("Most circuit courts are split on the issue, and this poses a particular problem for federal law enforcement agents who carry ECDs and must cross jurisdictional lines in the course of their law enforcement duties."). While this Note is only dealing with taser regulation at the state level, Woolfstead advocates that the solution at the federal level is for the Supreme Court to deliver a ruling on the issue. *Id.* at 326.

¹⁸ See *infra* Part II (focusing heavily on the Seventh Circuit, the *Abbott* decision, and states that currently have statutes addressing taser use by law enforcement).

¹⁹ See *infra* Part III.A (analyzing Florida's current statute for the use of tasers by law enforcement); *infra* Part III.B (explaining the importance of Florida's statute's training requirements for future regulations); *infra* Part III.C (addressing the importance of including a warning requirement and a medical requirement in future state statutes); *infra* Part III.D (discussing taser technology that law enforcement should be required to use).

²⁰ See *infra* Part IV.A (drafting a model statute for taser regulation for Illinois, Indiana, and Wisconsin); *infra* Part IV.B (elaborating on areas of the proposed statute where there may be resistance to its enactment).

addresses and alleviates the current problems governing the use of tasers.²¹

II. BACKGROUND

The current system for regulating taser use by law enforcement creates inconsistencies throughout different law enforcement agencies, states, and federal appellate courts.²² For instance, problems arise because the public does not understand or appreciate the benefits that tasers provide to law enforcement.²³ Additionally, case law varies widely on the correct way to analyze excessive force claims that arise from law enforcement's improper use of tasers.²⁴ Finally, only a few states have

²¹ See *infra* Part V (concluding the proposed model statute addresses the inconsistencies surrounding when an officer may lawfully deploy a taser).

²² Michelle E. McStravick, Note, *The Shocking Truth: Law Enforcement's Use and Abuse of Tasers and the Need for Reform*, 56 VILL. L. REV. 363, 386–88 (2011); see Woolfstead, *supra* note 15 (providing an in-depth analysis of the different circuits' views on tasers relating to excessive force claims); see also *infra* Part II.C (reviewing the current case law on excessive force claims arising from law enforcement's use of the taser); *infra* Part II.D (analyzing the varying opinions of the different federal circuit courts as to the location of the taser on the Use-of-Force Continuum); *infra* Part II.F (discussing the states that have currently adopted statutes to regulate the use of tasers by law enforcement). McCray and Anderson wrote: "states do not uniformly or consistently govern or regulate officers' use of Tasers. This means that Taser policies vary greatly between police departments, often leading to vague, outdated and inaccurate guidelines that result in misunderstanding about the misuse of these allegedly non-lethal weapons." McCray & Anderson, *supra* note 15. There is an equal concern for the varied taser policies between police departments as there is for the different policies between circuits. J.J. Hensley, *ACLU: Rules Vary on Police Taser Use*, ARIZ. REPUBLIC (June 29, 2011), http://www.azcentral.com/arizonarepublic/local/articles/20110629-arizona-police-taser-aclu-research.html?nclick_check=1, archived at <http://perma.cc/XT6S-7QHC>; McCray & Anderson, *supra* note 15; Justin Murphy, *Watchdog Report: Taser Use, Guidelines Vary in Suburbs*, DEMOCRAT & CHRON. (Feb. 3, 2013), <http://www.democratandchronicle.com/article/20130203/NEWS01/302030016/>, archived at <http://perma.cc/4EGD-6M2U>; see Part II (discussing the inconsistencies with taser regulation between the circuits).

²³ See Aaron Sussman, Comment, *Shocking the Conscience: What Police Tasers and Weapon Technology Reveal About Excessive Force Law*, 59 UCLA L. REV. 1342, 1351–64 (2012) (discussing the positive and negative effects of tasers). Sussman lists three concerns that may be preventing a better understanding of current taser regulations, namely "the lack of impartial studies, the painful effects of being tased, and the particularly harmful and potentially deadly effects that tasers have on certain vulnerable populations." *Id.* at 1351. The concept of "excited delirium" has also caused some confusion with regards to taser use by law enforcement. Matthew J. Spriggs, Note, *"Don't Tase Me Bro!" An Argument for Clear and Effective Taser Regulation*, 70 OHIO ST. L.J. 487, 489, n.18, 492 (2009) (discussing USA: Amnesty International's Continuing Concerns about Taser Use and stating that: "Amnesty International's primary complaints against taser use is the known and unknown associated health risks of taser use"); AMNESTY INT'L, USA: AMNESTY INTERNATIONAL'S CONTINUING CONCERNS ABOUT TASER USE 17 (Mar. 27, 2006), available at <https://www.amnesty.org/en/documents/AMR51/030/2006/en/>, archived at <https://perma.cc/E8XE-QLXM>.

²⁴ See *infra* Part II.C (explaining how courts have applied the *Graham* test by using additional factors). An additional hurdle for suspects to overcome, which is not discussed

enacted statutes that provide law enforcement with concrete regulations governing the use of tasers.²⁵ Three state statutes in particular – Arkansas, Georgia, and Florida – provide a template that other legislatures may implement in the future to improve officers’ and communities’ understanding of lawful taser usage.²⁶

To appreciate the importance of improved taser regulation, it is first necessary to be aware of how tasers work and what the benefits are of allowing law enforcement to use the device.²⁷ Part II.A provides background on tasers and explains how the technology affects both law enforcement and suspects.²⁸ Next, Part II.B establishes the potential problems of using tasers on certain classes of suspects.²⁹ Part II.C provides the current law on excessive force claims involving taser use.³⁰ Then, Part II.D explains where tasers are located on the Use of Force Continuum.³¹ Part II.E explores the Seventh Circuit’s views relating to the *Abbott* decision.³² Finally, Part II.F discusses the current state statutes in effect that govern law enforcement’s use of tasers.³³

in-depth in this Note, is the subjective concept of Qualified Immunity. McStravick, *supra* note 22, at 372–75. *Saucier v. Katz* created a two-part test to determine whether an officer had qualified immunity. 533 U.S. 194, 200 (2001); *see* McStravick, *supra* note 22, at 373 n.56 (citing to *Saucier v. Katz* and discussing the obstacles that qualified immunity places in front of a plaintiff’s excessive force claim). In 2009, the Supreme Court gave lower courts more ways to interpret excessive force claims differently from one another by allowing the test to be applied by either asking the first question first or the second question first. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009); *see* McStravick, *supra* note 22, at 373 n.56 (citing to *Pearson* and explaining how the concept of qualified immunity has evolved).

²⁵ *See infra* Part II.E (discussing the Seventh Circuit’s decision in *Abbott*); *infra* Part II.F (evaluating the Arkansas, Florida, Georgia, and New Jersey state statutes that specifically address taser use by law enforcement).

²⁶ *See infra* Part IV.A (drafting a model statute for Illinois, Indiana, and Wisconsin to adopt to improve the regulation of taser use by law enforcement).

²⁷ *See infra* Part II.A (providing a general overview of tasers).

²⁸ *See infra* Part II.A (discussing the background, technology, and effect taser usage has on both law enforcement and suspects).

²⁹ *See infra* Part II.B (explaining the issue and danger that may be present for certain classes of suspects if law enforcement officers are allowed to use a taser).

³⁰ *See infra* Part II.C (providing the current law for the use of tasers by law enforcement).

³¹ *See infra* Part II.D (summarizing the Use-of-Force Continuum and its relation to regulating the use of tasers by law enforcement).

³² *See infra* Part II.E (clarifying the Seventh Circuit’s stance on law enforcement’s use of taser after the *Abbott* decision).

³³ *See infra* Part II.F (discussing state statutes that are currently in effect that address law enforcement’s taser usage).

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A. *An Overview of Tasers*

Law enforcement officers are well aware of the inherent risks associated with their line of duty.³⁴ Over 1500 officers across the United States have been killed while on duty since 2004.³⁵ Statistically, these numbers are significantly lower than may be expected since the number of annual assaults against officers can reach as high as 60,000 and the number of officer injuries can exceed 16,000.³⁶

Jack Cover addressed law enforcement's safety needs when he created the taser, which allowed officials to effectively apprehend suspects while using non-deadly means.³⁷ However, it is TASER International that transformed the taser into the device that is currently used by law enforcement.³⁸ Officers can deploy tasers in two modes – drive stun mode

³⁴ See *Deaths, Assaults & Injuries*, NAT'L L. ENFORCEMENT OFFICERS MEMORIAL FUND (Feb. 21, 2014, 10:33 AM), <http://www.nleomf.org/facts/officer-fatalities-data/daifacts.html>, archived at <http://perma.cc/BF65-ZN6F> (listing the number of assaults against officers per year); *Honoring Officers Killed in 2014*, OFFICER DOWN MEM'L PAGE (Feb. 21, 2014, 10:37 AM), <http://www.odmp.org/search/year>, archived at <http://perma.cc/8W93-YAQ9> (providing statistical data on officer deaths while they were on duty).

³⁵ *Honoring Officers Killed in 2014*, *supra* note 34; see *Law Enforcement Facts*, NAT'L L. ENFORCEMENT OFFICERS MEMORIAL FUND (Feb. 21, 2014, 10:41 AM), <http://www.nleomf.org/facts/enforcement/>, archived at <http://perma.cc/KY86-CWAY> (posting statistics showing over 1500 police officer deaths in the last ten years). Officer Down Memorial Page writes, "[m]ore than 20,000 have made the ultimate sacrifice in the United States and it is with great honor that the [Officer Down Memorial Page] pays a lasting tribute to each of these officers by preserving their memories with its pages." *About ODMP*, OFFICER DOWN MEMORIAL PAGE (Feb. 21, 2014, 10:44 AM), <http://www.odmp.org/info/about-odmp>, archived at <http://perma.cc/2NMR-LMZ4>. The breakdown for the past ten years of officers' deaths are: 105 deaths in 2013, 125 in 2012, 179 in 2011, 177 in 2010, 140 in 2009, 158 in 2008, 203 in 2007, 161 in 2006, 166 in 2005, and 166 in 2004. *Honoring Officers Killed in 2014*, *supra* note 34.

³⁶ *Deaths, Assaults & Injuries*, *supra* note 34 (posting statistics from 2003 to 2012, which included at least 60,000 assaults against officers in the years 2004, 2007, and 2008 and over 16,000 injuries to officers in the years 2003, 2004, and 2005).

³⁷ Bruce Webber, *Jack Cover, 88, Physicist Who Invented the Taser Stun Gun, Dies*, N.Y. TIMES (Feb. 16, 2009), http://www.nytimes.com/2009/02/16/us/16cover.html?_r=0, archived at <http://perma.cc/NHE3-LNRY>. Jack Cover is also given credit for naming the taser. *Id.* Originally, the abbreviation was T.S.E.R., which stood for Thomas Swift Electric Rifle named after a favorite childhood book of his *Tom Swift and His Electric Rifle*. Webber, *supra*; Woolfstead, *supra* note 15, at 291-92 (discussing Jack Cover's invention). However, in an interview with *The Washington Post*, Jack Cover claimed that the abbreviation was changed to TASER "because we got tired of answering the phone 'T.S.E.R.'" See Webber, *supra* (quoting Jack Cover from his interview with *The Washington Post*). Jack Cover died in 2009 at the age of 88. *Id.* His wife was quoted as saying, "[h]e used to say he saved 100,000 lives." See *id.* (quoting Jack Cover's wife).

³⁸ See Sussman, *supra* note 23, at 1348 (providing a discussion of TASER International's past and why they are considered to have "popularized" these devices). Other scholars refer to the devices as "Thomas A. Swift Electric Rifles," "Conducted Electrical Weapons," "electronic control devices," or "stun guns." See Woolfstead, *supra* note 15, at 287 (referring

and dart stun mode.³⁹ Each mode provides officers with different advantages and disadvantages.⁴⁰ However, the main differences between the modes are how law enforcement officers initiate contact with the suspect and the resulting harm to the suspect.⁴¹

To illustrate, a taser deployed in dart stun mode fires two dart-like projectiles at the suspect, and upon contact, the projectiles penetrate the suspect's skin.⁴² TASER International eliminated the use of gunpowder to propel the darts and now uses compressed nitrogen.⁴³ The suspect is first

to tasers as electronic control devices); Ian A. Mance, Comment, *Power Down: Tasers, The Fourth Amendment, and Police Accountability in the Fourth Circuit*, 91 N.C. L. REV. 606, 607 (2013) (analogizing the names taser and Thomas A. Swift Electric Rifle); Spriggs, *supra* note 23, at 487 n.4 (discussing the model of taser used in the Andrew Meyer tasing and Taser.com); About TASER, TASER.COM (Feb. 21, 2014, 11:24 AM), <http://www.taser.com/about-taser>, archived at <http://perma.cc/V4FU-3C6D> (referring to their own product as Conducted Electrical Weapons); Webber, *supra* note 37 (providing background of the man responsible for creating the taser, which he originally referred to as the Thomas Swift Electric Rifle).

³⁹ Woolfstead, *supra* note 15, at 292–93; Sussman, *supra* note 23, at 1350.

⁴⁰ See Woolfstead, *supra* note 15, at 291–94 (explaining the distances of each mode and the effects it has on the suspect when deployed).

⁴¹ *Id.* at 292.

⁴² See *id.* (“Dart stun mode uses compressed nitrogen to propel a pair of . . . aluminum darts tipped with stainless steel barbs Once a [t]aser in dart stun mode makes contact with the skin, the barbs will imbed one quarter of an inch into the subject’s skin or clothing”) (quoting in part *Bryan v. MacPherson*, 630 F.3d 805, 824 (9th Cir. 2010)); Sussman, *supra* note 23, at 1350 (“In dart mode, compressed nitrogen is used to propel two barbs with enough force to penetrate two inches of clothing”). However, the device is still capable of subduing a suspect even if the darts do not penetrate the skin. Jeff Fabian, Note, *Don’t Tase Me Bro!: A Comprehensive Analysis of the Laws Governing Taser Use By Law Enforcement*, 62 FLA. L. REV. 763, 766 (2010) (“The electric shock can travel through two inches of clothing, so the probes do not need to be embedded into a person’s skin to incapacitate him or her.”).

⁴³ See Woolfstead, *supra* note 15, at 292 (stating that a taser in dart mode used “compressed nitrogen”); Sussman, *supra* note 23, at 1348 (explaining how the device now uses “compressed nitrogen”); Michael E. Miller, *Taser Use and the Use-of-Force Continuum: Examining the Effect of Policy Change*, POLICE CHIEF 73 (Sept. 2010) (“The latest models feature a nitrogen gas propulsion system.”). Taser.com provides a description of how the tasers currently work on the human body:

TASER CEW current does not rely on brute force, or on sheer power.

Instead, the TASER CEW pulsed output is really an elegant approach to incapacitating violent persons. The TASER CEW pulses mimic the electrical signals used within the human body to communicate between the brain and the muscles. The TASER CEW simulates the pulsed communications used within the nerves, and interferes with communication—like static on the telephone lines within the body. Sometimes people will ask “Isn’t electricity dangerous?” The answer is—well yes, it can be. But electricity is actually necessary for life—we literally cannot live without it. Electrical pulses control every thought we have, every breath we take, every sensation we feel, every sight we see, every sound we hear—every complex life process depends on these

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given an initial five-second shock, but the officer can send additional shocks throughout the suspect's body with the wires remaining connected to the device, which can cause temporary paralysis.⁴⁴ Further, dart stun mode enables the officer to hit a suspect from a distance of over twenty feet.⁴⁵

electrical signals within our bodies that occur billions of times every second.

How Does a TASER CEW Work, TASER.COM (2014), <http://www.taser.com/research-and-safety/how-a-taser-works>, archived at <http://perma.cc/W5UH-GCF2>. TASER International was created in 1993 and is still a prevalent force in supplying tasers around the globe. *About TASER*, *supra* note 38. Further, TASER.com claims responsibility for its product assisting in saving over a million lives. *Taser*, TASER.COM, <http://www.taser.com/> (last visited Mar. 21, 2015), archived at <http://perma.cc/QNF4-3DYB>. To put this in perspective, TASER asserts that it will assist in saving a life by the time this Note is read from start to finish. *Times That Police Have Used TASER CEW in the Field*, TASER.COM, <http://www.taser.com/taser-products-save-lives/times-police-have-used-taser-ecds-in-the-field> (last visited Mar. 21, 2015), archived at <http://perma.cc/BN3T-ZRUZ>. TASER.com claims that a life is saved because of a taser every thirty minutes. *Id.* The website considers that a life is saved when either a “[p]otential [d]eath or [s]erious [i]njury” is prevented. *TASER Products Have Saved*, TASER.com, <http://www.taser.com/taser-products-save-lives> (last visited Mar. 21, 2015), archived at <http://perma.cc/FT4J-LG9P>.

⁴⁴ See Woolfstead, *supra* note 15, at 292–93 (explaining how the “barbs” remain connected by “insulated wires” after being fired and how “[t]he electrical impulse instantly overrides the victim’s central nervous system, paralyzing the muscles throughout the body, rendering the target limp and helpless”); Fabian, *supra* note 42, at 766 (“[t]he electrical shock lasts for about five seconds, and people typically recover after ten seconds”); Sussman, *supra* note 23, at 1350 (discussing how the duration of a shock can be extended in dart stun mode by an officer holding the trigger and that dart stun mode results neuromuscular incapacitation); *How Does a TASER CEW Work*, *supra* note 43 (“[t]he probes deployed from a TASER CEW carry fine wires that connect to the target and deliver the TASER into his neutral network. These pulses delivered by the TASER CEW overwhelm the normal nerve traffic, causing involuntary muscle contractions and impairment of motor skills”); TASER, TASER X26C OPERATING MANUAL 8–9 (2007), available at http://www.taser.com/images/support/downloads/downloads/mk-inst-x26c-001_rev_a_x26c_manual.pdf, archived at <http://perma.cc/BG8E-HNVY> (explaining the proper use of a taser). The *Taser X26C Operating Manual* states:

When the X26C is deployed, it delivers a [ten]-second Shaped Pulse energy burst of short-duration electrical impulses. The CID displays a countdown from [ten] to [zero] indicating how many seconds remain in the current burst. The burst can be stopped at any time by positioning the safety switch to the down (SAFE) position. Pulling the trigger two more times during the burst cycle will increase the total electrical discharge cycle time to [thirty] seconds. Continuously holding the trigger will result in continuous discharge until the trigger switch is released or, the DPM is depleted.

TASER X26C OPERATING MANUAL, *supra*, at 8–9.

⁴⁵ See Woolfstead, *supra* note 15, at 293 (“Tasering technology has developed firing speeds of up to 220 feet per second and can reach distances of up to twenty one feet.”); Miller, *supra* note 43, at 73 (stating that a taser deployed in dart mode can be shot from twenty-one feet, with the darts or probes traveling at “200–220 feet per second”).

Comparatively, when an officer uses a taser in drive stun mode, the officer must be within a short enough distance to make contact with the taser to the suspect, as the officer must physically touch the suspect with the taser.⁴⁶ When applied, drive stun mode sends shocks to the area of the suspect's body in contact with the taser.⁴⁷ The shocks persist as long as the device remains in contact with the suspect.⁴⁸

Technological advancement of tasers is ever evolving.⁴⁹ Notably, tasers are currently being developed to leave no physical injuries to suspects.⁵⁰ Because of this, legal concepts such as the De Minimis Injury Exception ("DME"), which requires alleged victims to show an "actual injury," arise in this area of law.⁵¹ Another major advancement in taser technology is the TASER CAM.⁵² The creation of the TASER CAM is particularly important for regulating excessive force claims.⁵³ The TASER

⁴⁶ See Woolfstead, *supra* note 15, at 292-93 ("In drive stun mode, the operator removes the dart cartridge and pushes two electrode contacts located on the front of the taser directly against the victim.") (quoting in part *Mattos v. Agarano*, 661 F.3d 433, 443 (9th Cir. 2011)); Sussman, *supra* note 23, at 1350 ("In drive stun mode, the taser is pressed against the subject's body . . .").

⁴⁷ See Sussman, *supra* note 23, at 1350 ("[D]rive stun mode . . . causes a painful current to run through the specific body area to which the taser is applied.").

⁴⁸ TASER X26C OPERATING MANUAL, *supra* note 44, at 19 ("Drive-stun is only effective while the device is in contact with the subject or the subject's clothing. As soon as the device is moved away, the energy effect stops.").

⁴⁹ See generally Douglas B. McKechnie, *Don't Daze, Phase, 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, 179-82 (2011) (analyzing nonlethal police weaponry).

⁵⁰ See *infra* Part III.C-D (discussing the DME and how the technological advancements have created devices that do not leave marks).

⁵¹ See *supra* Part III.D (evaluating technological advancements for tasers). However, there are some scholars that believe that the DME is not constitutional. Bryan N. Georgiady, Note, *An Excessively Painful Encounter: The Reasonableness of Pain and De Minimis Injuries for Fourth Amendment Excessive Force Claims*, 59 SYRACUSE L. REV. 123, 163 (2008) ("The Supreme Court should resolve this issue, and hold that actual injury requirements impinge upon the Fourth Amendment right to freedom from unreasonable seizures.").

⁵² Doug Wyllie, *New TASER AXON Body On-Officer Camera Hits the Streets*, POLICEONE (Aug. 1, 2013), <http://www.policeone.com/police-products/body-cameras/articles/6354361-New-TASER-AXON-Body-on-officer-camera-hits-the-streets/>, archived at <http://perma.cc/MM9Z-9ZB7>; TASER X26C OPERATING MANUAL, *supra* note 44, at 23.

⁵³ Quentin Hardy, *Taser's Latest Police Weapon: The Tiny Camera and the Cloud*, N.Y. TIMES (Feb. 21, 2012), <http://www.nytimes.com/2012/02/21/technology/tasers-latest-police-weapon-the-tiny-camera-and-the-cloud.html?pagewanted=all>, archived at <http://perma.cc/C65C-CFBJ>; TASER X26C OPERATING MANUAL, *supra* note 44, at 23. Another attachment, not included in the main text of the Note because it is not specifically addressed in the proposed model statute is the Anti-Felon Identification Tags ("ID Tags"). *Id.* at 13. The ID Tags also further accountability for officers. *Id.* The ID Tags help determine when a taser is used, where it was used, and which officer deployed the device. *Id.* As the taser is deployed, twenty-four identification tags, labeled with a serial number, are expelled from the device like "confetti." *Id.* ("Every time a [taser] [c]artridge is deployed, at least [twenty-four] small

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CAM works by recording a video as soon as the taser is armed and continues to record until the officer disarms the device, which allows them to be used by officers for defensive purposes.⁵⁴ Thus, these technological advances will have an effect on the regulation of taser usage by law enforcement.⁵⁵ Injuries resulting from taser use also may vary depending on the suspect tased.⁵⁶

B. Categories of Individuals Who May Be at a Heightened Risk When Tased

An officer who deploys a taser at a suspect sends electricity into the person's body that was not there before the tasing.⁵⁷ As a result, the effect of that electricity could differ depending on the person who was tased.⁵⁸ Therefore, tasing certain groups of individuals such as children, pregnant women, the physically disabled, the elderly, or those suspected of being under the influence of drugs or alcohol may have an adverse effect on the suspect's well-being.⁵⁹

confetti-like AFID tags are ejected. Each AFID is printed with the serial number of the cartridge deployed, allowing law enforcement agencies to determine the registered owner of the cartridge and track citizen use if ever used in a criminal act.”)

⁵⁴ See TASER X26C OPERATING MANUAL, *supra* note 44, at 23 (“The TASER CAM is activated any time the safety switch is in the up (ARMED) position. This assists citizens to capture vital information prior to, during, and after the potential deployment of the X26C.”). The little camera is capable of recording up to two hours of video. See Hardy, *supra* note 53 (“can record two hours of video during a shift”); TASER X26C OPERATING MANUAL, *supra* note 44, at 23 (“The TASER CAM records approximately 1.5 hours of MPEG 4 video before recording over previous files (continuous loop system).”). Rick Smith, TASER’s co-founder, was quoted as saying, “One big reason to have these is defensive Police spend \$2 billion to \$2.5 billion a year paying off complaints about brutality. Plus, people plead out when there is video.” See Hardy, *supra* note 53 (quoting Rick Smith) (internal quotation marks omitted).

⁵⁵ See *infra* Part IV.A (providing a proposed model statute that incorporates technological advances into its language, as well as safeguards to provide against injuries that are not visible).

⁵⁶ See *infra* Part II.B (discussing individuals that may be at a heightened risk due to the dangers associated with tasers).

⁵⁷ Jeff Black, *Are Taser’s Too Deadly to Be Called ‘Non-Lethal’?*, NBC NEWS (Sept. 4, 2013), available at http://commonsensehd.com/attachments/article/262/usnews_nbcnews_com_news_2013_09_04_20330077_are_tasers.pdf; archived at <http://perma.cc/69NH-YNB9>.

⁵⁸ See Michael L. Storey, Comment, *Explaining the Unexplainable: Excited Delirium Syndrome and its Impact on the Objective Reasonableness Standard for Allegations of Excessive Force*, 56 ST. LOUIS U. L.J. 633, 636–37 (2012) (discussing suspects who were tased while suffering from Excited Delirium Syndrome); Black, *supra* note 57 (writing that some suspects may suffer from cardiac arrest by being tased).

⁵⁹ See Fabian, *supra* note 42, at 768 (“Tas[ing] vulnerable suspects such as the elderly, those with heart problems, minors, restrained suspects, or those who are high on drugs may increase their risk of heart failure or asphyxiation. And shocking suspects multiple times may also increase a suspect’s risk of serious health problems. All of the foregoing factors should be accounted for when crafting laws and policies that govern [t]aser use by law

For example, a phenomenon known as Excited Delirium Syndrome (“EDS”) could account for a majority of taser-related deaths.⁶⁰ EDS is a concept that has gained more recognition in recent years and seems to “explain[] complex situations where an individual dies during police contact from injuries insufficient to otherwise cause death.”⁶¹ EDS victims “suffer from increased rates of adrenaline,” which means officers must be able to quickly identify these individuals to properly respond.⁶²

enforcement”); McStravick, *supra* note 22, at 392 (stating that individuals at either a young or old age or pregnant women are more susceptible to harm when tased); Spriggs, *supra* note 23, at 514 (“A regulation guiding law enforcement in its use of tasers should include restrictions against taser use on categories of individuals generally recognized to possess unique health characteristics. With rare exceptions, tasers should not be used on children, the elderly, the physically disabled, or pregnant women.”); Sussman, *supra* note 23, at 1355-64 (listing individuals with heart conditions, those who are mentally ill, and individuals who were under the influence of narcotics as “vulnerable populations”); AMNESTY INT’L, USA: AMNESTY INTERNATIONAL’S CONTINUING CONCERNS ABOUT TASER USE, *supra* note 23, at 15 (listing “young children, the elderly, individuals with underlying heart conditions, or individuals with concurrent drug use” as more susceptible to the dangers of tasers). The ACLU of Northern California recommends that tasers should not be used on “juveniles, the elderly, pregnant women, and people known to be under the influence of drugs.” AM. CIVIL LIBERTIES UNION OF N. CAL., STUN GUN FALLACY: HOW THE LACK OF TASER REGULATION ENDANGERS LIVES 15 (2005), available at <https://www.aclunc.org/sites/default/files/Stun%20Gun%20Fallacy%20-%20How%20the%20Lack%20of%20Taser%20Regulation%20Endangers%20Lives.pdf>, archived at <https://perma.cc/3GNS-RFBW> [hereinafter ACLU OF N. CAL.]; Spriggs, *supra* note 23, at 513 n.167 (citing the ACLU of Northern California’s recommendations). Tasers have additionally “been associated with serious injury or death primarily in instances of multiple or prolonged discharge, when the subject is under the influence of drugs or alcohol; when the subject is pregnant; or when the subject injures himself while falling after incapacitation by the taser” Spriggs *supra* note 23, at 492.

⁶⁰ Sussman, *supra* note 23, at 1358-59.

⁶¹ See Storey, *supra* note 58, at 636-37 (“Excited Delirium Syndrome is considered to be a cause of death that explains complex situations where an individual dies during police contact from injuries insufficient to cause death.”). Amnesty International suggests:

[I]n the past few years the term has been used increasingly by medical examiners to explain sudden deaths in custody of individuals in a highly agitated state—usually under the influence of drugs or with some form of psychosis— who suffer a surge of adrenaline and collapse after struggle and police restraint.

‘Less Than Lethal’?: The Use of Stun Weapons in US Law Enforcement, AMNESTY INT’L 26 (Dec. 2008), available at <http://www.amnesty.org/en/library/info/AMR51/010/2008>, archived at <http://perma.cc/U8UF-GR9Q>; Storey, *supra* note 58, at 637 (quoting *‘Less Than Lethal’?: The Use of Stun Weapons in US Law Enforcement*). However, the American Medical Association has not yet recognized EDS as a diagnosis. Storey, *supra* note 58, at 642 (“Currently, Excited Delirium Syndrome is not a diagnosis recognized by the American Medical Association or found in the leading diagnostic manuals, which invariable makes it difficult for medical personnel or police officers to identify.”).

⁶² See Storey, *supra* note 58, at 637 (explaining that individuals experiencing EDS “suffer from increased rates of adrenaline, and ultimately, the anxiety caused by the adrenaline results in a heart attack or a failure of the respiratory system”); Greg Meyer, *Less Lethal Issues*

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According to Amnesty International, death resulting from EDS is more common in suspects who were under the influence of drugs at the time.⁶³ For instance, one study showed that suspects who used unlawful drugs accounted for a vast majority of deaths in taser cases.⁶⁴ In cases where a suspect is experiencing EDS, experts suggest that the officer should use a taser to resolve the situation, as it is the best course of action for everyone involved.⁶⁵

in *Law Enforcement: TASER Tactics Update*, POLICEONE (Nov. 2006), <http://www.policeone.com/police-products/less-lethal/articles/1188331-TASER-tactics-update/>, archived at <http://perma.cc/FWF5-5SRF> (“Finally, you need to understand that people who are under excited delirium tend to [not] feel pain[.]”).

⁶³ *‘Less Than Lethal’?: The Use of Stun Weapons in US Law Enforcement*, *supra* note 61, at 26; see *supra* note 61 (providing the full quote from Amnesty International). According to Storey, there are many types of drugs which cause an EDS episode including: “amphetamine (meth), Phencyclidine (PCP), alcohol, antidepressants, antipsychotics, diphenhydramine, marijuana, albuterol, promethazine, and epileptic medication.” Storey, *supra* note 58, at 639–40.

⁶⁴ See Sussman, *supra* note 23, at 1358–59 (“[i]n 2006, researchers found that [70%] of the taser related deaths examined involved illicit drug use . . .”). Statistics also show that in 2009 over 35,000 people died as a result of drug use. Lisa Girion et al., *Drug Deaths Now Outnumber Traffic Fatalities in U.S.*, *Data Show*, L.A. TIMES (Sept. 17, 2011), <http://articles.latimes.com/2011/sep/17/local/la-me-drugs-epidemic-20110918>, archived at <http://perma.cc/8C9J-H9WF>. Simply put, this is one death every fourteen minutes. *Id.* To that end, an overwhelming majority of deaths in taser cases were a result of drug users disrupting the community, as opposed to officer’s improper use of tasers. Sussman, *supra* note 23, at 1355–64. Comparatively, by the time a reader finishes this Note, tasers will have saved one life and drugs will have taken away two lives. Girion et al., *supra*; see also *supra* note 43 (referencing a comment made previously in the Note on how Taser.com claims a taser is responsible for saving a life every thirty minutes and therefore by the time a reader finishes the Note one life will have been saved as a result of a taser).

⁶⁵ Meyer, *supra* note 62. Greg Meyer, an expert on use of force cases, has written: “[s]everal doctors, I’m listening to at various seminars teach that the [taser] is the best way to quickly subdue such an individual and stop the hyperactivity [or excited delirium] that occasionally leads to sudden deaths following restraint, regardless of what police tool or tactic was used.” *Id.* Greg Meyer’s profile reads:

Greg Meyer, a retired Captain from the Los Angeles Police Academy, served [thirty] years, including eight years as a commanding officer. Greg is a member of the National Advisory Board of the Force Science Research Center, a member of the Police Executive Research Forum (PERF) and the International Association of Chiefs of Police (IACP) Greg has served as a use of force expert witness in his official capacity for the Los Angeles City Attorney and Los Angeles District Attorney, as well as privately across the United States. He specialized in risk management issues including policy, training, equipment, tactics, supervision and review processes, with a focus on injury reduction during lethal and nonlethal encounters.

Less Lethal Issues in Law Enforcement with Capt. Greg Meyer, POLICEONE <http://www.policeone.com/columnists/greg-meyer/> (last visited Mar. 21, 2015), archived at <http://www.policeone.com/columnists/greg-meyer/>.

In addition, individuals at both ends of the age spectrum, the young and the elderly, are more susceptible to the harms associated with tasers.⁶⁶ However, these individual's actions are still capable of causing police interaction and may call for officers to use non-deadly force on them.⁶⁷ For example, in October 2013, police officers received a call regarding a suicidal eight-year-old girl.⁶⁸ Upon arrival, the officers found the young girl directing a four-and-a-half inch knife at her chest.⁶⁹ When an officer attempted to move closer to her, the girl pointed the knife at him instead.⁷⁰ The officer then deployed a taser in dart stun mode against the child, subduing her.⁷¹ As a result of the officer's actions, the child and the officers were removed from the harmful situation without major injury.⁷² The police chief of the department said that "he [felt] terrible about the

⁶⁶ See *infra* Part II.B (listing individuals who are more prone to the harms associated with being tased).

⁶⁷ John Hult, *Taser Use on 8-Year-Old Justified, Police in S.D. Say*, USA TODAY (Oct. 19, 2013, 11:21 AM), <http://www.usatoday.com/story/news/nation/2013/10/09/taser-of-8-year-old-girl/2951083/>, archived at <http://perma.cc/9D9P-W4MQ>.

⁶⁸ *Id.* The original call stated that the young girl had already stabbed herself in the leg; however, after the medical examination following her tasing, it was reported that there were not stab wounds to the girl. Hult, *supra* note 67; Heather Smith, *What Could Justify Using a Taser on an 8-Year-Old Girl?*, ACLU (Oct. 11, 2013), <https://www.aclu.org/blog/criminal-law-reform-free-speech/what-could-justify-using-taser-8-year-old-girl>, archived at <https://perma.cc/LD5F-PBC3>.

⁶⁹ Hult, *supra* note 67; Denver Nicks, *Cops Taser A Little Girl*, TIME U.S. (Oct. 10, 2013), <http://nation.time.com/2013/10/10/cops-taser-a-little-girl/>, archived at <http://perma.cc/WWU7-ZE9E>; Smith, *supra* note 68; *Parents Consider Legal Action After South Dakota Police Use Taser on 8-Year-Old Girl*, NBC NEWS (Oct. 9, 2013), <http://www.nbcnews.com/news/us-news/parents-consider-legal-action-after-south-dakota-police-use-taser-v20888694>, archived at <http://perma.cc/4W6K-G8QY>.

⁷⁰ Hult, *supra* note 67. After pointing the knife at an officer, and before being tased, the little girl redirected the knife back at her chest. *Id.*

⁷¹ *Id.* Chief Bob Grandpre was quoted as saying: "[the officer] quite possibly saved the juvenile's life that night . . ." See Nicks, *supra* note 69 (quoting Chief Bob Grandpre). Investigation of the incident concluded that the officer did not use excessive force while resolving the situation. Sarah Fruchnicht, *Police Officer Who Tasered 8-Year-Old Is Cleared Of Wrongdoing*, OPPOSING VIEWS (Dec. 18, 2013), <http://www.opposingviews.com/i/society/crime/police-officer-who-tasered-8-year-old-cleared-wrongdoing>, archived at <http://perma.cc/QGU4-A8GC>; David Rookhuyzen, *Multiple Reviews for Pierre Officer Who Use Taser on 8-Year-Old*, CAP. J. (Oct. 17, 2013, 11:03 PM), http://www.capjournal.com/news/multiple-reviews-for-pierre-officer-who-used-taser-on-/article_4bf0fe8a-37aa-11e3-95a8-0019bb2963f4.html, archived at <http://perma.cc/U6A3-8UUF> (reporting of three separate investigations of the incident).

⁷² See Hult, *supra* note 67 ("[t]he girl was not seriously injured, but 'she was in pain the whole night,' said her mother"). Yet, the family believed that the officer, who was responsible for safely resolving the situation, should be punished. *Id.* Her mom asked: "[h]ow much harm could she have done?" *Id.* (quoting Dawn Stenstrom, the young girl's mother). Her father also was quoted as saying: "They say it was for her own safety, but there is no justification for that." *Id.*

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incident,” but stated that officers “can’t control if the threat is [eight or eighty years of age].”⁷³

Officers encounter a wide variety of individuals throughout their shift, some of whom may be suffering from disabilities such as deafness or blindness.⁷⁴ All the same, officers are faced with the task of communicating with suspects, with or without a disability, during chaotic situations.⁷⁵ Scholars have identified and advocated for a warning requirement, which would prevent law enforcement from tasing suspects who did not have an opportunity to comply with an officer’s instructions.⁷⁶ The American Civil Liberties Union of Northern California (“ACLU of Northern California”) has expanded beyond just a basic warning requirement and advocated that both a verbal and visual warning be given before an officer deploys a taser on a suspect.⁷⁷

The ACLU of Northern California, as well as other scholars, also warn of the potential dangers that tasers could have on the human body and how the effects of a taser could vary from person to person.⁷⁸ Injuries can range from no injuries at all, to minor bruising, head trauma, or even cardiac arrest.⁷⁹ Because not all injuries are visible to officers in tasing

⁷³ *Id.* (quoting the Police Chief Bob Grandpre of the Pierre, South Dakota Department).

⁷⁴ See Ross E. Mitchell, *Can You Tell Me How Many Deaf People There Are in the United States*, GALLAUDET U. (Feb. 14, 2014), <http://research.gallaudet.edu/Demographics/deaf-US.php>, archived at <http://perma.cc/GA92-WLF8> (stating that there are around 600,000 people in the United States that are deaf); *Questions and Answers About Blindness and Vision Impairments in the Workplace and the Americans with Disabilities Act*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (Jan. 19, 2011), http://www.eeoc.gov/eeoc/publications/qa_vision.cfm, archived at <http://perma.cc/K5PB-BX2N> (stating that currently in the United States there are at least one million individuals who are considered blind).

⁷⁵ See *supra* Part I (describing the facts of the *Abbott* decision, and demonstrating how police encounters escalate very quickly and can turn into chaotic and dangerous situations for all parties involved).

⁷⁶ See McStravick, *supra* note 22, at 393 (“A warning to suspects should be mandatory before firing a [taser] whenever it is possible, and so long as it would not be futile, in order to give a suspect the opportunity to stop resisting and follow orders.”); ACLU OF N. CAL., *supra* note 59, at 18.

⁷⁷ See ACLU OF N. CAL., *supra* note 59, at 18 (providing the language of the ACLU of Northern California’s warning proposal).

⁷⁸ Fabian, *supra* note 42 at 768; McStravick, *supra* note 22, at 392; Spriggs, *supra* note 23, at 514; Sussman, *supra* note 23, at 1355–64; Michael R. Smith et al., *A Multi-Method Evaluation of Police Use of Force Outcomes: Final Report to the National Institute of Justice 3-15-3-16* (2010) (indicating that some police agencies have their officers tased before that officer being allowed to use a taser on a suspect); ACLU OF N. CAL., *supra* note 59, at 15; USA: AMNESTY INTERNATIONAL’S CONTINUING CONCERNS ABOUT TASER USE, *supra* note 23, at 15–16.

⁷⁹ See Black, *supra* note 57 (describing how tasing incidents could result in cardiac arrest); Catherine Paddock, *Study Suggests Taser Use by US Police is Safe*, MED. NEWS TODAY (Oct. 9, 2007, 2:00 AM), <http://www.medicalnewstoday.com/articles/84955.php>, archived at <http://perma.cc/32Y5-E5A7> (discussing how some individuals who were tased had to be admitted to the hospital because they have suffered a head injury as a result of falling after

situations, the ACLU of Northern California recommends that all suspects who have been tased receive medical attention.⁸⁰

The trend in the United States is for police agencies to give their officers the ability to use tasers in the field, as the device has been used more than 1,750,000 times.⁸¹ The number of law enforcement agencies that allow tasers increased at a booming rate over the past decade and tasers are now used in a vast majority of agencies.⁸² In 2006, only 38.89% of law enforcement agencies allowed tasers.⁸³ That number jumped in 2010 to around 63.89% of agencies.⁸⁴ Finally, in 2012, a little over 94% of law enforcement allowed the use of tasers in their departments.⁸⁵ Thus, it appears that tasers are solidified as a tool in law enforcement's arsenal, and therefore, the safety of their use is something that the legislature must confront.⁸⁶

C. *Excessive Force Claims and the Graham Factors*

When a suspect claims to be the victim of excessive force by law enforcement, 42 U.S.C. § 1983, which protects against state actors infringing upon a protected right that under the United States Constitution, provides a cause of action.⁸⁷ Excessive force claims that

being tased); J. Tripp Winslow et al., *Taser Study Finds Serious Injuries Rare After Taser Use*, NEWS MED. (Jan. 19, 2009, 2:20 AM), <http://www.news-medical.net/news/2009/01/19/45071.aspx>, archived at <http://perma.cc/48SU-GCWZ> (listings "scrapes and bruises" as possible injuries suffered by suspects who have been tased, as well as stating that some individuals do not suffer any injuries at all after being tased).

⁸⁰ ACLU OF N. CAL., *supra* note 59, at 19.

⁸¹ See Woolfstead, *supra* note 15, at 293 ("Still, it is important to note that while [t]asers have been deemed safe for use and have been used over 1,750,000 times by law enforcement, no use-of-force technique can be considered completely safe.").

⁸² Sussman, *supra* note 23, at 1349; Hardy, *supra* note 53; USA: AMNESTY INTERNATIONAL'S CONTINUING CONCERNS ABOUT TASER USE, *supra* note 23, at 1.

⁸³ USA: AMNESTY INTERNATIONAL'S CONTINUING CONCERNS ABOUT TASER USE, *supra* note 23, at 1 ("More than 7000 law enforcement agencies in the US, out of a total of 18,000, now count tasers as part of their arsenal.").

⁸⁴ See Sussman, *supra* note 23, at 1349 (stating that 11,500 agencies allow taser use by their officers). To get 63.89%, it is assumed that in 2010 there were still around 18,000 law enforcement agencies since there were 18,000 agencies in 2006 and 18,000 in 2012. *Id.*; USA: AMNESTY INTERNATIONAL'S CONTINUING CONCERNS ABOUT TASER USE, *supra* note 23, at 1.

⁸⁵ See Hardy, *supra* note 53 ("Rick Smith, [TASER's] co-founder and chief executive, says [tasers] are used by 17,000 of the 18,000 law enforcement agencies in the United States"); Sussman, *supra* note 23, at 1349 (discussing the growth of the taser use by law enforcement and quoting Rick Smith from the article).

⁸⁶ See *supra* notes 81-85 and accompanying text (providing statistics and the steady rise of law enforcement agencies that are allowing officers to carry and use tasers).

⁸⁷ See 42 U.S.C. § 1983 (2012) ("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

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occur while law enforcement officers are making an arrest are further “properly analyzed” by Fourth Amendment standards.⁸⁸ As a result of these excessive force claims, the United State Supreme Court established a balancing test in *Graham v. Connor*.⁸⁹

The court in *Graham* developed a test that balances the suspect’s actions against the appropriateness of the officer’s decision to deploy his taser during the incident.⁹⁰ In determining this, the *Graham* test looks to three factors: (1) whether the crime was severe enough to justify the level

Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress”); Fabian, *supra* note 42, at 768 (“Excessive force claims typically arise as federal civil suits under 42 U.S.C. § 1983. Section 1983 gives a cause of action to someone who has been deprived of his or her constitutional rights by someone acting under the color of law.”); McStravick, *supra* note 22, at 370 (“[m]ost often, excessive force claims arise as federal suits under 42 U.S.C. § 1983”); Sussman, *supra* note 23, at 1372 (“Excessive force claims against state or local police officers arise under 42 U.S.C. § 1983, which enables an individual to file an action for damages against any state actor, often police officers or prison guards, for violating the individual’s constitutional rights while acting under state authority.”). This Note’s focus is on state regulation and therefore will only address claims arising under 42 U.S.C. § 1983, but if the excessive force claim was against “federal actors,” the claim would be covered by a *Bivens* claim. Woolfstead, *supra* note 15, at 297 (“While the Fourth Amendment and *Graham v. Conn[o]r* provide a framework to analyze constitutional violations, the federal government and individual states enjoy sovereign immunity, so any claim for recovery must be made under one of two methods that waive sovereign immunity for constitutional torts: (1) 42 U.S.C. § 1983 (for violations against state actors) or (2) a *Bivens* claim (for violations by federal actors).”).

⁸⁸ See U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath and affirmation, and particularly describing the place to be searched, and the person or things to be searched, and the persons or things to be seized.”). See generally *Graham v. Connor*, 490 U.S. 386, 394 (1989) (“Where, as here, the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right ‘to be secure in their person . . . against unreasonable . . . seizures of that person.’”); Woolfstead, *supra* note 15, at 287 (“In *Graham v. Connor*, the Supreme Court of the United States ruled that excessive force by police officers ‘in the course of making an arrest, [or] investigatory stop’ constitutes a seizure under the Fourth Amendment.” (quoting *Graham*, 490 U.S. at 388)); Fabian, *supra* note 42, at 768 (“If the alleged excessive force occurred during an arrest or investigatory stop by law enforcement, the § 1983 claim is properly analyzed using the reasonableness standard of the Fourth Amendment.”). Other claims that fall under the protection of 42 U.S.C. § 1983 may bring other constitutional concerns, but are not the focus of this Note. McStravick, *supra* note 22, at 370–71. “Claims brought by incarcerated individuals are analyzed separately under the Eighth Amendment band against ‘cruel and unusual punishment.’” *Id.* (quoting U.S. CONST. amend. VII).

⁸⁹ *Graham*, 490 U.S. at 396; McStravick, *supra* note 22, at 372; Sussman, *supra* note 23, at 1373–74. The three factors are collectively now known as the “the *Graham* multifactor balancing test or the *Graham* factors.” Woolfstead, *supra* note 15, at 299. This Note will refer to these factors as the *Graham* test. See Part II.C (discussing the *Graham* decision).

⁹⁰ Woolfstead, *supra* note 15, at 299 (“[W]hether a law enforcement officer, in the specific situation, made an objectively reasonable decision.”).

of force used; (2) whether the suspect posed an immediate threat to law enforcement; and (3) whether the suspect actively resisted arrest or evaded arrest by flight.⁹¹ Although the Supreme Court established the *Graham* test to decide an excessive force claim, other courts have expanded the test to go beyond the original three factors.⁹² For example, some courts have asked “whether the action takes place in the context of affecting an arrest,” “whether a warrant was used,” or “whether more than one arrestee or officer was involved.”⁹³ Other courts have looked at “the possibility that the suspect may be armed” or “whether the plaintiff was sober.”⁹⁴ Further, some courts have asked “whether the officer gave a warning before using the [taser],” “whether other dangerous exigent circumstances existed,” and “whether the officer applied repeated shockings.”⁹⁵ In sum, courts have considered a total of twelve factors to determine whether officers used tasers excessively against suspects.⁹⁶

Additionally, there are a few federal circuit courts that recognize the De Minimis Injury Doctrine (“DME”) in the context of excessive force claims.⁹⁷ Under the DME, individuals wishing to file an excessive force claim based on the alleged improper use of a taser by law enforcement must prove they suffered some form of physical injury as a direct result of the excessive force.⁹⁸ Examples of de minimis injuries include “light

⁹¹ See *Graham*, 490 U.S. at 396; McStravick, *supra* note 22, at 372 (listing the factors and citing to *Graham*); Nathan R. Pittman, *Unintentional Levels of Force in § 1983 Excessive Force Claims*, 53 WM. & MARY L. REV. 2107, 2120–24 (2012) (discussing the *Graham* decision); Sussman, *supra* note 23, at 1373–74 (providing the factors and citing to *Graham*).

⁹² Fabian, *supra* note 42, at 774 (“Lower courts have widely embraced the *Graham* approach when deciding § 1983 excessive force claims.”); see McStravick, *supra* note 22, at 381 (providing a list of additional factors courts have used).

⁹³ McStravick, *supra* note 22, at 381–82 (citing *Autin v. City of Baytown*, 174 F. App’x 183, 185 (5th Cir. 2005); *Chew v. Gates*, 27 F.3d 1432, 1441 n.5 (9th Cir. 1994); *Schultz v. Carlisle Police Dep’t*, 706 F. Supp. 2d 613, 620 (M.D. Pa. 2010)).

⁹⁴ *Id.*

⁹⁵ *Id.* Another scholar suggests an additional problem with using a balancing test for situations involving tasers by stating that “[r]easonable individuals may interpret the same set of facts differently, leading to different conclusions about whether a particular use of force was reasonable.” Fabian, *supra* note 42, at 775.

⁹⁶ McStravick, *supra* note 22, at 381. The twelve factors are reached by adding the original three factors supplied by *Graham* plus the additional nine factors supplied by McStravick. *Graham*, 490 U.S. at 396; McStravick, *supra* note 22, at 381; Sussman, *supra* note 23, at 1373–74.

⁹⁷ See Georgiady, *supra* note 51, at 141 (referring to the legal concept as the De Minimis Injury Exception); Mance, *supra* note 38, at 638–45 (referring to the legal concept as the De Minimis Injury Doctrine).

⁹⁸ See Georgiady, *supra* note 51, at 151–52 (elaborating on the necessary pain threshold). The author states:

[W]hereas physical injuries can be objectively described by a neutral medical professional and graded on scales of severity, pain is an ethereal concept. It is difficult to objectively measure or compare. Especially where the force left no marks on the claimant’s body, it can be difficult

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bruises, scrapes, or sprains that can heal without medical attention.”⁹⁹ Currently, the Fourth, Fifth, Eighth, and Eleventh Circuits still use the DME.¹⁰⁰ The Circuits’ varying stances on taser regulation can further be seen when reviewing the level of force that each Circuit associates with the device.¹⁰¹

D. Tasers’ Place on the Use-of-Force Continuum

In addition, courts are divided on where the taser is located on the Use-of-Force Continuum (“Force Continuum”), which evaluates the suspect’s resistance when considering the appropriate amount of force an officer may use against the suspect.¹⁰² Some circuits determine the taser’s location on the Force Continuum based on the mode in which the taser was deployed.¹⁰³ However, it is difficult to provide a comprehensive

for third parties—including courts—to determine with certainty how much pain was really caused by an officer’s use of force.

Id.

⁹⁹ *Id.* at 136.

¹⁰⁰ See Mance, *supra* note 38, at 641 (“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, the Fourth, Fifth, Eighth, and Eleventh Circuit have not.”).

¹⁰¹ See *infra* Part II.D (reviewing the different Circuit’s views on the level of force a taser exerts when used by law enforcement).

¹⁰² See generally Woolfstead, *supra* note 15, at 303–04 (explaining the circuits differing views on what level of a force a taser constitutes); Miller, *supra* note 43, at 72–73 tbls. 1–2. Miller explains in his article the six levels of force an officer can use against a suspect. Miller, *supra* note 43, at 72–73 tbls. 1–2. The first level permits, at most, only “[o]fficer presence” when a suspect is not resisting. *Id.* At the second level, when the suspect is “[v]erbal[ly] resist[ing],” an officer may not use more force than “[v]erbal commands.” *Id.* Next, level three authorizes an officer to use “[h]ands-on tactics” and chemical spray when the suspect is passively resisting. *Id.* Miller defined passive resistance as “[t]he subject fails to obey verbal direction, preventing the officer from taking lawful action.” *Id.* Level four then allows officers to use “[i]ntermediate weapons,” such as batons, tasers, strikes, and other non-deadly force against a suspect who is actively resisting. *Id.* Miller defined active resistance as: “[t]he subject’s actions are intended to facilitate an escape or prevent an arrest.” Miller, *supra* note 43, at 72–73 tbls. 1–2. The fifth level deals with suspects who are aggressively resisting and permits officers to use “[i]ntermediate weapons, intensified techniques, [and] non-deadly force.” *Id.* A suspect is aggressively resisting when “[t]he subject has battered or is about to batter an officer, and the subject’s action is likely to cause injury.” *Id.* Finally, the last level of suspect resistance is where the suspect is resisting with deadly force. *Id.* When a suspect is using deadly force to resist an officer, the officer is able to use deadly force against the suspect. *Id.* Miller defined deadly force resistance as “[t]he subject’s actions are likely to cause death or significant bodily harm to the officer or another person. *Id.*

¹⁰³ See Woolfstead, *supra* note 15, at 304 (“Not only do the different circuits hold that [t]asers constitute different levels of force, most holding that [t]asers are a gray area between trivial and lethal force, but also some circuits differentiate between [t]asers used in drive stun and dart stun mode.”). See generally *Abbott v. Sangamon Cnty., Ill.*, 705 F.3d 706, 728, 732 (7th Cir. 2013) (noting a difference between whether the device was deployed in dart stun mode “against a nonviolent misdemeanor,” as opposed to an individual who had a taser used on them in drive stun mode for actively resisting). Drive stun mode may be appropriate

overview of the circuit courts' views as to the level of force a taser possesses because a vast majority of the circuits have not established where to place the taser on the Force Continuum.¹⁰⁴ The Sixth Circuit classifies tasers as "substantial force," the Seventh Circuit equates tasers to pepper spray, and the Ninth Circuit states that dart stun mode is an "intermediate level of force."¹⁰⁵ The conflicting opinions have caused a

in more situations because it is described as being the less painful of the two modes. See Jack Ryan, *TASER Probe Mode, Secondary Impact and Liability*, LEGAL & LIABILITY RISK MGMT. INST. (2011), http://www.llrmi.com/articles/legal_update/taser_2011_secondary_impact.shtml, archived at <http://perma.cc/7YCW-G5J8> ("Some recent cases, suggest that while the drive-stun mode is painful, it is a lesser (on the hurt scale) than the probe mode, and thus may be found to be a reasonable use of force in more circumstances than the probe mode."). "Dart stun mode is generally considered to be much more invasive than drive stun mode" Woolfstead, *supra* note 15, at 293. The logic is that in dart stun mode "the barbs are imbed one quarter of inch into the subjects skin" *Id.* at 292. Further, recent occurrences have captivated the public, which "have cast police in a negative light and have altered the public's perception of police use-of-force judgment." See Fabian, *supra* note 42, at 793 ("When officers use force that is disproportionate to the threat, it can spark fear, anger, and even protests that degrade law enforcement's relationship with the community."); Miller, *supra* note 43, at 72 ("During the past few decades, several incidents of excessive use of police force have garnered local, national, and international media attention. These incidents have cast police in a negative light and have altered the public's perception of police use-of-force judgment.").

¹⁰⁴ See generally Woolfstead, *supra* note 15, at 303–24 (analyzing the differing views of the circuits). "The First, Second, Third, Fourth, Fifth, Eighth, Tenth, Eleventh, and District of Columbia Circuits do not fare to determine what level of force a [t]aser constitutes but uses the Graham multifactor test to determine reasonableness." *Id.* at 325. Although, Bailey Woolfstead provides the basis for how each circuit views the level of force a taser exerts, it is still difficult to develop a clear picture and understanding. *Id.* at 287 ("While use of, and lawsuits based on, electronic control devices (ECDs, [t]asers, or stun guns) have increased dramatically in recent years, there is no legal consensus on what level of force the use of a [t]aser constitutes."). The mere fact that some states have ruled on the level of force a taser constitutes "directly conflicts with Supreme Court precedent, which states that reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application." McStravick, *supra* note 22, at 385 (internal quotation marks omitted). Woolfstead provided the current case law for each federal circuit court and concluded that it the best solution to correct the current regulation of taser use by law enforcement is through a Supreme Court decision. See generally Woolfstead, *supra* note 15, at 303–24 (providing the current case law for each federal circuit court on excessive force claims against taser use by law enforcement). Woolfstead said that the time is "ripe" for the issue to be resolved. See *id.* at 326 ("A determination on the level of force [t]asers constitute in both dart stun and drive stun mode is ripe for a decision by the Supreme Court, and doing so will clarify the law for litigants on both sides of § 1983 and [*Bivens*] claims.").

¹⁰⁵ See *Abbott v. Sangamon Cnty., Ill.*, 705 F.3d 706, 726 (7th Cir. 2013) ("[W]e have . . . acknowledged that the use of a taser, like the use of pepper spray or pain-compliance techniques, generally does not constitute as much force as so-called impact weapons, such as baton launchers and beanbag projectiles The use of a taser, therefore, falls somewhere in the middle of the nonlethal-force spectrum."); Woolfstead, *supra* note 15, at 325 ("Of the circuits that attempt to determine what force a [t]aser constitutes, the Sixth Circuit holds that a [t]aser uses substantial force . . . and the Ninth Circuit held that a [t]aser in dart stun mode

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shift in law enforcement's evaluation for when taser usage becomes excessive.¹⁰⁶

Officers now look to the level of resistance that the suspect demonstrates to determine if taser use is appropriate.¹⁰⁷ Law enforcement analyzes a suspect's resistance, as either passive resistance or active resistance.¹⁰⁸ Passive resistance occurs where "the subject fails to obey verbal direction, preventing the officer from taking lawful action," while active resistance occurs where "the subject's actions are intended to facilitate an escape or prevent an arrest . . . [and] is not likely to cause injury."¹⁰⁹ Law enforcement agencies shifted to analyze the suspect's resistance, to determine when an officer may deploy his taser to "mitigate public concern and guide officers on proper electronic weapon use."¹¹⁰ To that extent, officers must consider the effect their actions will have on the community's perception of tasers.¹¹¹

Over the past decade, a few incidents occurred that caused the public to question the appropriateness of taser use on a suspect.¹¹² The tasing of

is an intermediate level of force but expressly refused to make a determination on [t]asers in drive stun mode."); Kelly, *supra* note 1 ("[T]he Seventh Circuit in the *Abbott* case, have held that the use of the taser falls in the middle of the use of force continuum, similar to the use of pepper spray.").

¹⁰⁶ See Miller, *supra* note 43, at 72 ("In an attempt to mitigate public concerns and guide officers on proper electronic control weapon use, many agencies have changed their use policies based on the level of suspect resistance encountered."); *supra* Part II.E (emphasizing how the Seventh Circuit in *Abbott* acknowledged the type of mode used in each instance).

¹⁰⁷ Miller, *supra* note 43, at 72.

¹⁰⁸ See *Abbott*, 705 F.3d at 711, 728, 732 (comparing Travis' active resistance, to his mother's passive resistance); Fabian, *supra* note 42, at 776-89 (analyzing the difference between an officer tasing a suspect who is passively resisting and a suspect who is actively resisting); Spriggs, *supra* note 23, at 516 (advocating that "law enforcement agents should be prevented from applying tasers to subjects practicing genuine passive resistance by remaining unresponsive or verbally uncooperative . . .").

¹⁰⁹ Miller, *supra* note 43, at 72-73 (illustrating the use-of-force continuum and defining the levels of resistance).

¹¹⁰ *Id.* at 72.

¹¹¹ *Id.* at 72-73 ("After the introduction of newer and more powerful electronic control devices, many agencies integrated their public development into the use-of-force continuum at a level to be used when suspects only passively resisting the actions of the officer. The use of electronic control weapons in these low-intensity situations led to considerable media attention and public controversy. In response to this scrutiny and to mitigate citizen complaints, many agencies increased the required level of resistance by suspects to warrant use of this device from passive resistance to active physical resistance.").

¹¹² See *Brooks v. City of Seattle*, 599 F.3d 1018, 1020-21 (9th Cir. 2010) (discussing a case that involved a pregnant woman being tased after being stopped for speeding); *Torres v. City of Madera*, 648 F.3d 1119, 1121 (9th Cir. 2011) (involving an officer who mistakenly shot a suspect when trying to tase him); Spriggs, *supra* note 23, at 487-88 (discussing the tasing of Andrew Meyer on the University of Florida's campus); Sussman, *supra* note 23, at 1350 n.33 (citing to *Torres v. City of Madera*, which was discussed by the author); Chris Dettro, *Taser Use in Best Buy Parking Lot Didn't Violate Policy, Police Say*, SJ-R.COM (Apr. 2, 2013),

a University of Florida student, Andrew Meyer, for resisting officers, after a speech by Senator Kerry, is one of the more well-known incidents.¹¹³ It was during this tasing that Meyer famously shouted, “[d]on’t tase me bro!”¹¹⁴ Then there was the tasing of a pregnant woman and her boyfriend in a Best Buy’s parking lot for being uncooperative and touching officers after their vehicle was hit by another individual.¹¹⁵ One of the more recent

http://www.sj-r.com/breaking/x766890485/Taser-use-in-Best-Buy-parking-lot-didnt-violate-policy-police-say?zc_p=0, archived at <http://perma.cc/NE52-HWVB> and <http://perma.cc/PRW9-BCHP> (providing details of a tasing incident that was captured on video in a parking lot at Best Buy in Springfield, Illinois); Hult, *supra* note 67 (describing a situation where an eight-year-old girl was tased to prevent her from harming herself with a knife).

¹¹³ Woolfstead, *supra* note 15, at 292; Spriggs, *supra* note 23, at 487–88; Patrick Oppmann, *Cops on Leave After Tasing Incident, Student’s Behavior Under Scrutiny*, CNN (Sept. 18, 2007, 9:43 PM), <http://www.cnn.com/2007/US/09/18/student.tasered/>, archived at <http://perma.cc/9CQQ-7K54>. A tasing incident, during a speech by Senator John Kerry on September 17, 2007 at the University of Florida is one of the most, if not the most, famous tasing incidents. Woolfstead, *supra* note 15, at 292; Spriggs, *supra* note 23, at 487–88; Oppmann, *supra*.

¹¹⁴ Spriggs, *supra* note 23, at 487–88; Oppmann, *supra* note 113. When Senator Kerry ended the time for questions to be asked and answered, University of Florida student Andrew Meyer stepped up to the microphone and proceeded to bombard Senator Kerry with questions before his microphone was turned off. Spriggs, *supra* note 23, at 487–88; Oppmann, *supra* note 113. Meyer’s questions included: “whether [Kerry] and Bush were both members of the secret society Skull and Bones at Yale University.” Associated Press, *Student Tasered, Arrested at Kerry Forum*, NBCNEWS (Sept. 18, 2007, 8:15 PM), <http://www.nbcnews.com/id/20835952/>, archived at <http://perma.cc/K383-24T7>. Officers instructed Meyer to leave, however he refused, and left officers no choice but to remove him. Spriggs, *supra* note 23, at 487–88; Oppmann, *supra* note 113. The events and “ensuing struggle” that followed ended with officers tasing Meyer in drive stun mode. Spriggs, *supra* note 23, at 487–88; Oppmann, *supra* note 113. Meyer, before being tased, can be heard saying, “Don’t tase me bro!” Spriggs, *supra* note 23, at 487–88; Oppmann, *supra* note 113. “Meyer’s plea . . . became an instant pop culture catchphrase and helped bring the debate over taser use to the public forum.” Spriggs, *supra* note 23, at 487–88. After his arrest, Meyer was quoted as saying to the officer, “I am not mad at you guys, you didn’t do anything wrong. You were just trying to do your job.” See Oppmann, *supra* note 113 (quoting police reports). Meyer would later release an apology saying that “I made the decision to supersede the rules, and for that I apologize. I should have acted calmer and obeyed the directives of the officers. If I had, none of the subsequent issues would have arisen.” Letter from Andrew Meyer, University of Florida student, to the University of Florida Police Department, (Oct. 25, 2007), available at <http://www.gainesville.com/assets/pdf/GS105271030.PDF>, archived at <http://perma.cc/AD29-ZUJ8> (quoting Andrew Meyer). An example of the video is available on YouTube. *UF Police Taser Student During Kerry Forum*, YOUTUBE (Sept. 17, 2007), <http://www.youtube.com/watch?v=SaiWCS10C5s>, archived at <http://perma.cc/MYS5-Q7DM>.

¹¹⁵ Detro, *supra* note 112. On March 30, 2013, Frederic Thomas was inside of Best Buy when an elderly man hit his pregnant girlfriend’s, Lucinda White’s, vehicle in the parking lot. *Id.* The officer was discussing the situation with White and filling out reports, while Thomas continued to interrupt and be a nuisance. *Id.* Thomas was given an ultimatum to go away or be placed under arrest, but Thomas refused to leave. *Id.* Thomas halted the

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incidents involved a pregnant woman, who was tased after she was stopped for speeding.¹¹⁶ These real life examples demonstrate the difficult job that law enforcement officers encounter when they are asked to deescalate intense situations, while also balancing the suspect's safety, their safety, and the community's safety.¹¹⁷ The Seventh Circuit recently decided a case that dealt with this type of situation.¹¹⁸

officer's attempts to arrest him by "swinging his arms," which caused the officer to fall to the ground. *Id.* During the scuffle, a backup officer arrived and used his taser in drive stun mode to separate the two. *Id.* During Thomas' tasing and arrest: "White kept yelling for the officer to get off Thomas, and pulled on the officer's shirt." Dettro, *supra* note 112. The second officer then "told White to 'get on the ground' but she verbally refused and tried to pull away from his grip on her shoulder." *Id.* After the officer warned her that she would be tased, which can be heard in the video, White was also tased in drive stun mode and placed under arrest. *Id.*; Chuck Sudo, *Video: Illinois Police Taser Pregnant Woman in Best Buy Parking Lot*, CHICAGOIST (Apr. 5, 2013, 12:00 PM), http://chicagoist.com/2013/04/05/illinois_police_taser_pregnant_wom.php, archived at <http://perma.cc/3264-N4NW>. A video of the incident is also available on The Chicagoist's website. *Id.*

¹¹⁶ *Brooks*, 599 F.3d at 1020–21; Sussman, *supra* note 23, at 1399 (citing to *Brooks*, 599 F.3d at 1020–21). The case states:

On November 23, 2004 . . . Brooks [was stopped] for speeding in a school zone. The situation deteriorated rather quickly. Brooks claimed that she had not been speeding . . . and then repeatedly refused to sign a Notice of Infraction Brooks refused to leave her car, remaining in it with the ignition running and her door shut. Officer Jones then showed Brooks his [t]aser, explaining that it would hurt 'extremely bad' if applied. Brooks told them she was pregnant Officer Jones demonstrated the [t]aser for [Brooks]. Brooks still remained in the car, so Officer Ornelas opened the door and reached over to take the key out of the ignition, dropping the keys on the floorboard. Officer Ornelas then employed a pain compliance technique, bringing Brook's left arm up behind her back, whereon Brooks stiffened her body and clutched the steering wheel in order to frustrate her removal from the car. Officer Jones discharged the [t]aser against Brook's thigh Officer Jones tased her two more times The third tasing moved Brooks to the right, at which point Officers Ornelas and Jones were able to extract her from the car through a combination of pushing and pulling. She was immediately seen by medical professional, and two months later delivered a healthy baby.

Brooks, 599 F.3d at 1020–21; see Sussman, *supra* note 23, at 1399–1401 (discussing further the *Brooks v. City of Seattle* incident).

¹¹⁷ See *supra* notes 114–16 and accompanying text (describing situations where suspects compelled officers to use tasers to resolve the situation). There are situations when officers are placed in difficult situations because of the suspect's actions, and at times, the officer's decision on how to properly handle the situation is not always viewed positively by the public. See *supra* notes 114–16 and accompanying text (noting that officers struggle in difficult situations about whether to deploy their tasers).

¹¹⁸ See *infra* Part II.E (discussing the *Abbott v. Sangamon Cnty.*, Ill., 705 F.3d 706 (7th Cir. 2013)).

E. *The Seventh Circuit & Abbott*

The case law surrounding law enforcement's use of tasers grew significantly since the devices were first addressed by the Seventh Circuit in *Forrest v. Prine*.¹¹⁹ The Seventh Circuit's most recent, and now leading, case is *Abbott v. Sangamon County, Illinois*.¹²⁰ In *Abbott*, officers were called to the Abbott residence to assist with animal control, but the situation ended with Cindy and her son, Travis, both receiving multiple shocks from tasers.¹²¹ Travis and Cindy each filed suit, claiming that excessive force was used against them when they were tased.¹²² These claims

¹¹⁹ Woolfstead, *supra* note 15, at 315. *Forrest v. Prine* involved a suspect who was tased on two different occasions within twenty-four hours. 620 F.3d 739, 741–42 (7th Cir. 2010); Woolfstead, *supra* note 15, at 315 (discussing cases in the Seventh Circuit that involved law enforcement's use of tasers and citing to *Forrest*). Mr. Forrest claimed that the second tasing, while he was already in a holding cell, was excessive force. *Forrest*, 620 F.3d at 741–42. The case states:

On March 8, 2007, the police responded to a 911 call from Mr. Forrest's son, who reported that Mr. Forrest was hitting people in their home The police forcefully entered the home, and an altercation ensued during which Mr. Forrest struck a police officer in the face. In order to subdue Mr. Forrest, the police employed a taser device several times. Several police officers then escorted Mr. Forrest to the Rock Island County Jail Mr. Forrest was escorted to a holding cell for the strip search. . . . The officers observed that Mr. Forrest appeared to be under the influence of something, possibly alcohol. Mr. Forrest removed most of his clothing, but refused to remove his underwear Officer Prine warned Mr. Forrest that he would employ the taser if he did not comply with the strip search commands. Mr. Forrest called the officers "faggots" and used other expletives Mr. Forrest eventually removed his underwear but would not comply with the rest of the strip search commands Officer Prine testified that he did not believe that it was safe to approach Mr. Forrest any closer. Officer Prine finally employed his taser on Mr. Forrest The officer testified that he aimed the taser gun at Mr. Forrest's upper back Officer Prine testified that, as he fired the taser, Mr. Forrest "kind of bent down." . . . One taser discharge hit Mr. Forrest's face, near his eye; another dart stuck in his arm.

Forrest, 620 F.3d at 741–42; Woolfstead, *supra* note 15, at 315 (discussing and citing to *Forrest*, 620 F.3d at 741–42). Summary judgment was affirmed in favor of Officer Prine. *Forrest*, 620 F.3d at 741. This Note is only addressing tasing instances before the arrest of a suspect. See McStravick, *supra* note 22, at 370–71 (suggesting that there are other constitutional concerns for suspects after being arrested).

¹²⁰ See generally *Abbott*, 705 F.3d at 731 (deciding that in the Seventh Circuit an officer cannot deploy a taser in dart mode on a suspect who is only passively resisting law enforcement).

¹²¹ *Id.* at 709–12; see *supra* Part I (describing the *Abbott* facts for the real life scenario in the Introduction of this Note).

¹²² *Abbott*, 705 F.3d at 709. Besides the excessive force claims, both Travis and Cindy each additionally sued for false arrest and false imprisonment. *Id.*

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provided the Seventh Circuit with a basis for deciding future excessive force cases involving law enforcement's use of tasers.¹²³

First, the Seventh Circuit reaffirmed that the *Graham* test continues to be the foundation of excessive force claims against law enforcement.¹²⁴ In deciding this, the court looked to three factors: (1) the severity of the crime; (2) whether the arrestee posed an immediate threat to the safety of the officers or others; and (3) whether he or she actively resisted arrest or attempted to flee and evade arrest.¹²⁵ Neither Cindy nor Travis challenged the officer tasing them the first time; however, both contended that the additional times they were tased were unwarranted.¹²⁶ The court held that Travis continued to resist officers; therefore, the second tasing did not constitute excessive force.¹²⁷ On the other hand, the court remanded Cindy's excessive force claim because "no reasonable officer could have understood Cindy's conduct after the first tasing . . . to be active physical resistance."¹²⁸

Second, the court in *Abbott* held that tasers are equivalent to pepper spray on the Force Continuum.¹²⁹ In the decision, the court reasoned that tasers are non-lethal, an intermediate level of force, and less forceful than other police weapons.¹³⁰ Finally, the case drew a clear distinction between

¹²³ See generally *id.* at 731 (balancing Cindy's and Travis's actions against the decisions of the officers to use a taser on each).

¹²⁴ *Id.* at 724. The decision mentions multiple times that a reasonable standard is the correct standard to apply. *Id.* An individual who is unfamiliar with excessive force claims may fail to make the connection that the reasonableness standard is the *Graham* test, until they read the three factors used in the case. *Abbott*, 705 F.3d at 724; Kelly, *supra* note 1 (discussing *Graham* and the reasonableness standard applied in excessive force claims).

¹²⁵ *Abbott*, 705 F.3d at 724.

¹²⁶ *Id.* at 727, 729. Cindy was tased a total of two times throughout the entire incident. *Id.* at 711. However, in Travis's situation, it is unknown exactly how many times he was tased while resisting officers. *Id.* at 727. Although, the facts of the case suggest that he was tased at least three to four times. *Id.*

¹²⁷ *Id.* at 728, 734.

¹²⁸ *Abbott*, 705 F.3d at 732-34. In the *Abbott* decision, the case cited another Seventh Circuit decision to help determine when force is reasonable. *Id.* at 729 (citing *Cyrus v. Town of Mukwonago*, 624 F.3d 856, 858-60 (7th Cir. 2010)). *Cyrus* was a case about a twenty-nine-year-old male that suffered from bipolar disorder. *Cyrus*, 624 F.3d at 858-60. Officers tased *Cyrus* in excess of five times in both dart stun mode and drive stun mode after trespassing. *Id.* The male was unarmed at the time and died as a result of the altercation. *Id.* at 860, 863. At trial the medical examiner was unable to identify the exact cause of death, and instead listed a total of eight factors that aided in his death. *Id.* at 860-61. One of the factors listed by the medical examiner was "the electrical shock from the [t]aser." *Id.* at 861. The court wrote that "[f]orce is reasonable only when exercised in proportion to the threat posed." *Id.* at 863.

¹²⁹ See *supra* note 123 and accompanying text (discussing where *Abbott* established the location of the taser on the Force Continuum).

¹³⁰ *Abbott*, 705 F.3d at 726.

the modes in which an officer may lawfully deploy a taser.¹³¹ The key factor the court considered was whether the suspect was actively or passively resisting law enforcement.¹³² The court was unequivocal for this point, stating, “it is unlawful to deploy a taser in dart mode against a nonviolent misdemeanor.”¹³³ Nevertheless, lower courts may vary in applying *Abbott*, similar to how they applied *Graham*, and therefore, taser regulation may not be any better off than it was before *Abbott*.¹³⁴ A few states, for that reason, have adopted statutes to solidify the law for law enforcement’s use of tasers.¹³⁵

F. State Statutes Currently in Effect

As a result of the lack of guidance provided by the Supreme Court, a few states have taken steps to ensure that law enforcement and the community know the parameters for when a taser may be lawfully deployed by officers, primarily by adopting state statutes.¹³⁶ Four states that adopted statutes governing tasers include Arkansas, Florida, Georgia, and New Jersey.¹³⁷ Of these statutes, New Jersey’s is unique because it is

¹³¹ *Id.* at 726, 728, 730, 732. The facts state that Travis “does not contend that he had ceased resisting or fighting with Sweeny at that point. Indeed, it is undisputed that Sweeny used the taser until Travis stopped fighting but did not use it thereafter . . .” *Id.* at 729. The court held that it was not excessive force for the officer to use a taser in drive stun mode while Travis was actively resisting the officers. *Id.* at 728–29. However, the court did find that it was excessive to tase Cindy in dart stun mode because Cindy was “subdued” and “made no movement” after she had been tased the first time, or simply put she was only passively resisting officers at that point. *Id.* at 732–33.

¹³² *Id.* at 712, 728–29, 732–33; *Graham v. Connor*, 490 U.S. 386, 396 (1989) (evaluating how a suspect’s resistance can be used as a factor to determine whether excessive force was used by an officer); see Kelly, *supra* note 1 (citing *Graham* while analyzing the decision of *Abbott v. Sangamon Cnty., Ill.*).

¹³³ *Abbott*, 705 F.3d at 732; see Kelly, *supra* note 1 (discussing the type of resistance that the *Graham* court used to determine whether tasing is excessive).

¹³⁴ See *supra* Part II.C (explaining how the *Graham* factors have been expanding beyond the three factors that the Supreme Court established in the case).

¹³⁵ See *infra* Part II.F (reviewing the current state statutes that regulate law enforcement’s use of tasers).

¹³⁶ See generally, ARK. CODE ANN. § 5-73-133(c) (2005) (allowing law enforcement to use tasers); FLA. STAT. ANN. § 943.1717 (West Supp. 2012) (setting the parameters for law enforcement’s use of tasers); GA. CODE ANN. § 35-8-26 (West 2012) (establishing law to govern the use of tasers by officers); N.J. STAT. ANN. § 2C:39-3(h) (West 2005) (preventing the use of tasers by anyone, including law enforcement).

¹³⁷ ARK. CODE ANN. § 5-73-133(c); FLA. STAT. ANN. § 943.1717; GA. CODE ANN. § 35-8-26; N.J. STAT. ANN. § 2C:39-3(h); see Fabian, *supra* note 42, at 790–91 (discussing the states that currently have statutes in place to regulate taser use by law enforcement); Spriggs, *supra* note 23, at 496–97 (analyzing the various state statutes that are currently in place).

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the only statute that denies both civilians and law enforcement the ability to use tasers.¹³⁸

Meanwhile, the Arkansas, Georgia, and Florida statutes vary regarding the depth in which they discuss tasers and the guidelines established for law enforcement.¹³⁹ For example, the Arkansas and Georgia statutes simply state that “training” is required by law enforcement, while Florida’s statute actually provides detail on the training requirements.¹⁴⁰ Florida’s statute requires officers to renew their training yearly in order to carry a taser in the field after completing a “basic skills course.”¹⁴¹

Additionally, Florida’s statute is the only one that mentions the type of mode in which an officer may fire a taser, and is titled “*Use of Dart-Firing Stun Guns*.”¹⁴² Consequently, Florida’s statute only focuses on the “dart-firing,” or dart stun mode, and fails to mention drive stun mode at all.¹⁴³ Moreover, where the other state statutes are silent, the Florida statute limits the situations in which a taser may be fired in dart stun mode to those in which the suspect is actively resisting the officer and demonstrating “the apparent ability to physically threaten the officer or others[,] or . . . [i]s preparing to or attempting to flee or escape.”¹⁴⁴ This language is taken almost directly from the *Graham* decision.¹⁴⁵

¹³⁸ Fabian, *supra* note 42, at 790; see N.J. STAT. ANN. § 2C:39-3(h) (“Any person who knowingly has in his possession any stun gun is guilty of a crime of the fourth degree.”).

¹³⁹ ARK. CODE ANN. § 5-73-133(c); FLA. STAT. ANN. § 943.1717; GA. CODE ANN. § 35-8-26.

¹⁴⁰ ARK. CODE ANN. § 5-73-133(c) (“Any law enforcement officer using a taser stun gun shall be properly trained in the use of the taser stun gun and informed of any danger or risk of serious harm and injury that may be caused by the use of the taser stun gun on a person.”); FLA. STAT. ANN. § 943.1717 (“After completing the basic skills course, each law enforcement . . . officer who is authorized . . . to use a dart-firing gun must complete an annual training course . . . [which] must be a minimum of [one] hour duration.”); GA. CODE ANN. § 35-8-26 (“The Georgia Public Safety Training Center shall provide council approved training to peace officers for the use of electronic control weapons and similar devices.”); see *infra* Part III.B (demonstrating why this requirement is needed in a state statute).

¹⁴¹ FLA. STAT. ANN. § 943.1717.

¹⁴² See *id.* (“A decision by a law enforcement officer . . . to use a dart-firing stun gun must involve an arrest or a custodial situation during which the person . . . 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”).

¹⁴³ *Id.*

¹⁴⁴ *Id.*; see Fabian, *supra* note 42, at 791 (explaining adopted state statutes); Spriggs, *supra* note 23, at 496-97 (discussing the current state regulations pertaining to law enforcements’ taser usage).

¹⁴⁵ *Graham v. Connor*, 490 U.S. 386, 396 (1989) (“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”).

In summary, with the current regulations in place, courts have expanded the *Graham* factors and caused confusion for suspects, officers, and the community regarding when an officer's use of a taser is excessive.¹⁴⁶ While the Seventh Circuit has provided more guidance for Illinois, Indiana, and Wisconsin with *Abbott*, there is nothing preventing lower courts from applying the decision differently, a result similar to what occurred in the circuit courts following *Graham*.¹⁴⁷ Accordingly, other states have adopted statutes in an effort to provide consistency in the law surrounding taser usage by law enforcement, and therefore, Illinois, Indiana, and Wisconsin may also want to codify their taser regulations in state statutes.¹⁴⁸

III. ANALYSIS

In *Abbott*, the Seventh Circuit confirmed that excessive force claims stemming from the use of tasers by law enforcement will continue to be analyzed by the *Graham* test.¹⁴⁹ However, the actual impact of the case provides a false hope that the case resolved the gray areas surrounding the use of tasers by law enforcement in the Seventh Circuit.¹⁵⁰ Further, *Abbott* fails to guarantee that judges and courts will apply the standards in the same manner for future excessive force claims involving tasers.¹⁵¹ Lower courts have already shown they are willing to expand the current analysis, which furthers the inconsistencies in these types of excessive force claims.¹⁵²

¹⁴⁶ See *supra* Part II.C (discussing the *Graham* factors and how lower courts have taken it upon themselves to expand their analysis of these issues to include additional factors).

¹⁴⁷ See *supra* Parts II.C, II.E (reviewing the *Graham* decision, the current law on taser regulations for law enforcement, and the recent *Seventh Circuit* decision, *Abbott*).

¹⁴⁸ See *supra* Part II.F (reviewing current statutes that directly address the use of tasers by law enforcement); *infra* Part IV (amending Florida's current statute to provide greater consistency for regulating taser usage in Illinois, Indiana, and Wisconsin).

¹⁴⁹ See *supra* notes 124–28 and accompanying text (discussing how *Abbott* applied the *Graham* test).

¹⁵⁰ See Kelly, *supra* note 1 (entitling his article: “*The Seventh Circuit Provides Guidance on False Arrest and the Use of the Taser*”); *supra* Part II.C (explaining how lower courts have expanded the original three *Graham* test factors). The Seventh Circuit opinion is still missing an opportunity to solidify the current feelings of the Seventh Circuit by placing them in a statute, similar to the one established in Florida. FLA. STAT. ANN. § 943.1717 (West Supp. 2012); see *supra* Part II.F (discussing the current state statutes in place that regulate law enforcement's use of tasers).

¹⁵¹ See *supra* Part II.C (explaining the original factors in the *Graham* test and the additional factors that other courts have later included in their analysis).

¹⁵² See *supra* Part I (discussing the Supreme Court's lack of a stance on taser regulation for law enforcement).

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Additionally, *Abbott* still fails to provide officers with clear and concrete guidance on when they are authorized to tase a suspect.¹⁵³ The alarming statistics of assaults against officers and the number of law enforcement killed while on duty highlight the importance of supplying officers with a quick, non-deadly weapon.¹⁵⁴ Further, regulations that fail to address the DME create inconsistency in excessive force claims arising from law enforcement's improper use of tasers.¹⁵⁵ As a result, other scholars have suggested that states enact statutes to establish consistency and to ensure that the taser is still a non-lethal tool that officers have at their disposal.¹⁵⁶ Although tasers are safer than other non-deadly methods, such as batons, this is only true if officers use the device in a reasonable manner.¹⁵⁷ No method of controlling suspects through force is perfect, and tasing is no exception.¹⁵⁸

Thus, Part III.A demonstrates why Florida's statute should be the foundation from which future statutes are built.¹⁵⁹ Further, Part III.B advocates that continued training is necessary to ensure that law enforcement adheres to the taser regulations in place.¹⁶⁰ Next, Part III.C

¹⁵³ See *supra* notes 93–96 and accompanying text (listing additional factors that lower courts have used to expand upon the original three factors established in the *Graham* test); see also Part II.F (discussing states that have statutes to detail appropriate uses of tasers by law enforcement).

¹⁵⁴ See *Miller, supra* note 43, at 72–73 (evaluating the Force Continuum and the different types of suspect resistance); *Deaths, Assaults & Injuries, supra* note 34 (providing statistical data on the number of assaults against law enforcement).

¹⁵⁵ See *supra* Part II.A (providing background to technological advancements of tasers and why the DME needs to be addressed in future regulations).

¹⁵⁶ *Fabian, supra* note 42, at 765 (“[L]aws governing [t]aser use by law enforcement can be improved by providing officers more guidance about when [t]aser use is appropriate”); *McStravick, supra* note 22, at 383–84 (“Explicit state regulations, similar to the one adopted in Florida, would resolve many of the inconsistencies in current case law and provide a uniform standard for state law enforcement agencies to apply in the field without fear of repercussions due to the uncertainty of a particular course of action.”); *Spriggs, supra* note 23, at 518 (“By developing this proposed regulation and incorporating it as a state or federal statute, law enforcement officers will be enabled to safely and effectively deploy tasers in appropriate situations without fear or lawsuits or disciplinary actions.”).

¹⁵⁷ *Hult, supra* note 67. *Greg Connor* says that “[r]ates of injury are lower for officers and suspects with [t]asers than with batons and other less-than-lethal devices . . . but ‘we have to talk about reasonableness with the use of force.’” See *id.* (demonstrating that “*Greg Connor* [is] a professor emeritus at the University of Illinois and . . . is a police trainer who specialized in the use of force.”).

¹⁵⁸ *McCray, supra* note 15 (“A study published . . . by the American Heart Association’s *Circulation Journal* confirms that the misuse of a [t]aser can cause sudden cardiac arrest and death.”).

¹⁵⁹ See *infra* Part III.A (providing an analysis on Florida’s current state statute addressing taser use by law enforcement).

¹⁶⁰ See *infra* Part III.B (explaining why proper training requirements must be in place for any taser regulation to be successful).

argues that officers must provide a warning to the suspect before deploying their taser, and that all suspects who have been tased receive medical attention.¹⁶¹ Finally, Part III.D proposes that technological advances can be used to hold officers accountable for their decisions in situations where a taser has been used.¹⁶² Legislatures should look at Florida's current statute as a starting point for drafting a regulation to guide law enforcements use of a taser.¹⁶³

A. *Florida's Statute Provides a Solid Foundation to Build upon for States Like Illinois, Indiana, and Wisconsin*

Florida's statute articulates guidelines for taser use that can be utilized by law enforcement, the community, and the courts, and therefore, provides consistency and stability to this area of law.¹⁶⁴ However, Florida's statute is not without flaws.¹⁶⁵ First, the Florida statute regulates the use of tasers in dart stun mode, but fails to address the acceptable situations for law enforcement to use drive stun mode.¹⁶⁶ This is a problem for tasers that can be utilized in two modes because the officer is only given guidance on how to properly handle the device in one of those modes.¹⁶⁷ If officers are allowed to operate a taser in both modes, then

¹⁶¹ See *infra* Part III.C (advocating for both a verbal and non-verbal warning requirement, as well as medical requirements for suspects who have been tased).

¹⁶² See *infra* Part III.D (suggesting that technological advances can be used to eliminate excessive force by law enforcement in situations involving tasers).

¹⁶³ See FLA. STAT. ANN. § 943.1717 (West Supp. 2012) (providing the language that Florida uses to govern law enforcement's use of tasers); *infra* Part III.A (analyzing Florida's state statute).

¹⁶⁴ FLA. STAT. ANN. § 943.1717.

¹⁶⁵ See *supra* Part III (analyzing how the current systems of regulating taser usage by law enforcement could be improved).

¹⁶⁶ FLA. STAT. ANN. § 943.1717; see *supra* Part III.A (discussing the omission of drive stun mode from the Florida statute). One scholar recognized:

The law does not, however, account for situations where a passively resisting suspect poses an apparent threat to officers or others Thus, a better rule would be that officers may only use a [t]aser when: (1) the suspect is actively resisting; or (2) the suspect is passively resisting but has the apparent ability to physically threaten the officer or others.

Fabian, *supra* note 42, at 793-94. While these additions would strengthen the Florida statute for only dart stun mode usage, it still fails to separate the types of resistance to the type of mode used on the suspect. *Id.* It is likely that when separating the different modes in the statute, one mode may be better fit for passive resistance and the other mode for active resistance. See *supra* Part II.D (discussing where different Circuit Courts have placed the taser on the Force Continuum).

¹⁶⁷ FLA. STAT. ANN. § 943.1717; see Woolfstead, *supra* note 15, at 292-93 (discussing the two different modes that a taser may be deployed); Fabian, *supra* note 42, at 765-66 (providing a discussion on the effects of a taser deployed in dart stun mode); Mance, *supra* note 38, at 607 (describing how a taser is used in dart stun mode); Spriggs, *supra* note 23, at 490 (discussing

statutes should address both modes to provide the best clarification possible for officers on the device's appropriate use.¹⁶⁸

Additionally, the Florida statute fails to require that officers provide a proper warning to the suspect before deploying their taser.¹⁶⁹ Without officers giving a proper warning, individuals have no advance notice of the officer's intent to deploy the device.¹⁷⁰ However, if a proper warning is required, individuals will be presented with the choice to obey the commands of the officer and avoid being tased.¹⁷¹

The Florida statute also fails to include provisions that mandate medical treatment for all tased suspects.¹⁷² By including a medical requirement, suspects will be able to obtain the potential medical treatment they need, while also providing law enforcement officers and agencies with the medical paperwork necessary to prove the suspects were not harmed during the arrest.¹⁷³ Finally, Florida's statute is silent when it comes to mandating that law enforcement utilize the most up-to-date technology for tasers.¹⁷⁴ A provision that requires equipping officers with a TASER CAM, or a similar device, would ensure that every tasing incident is recorded, and thus provide evidence for or against excessive

dart stun mode); Sussman *supra* note 23, at 1350 (analyzing drive-stun mode and dart stun mode).

¹⁶⁸ See *supra* Part II.A (discussing the different taser modes); *supra* Part III.B (evaluating the benefits for including guidelines for both tasers modes in a statute).

¹⁶⁹ FLA. STAT. ANN. § 943.1717; see *infra* Part III.C (proposing that a warning requirement is included in a statute for the States in the Seventh Circuit).

¹⁷⁰ See *infra* Part III.C (providing a discussion on the warning requirements to include in the proposed model statute).

¹⁷¹ See *supra* notes 113–16 (discussing tasing incidents where suspects were given the opportunity to comply with an officer's instructions, but failed to do).

¹⁷² FLA. STAT. ANN. § 943.1717; ACLU OF N. CAL., *supra* note 59, at 19 (discussing the ACLU of Northern California's proposal to include medical requirements in regulations for taser use by law enforcement).

¹⁷³ ACLU OF N. CAL., *supra* note 59, at 19 (suggesting that officers who transport suspects after receiving a medical evaluation obtain a "clearance form"). Wake Forest University School of Medicine conducted a study of around 1000 cases that involved the use of tasers by law enforcement and found that only 0.3% of suspects were admitted into hospitals. Paddock, *supra* note 79; Winslow et al., *supra* note 79. In fact, 99.7% of suspects who were tased had mild or no injuries. Paddock, *supra* note 79; Winslow et al., *supra* note 79. However, of the 0.3% of suspects, which accounted for three suspects, falls caused two of the suspects to have head injuries. Paddock, *supra* note 79; Winslow et al., *supra* note 79. Without a medical examination it is possible that these injuries would go unnoticed by law enforcement because they are not visible. Paddock, *supra* note 79; Winslow et al., *supra* note 79.

¹⁷⁴ FLA. STAT. ANN. § 943.1717; see Hardy, *supra* note 53 (discussing the TASER CAM); see also TASER X26C OPERATING MANUAL, *supra* note 44, at 23 (listing the TASER CAM in the TASER X26C manual as a possible attachment for the device).

force claims.¹⁷⁵ Florida's statute provides the most detailed guidelines for regulating the use of tasers by law enforcement, especially with its training requirements, and therefore provides the best foundation for future taser regulations.¹⁷⁶

B. Proper Training is Essential to Eliminating Excessive Force Claims Arising from the Use of Tasers

Reinforcing the importance of training officers is the first step to clarifying the ambiguities surrounding the use of tasers by law enforcement.¹⁷⁷ A training requirement is necessary to not only ensure that law enforcement officers are capable of properly using tasers for their own safety, but also to minimize any danger the device may present to suspects.¹⁷⁸ For the public to accept tasers as an appropriate safety measure for law enforcement, officers must be knowledgeable of the tasers' capabilities and the risks they present to certain victims.¹⁷⁹ In addition, officers must bear the responsibility of using the device properly in the field and under the appropriate circumstances, which will help to project tasers in the best light possible to the public.¹⁸⁰

¹⁷⁵ TASER X26C OPERATING MANUAL, *supra* note 44, at 23 (stating that the camera is turned on as soon as the safety switch for the taser is turned off and allows for the device to record the incident).

¹⁷⁶ ARK. CODE ANN. § 5-73-133(c) (2005); FLA. STAT. ANN. § 943.1717; GA. CODE ANN. § 35-8-26 (West 2012); N.J. STAT. ANN. § 2C:39-3(h); *see infra* Parts III.B-D (discussing potential improvements to add to statutes that regulate law enforcement's use of tasers).

¹⁷⁷ *See infra* Part III.B (discussing the importance of including training requirements in a statute regulating taser use by law enforcement).

¹⁷⁸ McCray, *supra* note 15. McCray stated:

[L]aw enforcement officers have a legitimate interest in protecting themselves and the public during potentially violent encounters, and for the victim, a [t]aser is generally a less lethal alternative to a firearm. But history demonstrates that law enforcement agencies have failed to create and implement [t]aser policies that effectively educate officers about the risks involved and ensure that officers only use [t]asers when actually necessary.

Id.; *see also supra* Parts II.A-B (describing the dangers that tasers present).

¹⁷⁹ *See supra* Parts II.A-B (discussing the harm that tasers can inflict). However, I respectively disagree with other scholars that certain limitations should be placed on which individuals can be tased. *See supra* Part II.B (discussing the categories of individuals that some believe law enforcement should be banned from using a taser on).

¹⁸⁰ *See Spriggs, supra* note 23, at 489 (discussing how the "opinions . . . were evenly divided" on the Andrew Meyer situation); Miller, *supra* note 43, at 72 ("The use of electronic control weapons in these low-intensity situations led to considerable media attention and public controversy."); *see also supra* notes 68-73, 113-16 and accompanying text (providing a description of the Andrew Meyer incident, an eight year old being tased, and two other tasing incidents involving pregnant women that grasped the public's attention).

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Florida's statute provides an excellent starting point by mandating that officers go through a training course before being issued a taser.¹⁸¹ Florida's statute provides the best guidance for drafting a training requirement, because it requires officers to complete a "basic skills course" and "an annual training course."¹⁸² The constant training will help imbed taser regulations and tactics into an officer's memory for when it comes time to use the device in the field.¹⁸³ This is important because without continuous proper training, the officer may unintentionally forget information vital to the proper handling of a taser.¹⁸⁴

¹⁸¹ See FLA. STAT. ANN. § 943.1717 (West Supp. 2012) ("The basic skills course required for certification as a law enforcement officer must include instruction on the use of dart-firing stun guns. The portion of the basic skills course on the use of dart-firing stun guns must be a minimum of [four] hours' duration.").

¹⁸² *Id.*

¹⁸³ See *id.* (requiring that law enforcement receive yearly training on tasers).

¹⁸⁴ Sussman, *supra* note 23, at 1349–50 n.33 (discussing cases involving officers who mixed up their guns with their taser). The facts in *Torres v. Madera* are:

Police officers arrested Everardo . . . and placed [him] in the back seat of a patrol car. Everardo awoke . . . and began yelling and kicking the rear car door from the inside Officer Noriega, one of several police officers on site that evening, was standing a few feet directly behind the patrol car when she first heard Everardo yelling. She recalls telling her fellow officers that whoever was closest should tase Everardo because he could injure himself if he kicked through the glass window Officer Noriega herself was closest, so she approached the car . . . opened it with her left hand . . . [and] reached down with her right hand to her right side, unsnapped her holster, removed the Glock, aimed the weapon's laser at Everardo's center mass, put her left hand under the gun, and pulled the trigger, all without looking at the weapon in her hand The parties agree that Officer Noriega had intended to reach immediately below her holstered Glock on her dominant right side, and that she had intended to use her [t]aser in dart-tase rather than touch-tase mode. Everardo died later that evening.

Torres v. City of Madera, 648 F.3d 1119, 1121 (9th Cir. 2011); Sussman, *supra* note 23, at 1349–50 n.33 (citing to *Torres*, 648 F.3d at 1121). This case is used to demonstrate how officers in the field are capable of having memory lapses that improved or increased levels of training could hopefully prevent. See *supra* Part III.B (analyzing the benefits of including continuous training requirements). Ideally, if the proposed statute at the end of this Note would have been in place in California at the time of this incident a number of different steps could have prevented a result ending in death. See *infra* Part IV.A (providing the language of the proposed model statute). For example, the officer would not have been allowed to use dart stun mode on this suspect. FLA. STAT. ANN. § 943.1717; see also *supra* Part III.B (evaluating the benefits of including training requirements in a statute). Additionally, a warning would need to be issued before deploying the taser, including a visual warning of the device. See *infra* Part III.C (providing a dialogue as to why a warning requirement should be included in a statute). Upon providing the visual warning, the officer could have noticed that it was not a taser she was holding, but was her firearm instead. *Torres*, 648 F.3d at 1121. Finally, proper or continued training may have taught or reminded the officer in the above situation

Future statutes should follow Florida's lead and require yearly training.¹⁸⁵ Ideally, this training will require officers themselves to endure the discomfort caused by tasers before being allowed to use the device on others.¹⁸⁶ In 2010, a majority of officers allowed to use tasers were

to double check the weapon they are using before firing it. *See supra* Part III.B (discussing the need for a statutory training requirement).

¹⁸⁵ *See supra* Part II.F (discussing the different types of training requirements present in current state statutes). The ACLU of Northern California's proposal is also vague on the training requirements that should be imposed. ACLU OF N. CAL., *supra* note 59, at 17; Spriggs, *supra* note 23, at 513 n.167 (suggesting that "[t]he model regulation by the ACLU of Northern California is a good starting point for clear and effective taser regulation"). "The [t]aser shall only be used by officers and supervisors trained in its deployment and use. Officers shall use the [t]aser in a manner that is consistent with departmental orders and training guidelines." ACLU OF N. CAL., *supra* note 59, at 17. However, by allowing different departments to have different guidelines it does not correct the concerning problem of providing consistency in taser regulation. *Id.*; *see supra* Part II (discussing the current problems with the inconsistency in regulating taser usage by law enforcement). In fact, this very idea contradicts the ultimate goal of this Note. *See infra* Part IV (providing language for a proposed statute for Illinois, Indiana, and Wisconsin). Therefore, the training requirement in the statute would be a minimum amount of training that officers have to go through. *See infra* Part IV.A (using language that indicates that the training in the statute is only the minimum amount that is required). It would seem counter-productive to put a ceiling on the amount of education that officers can receive about the device and impact on using it. *See supra* note 184 (describing an incident where an officer mistakenly fired her firearm instead of her taser). Michelle McStravick referenced a study from the Government Accountability Office, where they researched seven agencies and concluded that: "[o]f the seven agencies observed, the report noted that only four to eight hours of training were required for an officer to carry a [taser] as compared to sixty to 100 hours required for a firearm." McStravick, *supra* note 22, at 388. The study McStravick noted, influence this Note's proposed statute to include a requirement for a minimum number of hours of continuous annual training that an officer must complete before being issued a taser. *Id.* This minimum number of hours being proposed will be higher than the one hour of annual training in the Florida statute and require training for both drive stun mode and dart stun mode. FLA. STAT. ANN. § 943.1717 ("[t]he annual training course on the use of dart-firing stun guns must be a minimum of [one] hour duration").

¹⁸⁶ McStravick, *supra* note 22, at 390 ("One officer who was shot with a [taser] said, '[i]t is the most pain I ever felt in my life . . . [] I felt like my muscles were going to explode.' Another officer . . . compared the [taser] shock to sticking a finger in a light socket over and over."). "The Police Executive Research Forum conducted a survey of a stratified, random sample of approximately [1000] municipal, county and state law enforcement agencies." *See* Smith et al., *supra* note 78, at 3-1 (indicating that the survey was performed in 2010 and funded by the National Institution of Justice); Sussman, *supra* note 23, at 1348 n.20 (citing to the 2010 survey). The survey concluded that roughly 63.7% of the agencies required an officer to be tased before being allowed to use a taser. Smith et al., *supra* note 78, at 3-15-16. In contrast, a greater number of agencies, 77.4%, required that their officers have "chemical sprays" used on them before they are allowed to use the chemicals on suspects. *Id.* It seems logical, since both are non-lethal alternatives, that the number of agencies requiring their officers to be tased should be closer to the amount that require their officers to be sprayed with chemicals. Smith et al., *supra* note 78, at 3-15-16; *see supra* Part II.E (explaining that the *Abbott* decision found that pepper spray and tasers were similar a level of force).

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subjected to this type of training, with the logic that officers will take into consideration the discomfort of being tased before unnecessarily deploying their taser on a suspect.¹⁸⁷ To move forward with taser regulations, statutes should require constant training for law enforcement officers to have the best chance at minimizing improper use of the device and limiting excessive force claims.¹⁸⁸

Rather than requiring a complete ban against law enforcement's ability to use a taser on certain suspects, such as the old or young, proper training should instead be employed to deal with the potential problems that arise with tasing these types of suspects.¹⁸⁹ Restrictions should not be placed on individuals just because they are too young or too old, pregnant, or under the influence of drugs or alcohol.¹⁹⁰ Past incidents demonstrate that these classes of individuals are just as capable of ignoring an officer's instructions or placing themselves and others in danger; therefore, a taser may in fact be the best solution to subduing these suspects.¹⁹¹ Most individuals that are tased by law enforcement leave officers with no alternative by continuously refusing to follow officers' instructions.¹⁹²

¹⁸⁷ See *supra* note 186 (supplying statistical data on the number of agencies that already require an officer to go through this type of training before being issued a taser).

¹⁸⁸ FLA. STAT. ANN. § 943.1717.

¹⁸⁹ ACLU OF N. CAL., *supra* note 59, at 18. The ACLU of Northern California provided a policy that stated, "[a]lthough not absolutely prohibited, deputies should give additional consideration to the unique circumstances involved prior to applying the Taser. Criteria to consider: . . . (3) Individual[s] who may be at greater risk include: (a) Pregnant women; (b) Elderly person; (c) Children; (4) Person with known health problems . . ." *Id.*; see *supra* Part II.B (discussing other scholar's concerns about the effects tasers can have on certain people). Additionally, special training can be required to deal with situations involving excited delirium. Meyer, *supra* note 62. The training would include recognizing situations where the officer should call for medical backup before making contact with the suspect, but should not wait for their arrival and should "go ahead and subdue the suspect." *Id.*

¹⁹⁰ See *supra* Part II.B (discussing how there are some that believe law enforcement should be banned from tasing certain categories of individuals).

¹⁹¹ See Meyer, *supra* note 62 (discussing Greg Meyer's claim that, according to doctors, tasers may be the best solution to subdue suspects experiencing EDS); *supra* notes 68-73 (describing an incident where a suicidal eight-year-old girl pointed a knife at herself and towards an officer who attempted to help her); *supra* notes 115-16 (describing two different situations where pregnant woman failed to obey officers commands by either failing to exit a vehicle upon instruction or by making physical contact with an officer while he was performing his duties).

¹⁹² See *supra* notes 113-16 (providing examples of individuals who could have easily avoided being tased had they simply obeyed the officer's instructions); *supra* note 114 (providing an apology issued by Andrew Meyer for not listening to officers at the time); *supra* Part I (providing another example of two individuals who were tased because they too would not follow officers' instructions).

Thus, statutorily required training with respect to taser usage could eliminate numerous potential problems.¹⁹³ Legislatures should base the structure of a training program off of Florida's statute, where the law requires additional yearly training in conjunction with any initial training program before permitting an officer to use a taser in the field.¹⁹⁴ The law must allow officers to use their best judgment when dealing with groups of individuals, including those at both ends of the age spectrum or pregnant women.¹⁹⁵ Proper training, rather than straight restrictions, is vital to the success of any state statute regulating law enforcement's lawful use of tasers.¹⁹⁶ Still, there are other provisions that may be included in a statute, such as a warning or medical requirement, which could improve the regulation of law enforcements use of tasers.¹⁹⁷

C. Statutes Should Require Officers to Give a Warning Before the Deployment of a Taser and Seek Medical Treatment for All Tased Suspects

To ensure that law enforcement officers effectively use tasers, all state statutes must implement a warning requirement.¹⁹⁸ A visual and verbal warning requirement, similar to the one suggested by the ACLU of Northern California, will ensure that all suspects, including those with visual and hearing impairments, have an opportunity to obey instructions before the police take physical action.¹⁹⁹ The opportunity to see and hear a warning during loud and chaotic situations will benefit non-impaired

¹⁹³ See *supra* Part III.B (analyzing the benefits of mandating strong training requirements for the officers who are allowed to use a taser in the field).

¹⁹⁴ See *supra* Part III.B (evaluating the benefits of including a training requirement in statutes that regulates the use of tasers by law enforcement); *supra* Part II.F (comparing Florida's training requirement with other State statutes).

¹⁹⁵ See *supra* notes 68-73 (providing an example of a valid reason to taser an eight-year-old child); *supra* notes 115-16 (illustrating two valid examples of when pregnant woman have been tased).

¹⁹⁶ See *infra* Part IV.A (drafting a model statute that rejects restrictions on categories of individuals who may be tased and instead elects to focus on more stringent training requirements).

¹⁹⁷ See *infra* Part III.C (analyzing warning requirements and medical requirements that could be implemented into statutes regulating taser usage by law enforcement).

¹⁹⁸ ACLU OF N. CAL., *supra* note 59, at 18. The ACLU of Northern California suggests:

Unless it would otherwise endanger officer safety or is impractical due to circumstances, a verbal announcement of the intended use of the [t]aser shall proceed the application of taser device in order to:

1. Provide the individual with a reasonable opportunity to voluntarily comply.
2. Provide other deputies and individuals with a warning that a [t]aser device may be deployed.

Id.

¹⁹⁹ See *supra* Part III.C (demonstrating why it would be beneficial to require officers to give a warning requirement).

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individuals as well because the two warnings will give suspects multiple opportunities to obey an officer's order.²⁰⁰

Additionally, law enforcement will be accountable for documenting why the warnings were not given.²⁰¹ Requiring officers to include an additional couple of lines on their police reports regarding the warnings that were given is not a huge burden because reports are completed after all police incidents regardless of whether a taser was used.²⁰² Nevertheless, no such requirement exists in the Arkansas, Georgia, or Florida statutes despite scholars' recognition that a warning requirement is needed.²⁰³ Law enforcement officers and potential suspects will all benefit by the inclusion of this requirement and thus, a warning requirement should be included in any state statute accepted by Illinois, Indiana, or Wisconsin.²⁰⁴

In addition to adding warning requirements, taser regulations must also be capable of adapting to new technology in the field.²⁰⁵ Technological advances in tasers will play a major role in how states draft proper regulations.²⁰⁶ Statutes should include a medical examination requirement as a final safety measure for the protection of both the suspect who was tased and the law enforcement officer who engaged the taser.²⁰⁷ Again, the ACLU of Northern California provided suggested language for such a provision.²⁰⁸ The group proposed the simple requirement that a

²⁰⁰ ACLU OF N. CAL., *supra* note 59, at 18 (suggesting that both a visual and verbal warning be given). Additionally, the warning requirement may have prevented at least one officer from accidentally shooting a suspect because they believed they were firing a taser and not a gun. *See supra* note 184 (explaining the details of *Torres* and expressing how a warning requirement may have prevented the accident from occurring).

²⁰¹ ACLU OF N. CAL., *supra* note 59, at 18 (quoting the Sonoma County Sheriff's Department's taser regulations: "[t]he fact that a verbal and/or other warning was given or reason it was not given shall be documented in any relevant reports"); *see supra* Part II.A (discussing how the TASER CAM provides additional safeguards for police accountability in taser cases).

²⁰² *See* ACLU OF N. CAL., *supra* note 59, at 18 (suggesting that officers must explain in their reports why a warning was not given).

²⁰³ ARK. CODE ANN. § 5-73-133(c) (2005); FLA. STAT. ANN. § 943.1717 (West Supp. 2012); GA. CODE ANN. § 35-8-26 (West 2012).

²⁰⁴ *See infra* Part IV.A (drafting a model statute for the states in the Seventh Circuit to include warning requirements for officers before their deployment of a taser against a suspect).

²⁰⁵ *See infra* Part II.A (providing background to new taser technology).

²⁰⁶ *See supra* Part II.A (discussing the background of tasers and the current technological advancements for the devices).

²⁰⁷ *See infra* Part IV.A (drafting a model statute which includes the provision for a medical examination to be given to all suspects who have been tased).

²⁰⁸ ACLU OF N. CAL., *supra* note 59, at 19 ("Persons who have been subjected to the [t]aser electronic immobilization device, either the darts or the probes, shall be treated . . .").

medical examination take place regardless of the taser mode used.²⁰⁹ This examination will provide documentation of any injuries that a suspect may sustain, which victims or officers can use as evidence either in support of or against an excessive force claim.²¹⁰ Further, statutes should include the requirement that states “if the tase[d] suspect loses consciousness, officers shall immediately request fire rescue and an ambulance.”²¹¹ This way, if something goes wrong during the use of a taser, help will be available for the tased suspect as soon as possible.²¹²

As a final proposal, the ACLU of Northern California mentioned that “[a] thorough physical examination with particular emphasis on injuries secondary to the fall should be performed.”²¹³ This will provide additional protection for a suspect’s invisible injuries.²¹⁴ The ACLU of Northern California’s suggested medical requirements are valued additions for the furthered safety of taser use by law enforcement, and thus legislatures should include such a provision in future regulations.²¹⁵

²⁰⁹ See *supra* Part III.D (providing the language recommended so that individuals, regardless of which mode they were tased in, can receive medical attention).

²¹⁰ ACLU OF N. CAL., *supra* note 59, at 19 (“The transporting officer shall obtain medical clearance from the appropriate medical facility physician prior to booking the suspect.”). This language can be used both as a safeguard for injured suspects and also for the officers against suspects who bring unwarranted suits. See *infra* Part IV.A (amending Florida’s statute to provide safeguards for suspects and officers). Additionally, if an officer used excessive force in a tasing incident, then the medical documentation will be readily available for a victim to access. See *supra* Part III.C (evaluating medical requirements to include in statutes).

²¹¹ ACLU OF N. CAL., *supra* note 59, at 19 (emphasis omitted); see *supra* Part III.B (explaining the training requirement). The training should also include the recommendation of Meyer, who suggests that in incidents where time allows, officers should call an ambulance in before deploying a taser on an individual who may suffer from excited delirium. Meyer, *supra* note 62; see *supra* Part II.B (discussing the new concept of excited delirium).

²¹² ACLU OF N. CAL., *supra* note 59, at 19 (explaining how an officer trained to recognized EDS would have hopefully called for help before deploying their taser).

²¹³ *Id.*

²¹⁴ See *id.* (“One easily overlooked aspect of injury in a tase[d] subject is that of falling from a standing position. Potential injuries include: fractures, contusions, and intracranial hemorrhage.”); *supra* Part II (discussing the potential dangers of tasers). Most likely this type of training would have to be in unison with the medical personal in the area. See *supra* note 22 (explaining how regulation of tasers differs amongst police agencies). The process of medical examination may vary depending on the resources available in the area. See *supra* note 22 (discussing how there are variances between police agencies’ regulations regarding the use of tasers). This minor inconsistency from department to department has a less of an effect on taser regulations than other inconsistencies, as long as a medical examination is required in some form. See *supra* Part II (discussing the inconsistencies in the current regulation of law enforcement’s use of tasers).

²¹⁵ See *infra* Part IV.A (drafting a model statute that includes a medical examination provision).

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Some scholars do not believe that a DME has a place in excessive force claims involving tasers.²¹⁶ However, those opposing a DME are fearful of the rare situations where an officer uses excessive force by using a taser against a suspect and leaves them without a physical injury.²¹⁷ New weapon technology, like the taser, does not leave the same injuries as former tools used by law enforcement because the technology in this field focuses on reducing the amount of injury to a suspect, while still providing enough pain and discomfort so that the officer may subdue the suspect.²¹⁸ Thus, advancements in technology have raised concerns that if a DME is included in the applicable law, those suspects who suffer from actual abuse of force by law enforcement may be unable to bring a claim because of the inability to prove any injury.²¹⁹ Yet, legislatures should quickly dismiss these concerns when other safeguards to taser usage are read alongside the DME.²²⁰ To that end, a consistent evaluation of the

²¹⁶ Mance, *supra* note 38, at 638–45, 655 (advocating that the Fourth Circuit join the First, Second, Third, Sixth, Seventh, Ninth, Tenth, and D.C. Circuit Courts in not recognizing the De Minimis Injury Doctrine).

²¹⁷ McKechnie, *supra* note 49, at 188; Mance, *supra* note 38, at 645. Mance suggests:

In light of the increasingly common use of tasers in everyday law enforcement and the ever growing number of taser related death[,] currently in the hundreds[,] there is reason to think that the approach taken by the federal district courts in the Fourth Circuit of only granting the rarest plaintiff the opportunity to make his case is inadequate for dealing with the very real issue of taser related police brutality.

Mance, *supra* note 38, at 645.

²¹⁸ McKechnie, *supra* note 49, at 188. Douglas B. McKechnie, an assistant professor of law, wrote: “[t]he future of nonlethal weapons lies in the development of devices that use pain, disorientation, temporary blindness, and perhaps even stress and anxiety to detain the target The . . . goal is to avoid causing physical injury while seizing and arresting the target.” *Id.* at 139, 188. “Gone will be the days when police use a nightstick to subdue an arrestee. As the state’s devices evolve, they will not cause the same sort of harm as a nightstick.” Georgiady, *supra* note 51, at 189. *See generally* McKechnie, *supra* note 49 (discussing the future of new weapon technology and the effect that it will have on the De Minimis Injury Exception and Fourth Amendment excessive force claims).

²¹⁹ McKechnie, *supra* note 49, at 189. McKechnie further writes that:

Employing a de minimis injury exception appears to reduce potentially frivolous excessive force-claims by arrestees. In light of future nonlethal weapons on which police officers will likely rely to detain arrestees, however, a de minimis injury exception to such claims loses its luster. Indeed, if future nonlethal weapons are as enthusiastically adopted as the [t]aser, it is possible that police officers will almost exclusively rely on an arsenal of nonlethal devices to detain arrestees. For those circuits that permit district courts to employ a de minimis injury exception or require some more-than-insignificant quantum of injury, a citizen’s right to be free from the state’s excessive force could soon evaporate.

Id. at 188.

²²⁰ *See supra* Part III.B (evaluating training requirements for state statutes); *supra* Part III.C (analyzing the possible additions of a warning requirement and a medical requirement for

level of force for both modes of the taser is critical to the success of taser regulation.²²¹

D. Law Enforcement Agencies That Allow Taser Use Should Require That Their Officers Also Be Equipped with a TASER CAM

Any taser regulations must consider the availability of technological advancement in the field.²²² Often, the *Graham* test proves to be difficult for suspects to overcome because of the biased facts presented by each party.²²³ The TASER CAM, while costly upfront, can potentially save law enforcement agencies and states money, as well as free up court time that previously would have been wasted on unwarranted excessive force claims.²²⁴ Parties from either side will have trouble arguing against video evidence that captured the entire incident, preventing a lot of cases from requiring an expensive and time consuming trial.²²⁵

To that end, an ideal statute will require that officers, who are trained to carry tasers in the field, also be equipped with a TASER CAM or similar type of recording device.²²⁶ In addition to protecting officers, the camera will also protect suspects because the TASER CAM can provide a higher level of accountability for officers, under the logic that it is highly unlikely that an officer will voluntarily abuse their position of power with a taser knowing that they are being recorded.²²⁷ If the TASER CAM requirement

state statutes); *see also infra* Part IV.A (providing a draft of the proposed statute for states in the Seventh Circuit).

²²¹ *See supra* Part II.D (explaining the inconsistencies among the Circuits on where the taser fits on the use of force continuum).

²²² *See supra* Part II.A (discussing the technological advancements of tasers).

²²³ Sussman, *supra* note 23, at 1374–75. The problem for defendants began right away during the trial process, starting with establishing the facts for the judge and jury to hear. *Id.* at 1374–75. “When deciding if a reasonable jury could conclude that the force was excessive, courts engage in *Graham* balancing by looking at the facts as asserted by both parties[,] in other words, courts weigh the stories told by ‘honorably police officers’ against the stories told by ‘blameworthy troublemakers.’” *Id.*

²²⁴ *See Hardy, supra* note 53 (“The new cameras sell for [\$1000]”); *supra* note 54 (quoting Mr. Smith’s statement about the billions that are spent on “complaints about brutality”).

²²⁵ *See supra* note 54 (providing dollar amounts that are spent on excessive force cases). Video was able to protect an officer who shot and killed an individual. Hardy, *supra* note 53. The individual’s wife would later say that her husband did not have a gun in his hand, but only a cellphone. *Id.* However, after recorded video had been viewed, the officer was “exonerated.” *Id.*

²²⁶ *See supra* note 54 (explaining how the entire event is captured).

²²⁷ *See TASER CAM, TASER.COM* (2014), available at <http://www.taser.com/products/on-officer-video/taser-cam>, archived at <http://perma.cc/KD8K-C4ZC> (“The TASER CAM law enforcement video recorder offers increased accountability – not just for police officers, but for the people they arrest. Without video, it can be the officer’s word against the suspect’s word. Now with the TASER CAM recorder, every potential TASER X26 deployment can be documented with full audio and camera video.”); *supra* Part III.D (discussing TASER’s reasoning behind the benefits of having recorded the tasing incident). Doug Wyllie wrote

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was implemented, officers and suspects would be accountable for explaining their actions in light of video evidence, which would help confirm or dispel their stories.²²⁸

In short, when officers are called to assist and protect the community and are then met with uncooperative individuals, the concern shifts from the suspect's safety to the safety of the public and law enforcement.²²⁹ Suspects have as much control over being tased as do the officers who determine it is proper to tase the suspect.²³⁰ Requiring officers to be properly trained, and to give multiple warnings before deploying a taser, will solidify this concept.²³¹ Further, a medical requirement provision will allow suspects who have been tased to have any seen or unseen injuries treated.²³² By mandating a medical review requirement, medical documents of the event and potential injuries will be available for review.²³³ At its core, the medical review requirement is an additional obligation meant to further safety, while advocating for the continued use of tasers by law enforcement.²³⁴ Next, including a DME extension will eliminate unwarranted claims from suspects against officers.²³⁵ Finally, a

"[i]t has become pretty-widely accepted that the body-worn video camera will eventually become standard equipment for just about every American police officer." Wyllie, *supra* note 52 (quoting the PoliceOne Editor and Chief, Doug Wyllie).

²²⁸ See *supra* note 54 (explaining how the TASER CAM records video of the incident).

²²⁹ See *supra* notes 68-73, 113-16 (describing incidents where law enforcement officers were requested to assist in protecting their community).

²³⁰ See *supra* note 114 (providing Andrew Meyer's apology to law enforcement for doing their job).

²³¹ See *supra* Part III.A (analyzing how a training requirement could be properly included in a statute regulating taser usage by law enforcement); *supra* notes 68-73, 113-16 (providing examples of cases where suspects' refusals to cooperate were the cause for the tasing). There are two ways that suspects could prevent being tased. See *supra* Part III.C (evaluating warning requirements for officer to give before deploying a taser). First, the suspect can refrain from placing themselves in situations, most likely breaking the law in some fashion, where law enforcement is being forced to become involved. See *supra* notes 68-73, 113-16 (demonstrating how suspect's actions leave officers no choice but to use force). Second, after law enforcement has arrived on the scene, suspects can deescalate the situation by obeying the officer's commands. See *supra* notes 68-73, 113-16 (describing incidents that led to suspects being tased for failing to obey officer's commands).

²³² See *supra* Part III.D (analyzing the benefits of including a medical requirement in a statute).

²³³ See *supra* Part III.D (recommending that suspects who have been tased be medically examined).

²³⁴ See *supra* Part II.A (providing statistics on the dangers associated with being an officer, the benefits of tasers, and how agencies that allow tasers have continued to rise over the past decade).

²³⁵ See *supra* Parts II.C, III.C (discussing and analyzing the DME); Part III.D (explaining how the TASER CAM would help hold officers accountable for their actions).

strong statute will have to incorporate new taser technology.²³⁶ In excessive force cases it is easily forgotten why law enforcement officers were called to the scene in the first place—the suspect’s previous actions leading up to the tasing are often overlooked.²³⁷ Therefore, Illinois, Indiana, and Wisconsin can allow law enforcement to continue to utilize the taser, a non-deadly type of force, by improving regulation through implementing state statutes.²³⁸

IV. CONTRIBUTION

This Note advocates for the continued use of tasers by law enforcement but recognizes that the current system provides little guidance for officers, which creates inconsistencies within this area of the law.²³⁹ However, implementing a model state statute that is based on statutes currently in place can eliminate the inconsistencies and fear of tasers.²⁴⁰ The best way to further the holding of the Seventh Circuit’s recent decision in *Abbott* is for Illinois, Indiana, and Wisconsin to enact statutes modeled after preexisting laws, such as the one in Florida.²⁴¹ The lower courts have already demonstrated how inconsistencies can quickly develop when dealing with taser regulations, and have left law enforcement officers to decipher these inconsistencies as potentially dangerous situations unfold. Accordingly, the following proposed statute corrects flaws in Florida’s statute and supplements the goal of eliminating inconsistencies by providing officers with proper guidelines regarding the lawful use of a taser.²⁴² First, Part IV.A provides a comprehensive state statute modeled off of Florida’s existing law.²⁴³ Next, Part IV.B offers commentary on areas where there may be opposition and addresses why

²³⁶ See *supra* Parts II.A, III.D (explaining the current technological advancements that should be taken into consideration when drafting a statute directed at regulating tasers).

²³⁷ See *supra* notes 68–73, 113–16 (providing details of tasing incidents).

²³⁸ See *supra* Part III (analyzing provisions to include in statutes to regulations that deal with law enforcement’s use of the taser); *supra* note 43 (listing the taser as a non-deadly type of force).

²³⁹ See *supra* Part II (providing background for the current law regulating the use of tasers by law enforcement).

²⁴⁰ See *supra* Part III (advocating that the current regulations of tasers can be improved by adopting the proposed model statute).

²⁴¹ See FLA. STAT. ANN. § 943.1717 (West Supp. 2012) (providing the foundation for the proposed statute for Illinois, Indiana, and Wisconsin).

²⁴² See *supra* Part II (discussing the current inconsistencies of regulating taser use of law enforcement); *supra* Part II.C (providing a discussion on the *Graham* factors and how current courts have used additional factors to decide excessive force claims).

²⁴³ See *infra* Part IV.A (providing the language of the proposed model state statute for regulating taser use by law enforcement).

that resistance is unwarranted.²⁴⁴ Tasers, when properly used, are capable of providing safe resolutions to incidents for both officers and suspects, and thus states should enact the proposed statute to provide consistency for law enforcement's use of tasers.

A. *Proposed Statute for States in the Seventh Circuit*

The proposed provisions discussed in this Note are capable of merging into the existing Florida statute to create an improved and customized statute for Illinois, Indiana, and Wisconsin. A new statute will help provide both consistency throughout the states and give law enforcement concrete guidelines on when officers can lawfully deploy a taser.²⁴⁵ The following provides the proposed model state statute that should be adopted to provide suspects, officers, and communities with a consistent understanding for when law enforcement may properly deploy a taser:

*Law Enforcement's Use of Tasers ~~dart firing stun guns~~*²⁴⁶

(1) **Definitions.**

(a) **Active Resistance.** *The subject's actions are intended to facilitate an escape or prevent an arrest.*

(b) **Passive Resistance.** *The subject fails to obey verbal direction, preventing the officer from taking lawful action.*

(2) **Warning Requirement.** *Before using a taser an officer must provide warning, unless it would otherwise endanger officer safety or is impractical due to the circumstances, by:*

(a) *giving a verbal warning of intent to use the taser, and*

²⁴⁴ See *infra* Part IV.B (highlighting the areas of the proposed model statute in Part IV.A where there may be resistance to implementing the statute).

²⁴⁵ See *supra* Part III.B (expressing the need to address both taser modes in the statute); *supra* Part III.C (advocating for the inclusion of a warning requirement); *supra* Part III.B (analyzing the importance of strong training requirements); *supra* Part III.D (discussing the need for a medical requirement, as well as implementing the De Minimis Injury Exception for the taser usage by law enforcement). The regular font is text that comes directly from FLA. STAT. ANN. § 943.1717. The author has used italic font for the recommended additions to the statute. Finally, text that has a line through it, is recommended to be removed from Florida's statute by the author.

²⁴⁶ Subsection (2) from the original Florida statute was not included in the main text to preserve space because it referenced specifically training for Florida and would be removed in its entirety for a proposed statute in Illinois, Indiana, or Wisconsin.

~~(2) The Criminal Justice Standards and Training Commission shall establish standards for instructing law enforcement, correctional, and correctional probation officers in the use of dart firing stun guns. The instructions standards must include the effect a dart firing stun gun may have on a person.~~

FLA. STAT. ANN. § 943.1717.

(b) *giving a visual warning, by:*

(I) *displaying the electrical arc in drive stun mode;*
or

(II) *displaying the taser in dart stun mode.*

(3) **Drive Stun Mode.** *A decision by a law enforcement officer, correctional officer, or correctional probation officer to use drive stun mode must involve an arrest or custodial situation, during which the person who is the subject is demonstrating passive resistance by continuous refusal to obey an officer's command, after having been properly warned in accordance with subsection (2).*

(4) ~~(1)~~ **Dart Stun Mode.** *A decision by a law enforcement officer, correctional officer, or correctional probation officer to use dart stun mode ~~a dart firing stun gun~~ must involve an arrest or a custodial situation during which the person who is the subject, has been properly warned in accordance with subsection (2), and is demonstrating active resistance by: ~~of the arrest or custody escalates resistance to the officer from passive physical resistance to active physical resistance and the person:~~*

(a) *having ~~Has~~ the apparent ability to physically threaten the officer or others; or*

(b) *~~Is~~ preparing or attempting to flee or escape.*

(5) **Medical Requirement.** *A thorough physical examination shall be given to all suspects that have been tased in either dart stun mode or drive stun mode. The transporting officer shall obtain medical clearance from the appropriate medical physician before booking a suspect.*

(6) **De Minimis Injury Exception.** *If the suspect has been cleared by subsection (4) to have de minimis, non-permanent, injuries as a result of being lawfully tased as detailed in this statute, then the suspect cannot bring suit against an officer or the state for excessive force.*

(7) ~~(3)~~ *The basic skills course required for certification as a law enforcement officer must include instruction on the use of tasers in both dart stun mode and drive stun mode and ~~dart firing stun guns~~. The portion of the basic skills course ~~on the use of dart firing stun guns~~ must be a minimum of [four] hours duration.*

(8) ~~(4)~~ *A law enforcement officer, correctional officer, or correctional probation officer who has not received the ~~dart firing stun gun~~ training described in subsection (3) and who is authorized by his or her employing or*

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appointing agency to carry a *taser* ~~dart firing stun gun~~ after the effective date of this act must complete, before issuance and use of a *taser* ~~dart firing stun gun~~, the [four-hour] ~~dart firing stun gun~~ training described in subsection (3). ~~or an equivalent training course provided by the officer's employing appointing agency in accordance with the Criminal Justice Standards and Training Commission standards outline in subsection (2).~~

(9) ~~(5)~~ After completing the basic skills course, each law enforcement, correctional, and correctional probation officer who is authorized by his or her agency to use a *taser* ~~dart firing stun gun~~ must complete an annual training course on the use of a *taser* for both *dart stun mode* and *drive stun mode*. ~~dart firing stun guns~~. The annual training course on the use of dart-firing guns must be a minimum of *one hour every four months*. ~~1-hour duration.~~

(10) *All law enforcement agencies that allow tasers, must also equip those officers with digital recording video devices.*²⁴⁷

B. Commentary

The proposed model statute above provides Illinois, Indiana, and Wisconsin with an opportunity to further regulate tasers, as well as eliminate inconsistencies that have plagued this area of the law in the

²⁴⁷ The definitions for active resistance and passive resistance used throughout the statute are taken by Michael Miller's definitions. Miller, *supra* note 43, at 72-73. The phrasing for § 2 was taken from ACLU of Northern California's recommended policies. ACLU OF N. CAL., *supra* note 59, at 18 ("[u]nless it would otherwise endanger officer safety or impractical due to circumstances" and "a deputy may, but is not required to display the electrical arc Deputies should not remove a [t]aser cartridge in order to display an electrical arc"); see *supra* Part III.C (analyzing the ACLU of Northern California's suggestion for both a visual and verbal warning before an officer deploys his taser); *supra* Part III.C (advocating for the inclusion of a warning requirement, as well as using the wording provided by the ACLU of Northern California: "unless would otherwise endanger officer safety or is impractical due to the circumstances"). The language for § 3 was taken from Florida's current statute. See FLA. STAT. ANN. § 943.1717 (using language from the original subsection (1) of the Florida statute to alter for passive resistance). Language was taken from the policy recommendation of the ACLU of Northern California's to create § 5. ACLU OF N. CAL., *supra* note 59, at 19 (using language provided by the ACLU of Northern California for phrases such as "[a] thorough physical examination," "[t]he transporting officer shall obtain medical clearance from the appropriate medical facility physician prior to booking the suspect," and for recommending that a medical examination be performed regardless of the type of taser mode used). Language for § 6 was created by the discussion provided in Parts II.A, III.C-D. See *supra* Parts II.A, III.C-D (explaining the DME). For § 9, the language was kept as a minimum amount of training that is required. FLA. STAT. ANN. § 943.1717; see McStravick, *supra* note 22, at 387-88 (discussing a study that analyzed training requirements).

past.²⁴⁸ Florida's statute provides a strong foundation, but additional safeguards and sections of clarification should be added to allow law enforcement to continue to benefit by having tasers to use as a safety tool.²⁴⁹ The proposed statute expands upon Florida's existing statute by providing guidelines for when a taser can be utilized in both taser modes.²⁵⁰ Further, the statute has been expanded to protect both suspects and officers by solidifying strong training requirements and by adding medical requirements, a warning requirement, and a requirement that utilizes the technological advances in tasers by recording the incident.²⁵¹

Critics may contend that there is not always enough time for an officer to provide both verbal and visual warnings.²⁵² This is a real concern for officers who are constantly forced to make split-second decisions and who have to quickly adjust to escalating situations. However, in response to this argument, the ACLU of Northern California's proposal provides a one-line exception to the two-step warning requirement, "[u]nless it would otherwise endanger officer safety or is impractical due to circumstances."²⁵³ Hence, if officer safety is the main objective advocated in this Note, it is only practical to include a way to bypass the warning requirements in necessary circumstances, where there is otherwise not enough time to provide warnings, to prevent suspects from harming themselves, officers, or others in the community.²⁵⁴

Additionally, the proposed model statute focuses on adding safeguards to eliminate the public's fear of law enforcement abusing their ability to have tasers in the field.²⁵⁵ Critics may additionally argue against the proposed statute including a DME.²⁵⁶ However, this resistance is unfounded because of the safeguards built into the statute.²⁵⁷ The medical examination requirements that are included in the model statute require that medical personnel examine every individual tased, regardless of the

²⁴⁸ See *supra* Part II (explaining the current regulations in place that govern the use of tasers by law enforcement).

²⁴⁹ FLA. STAT. ANN. § 943.1717.

²⁵⁰ *Id.*; see *supra* Part IV.A (providing the text of the proposed model statute).

²⁵¹ See *supra* Part IV.A (providing the proposed model statute).

²⁵² McStravick, *supra* note 22, at 393 (providing an exception to the rule for situations in which the officer is not capable of providing a warning).

²⁵³ See *supra* note 198 (providing the warning requirement drafted by the ACLU of Northern California).

²⁵⁴ See *supra* Part IV.A (incorporating the exception provided by McStravick into the proposed model statute to be adopted by Illinois, Indiana, and Wisconsin); *supra* notes 68–73 (describing a situation where an officer tased an eight-year-old girl to protect her from harming herself with a knife).

²⁵⁵ See *supra* Part IV.A (providing the text of the proposed model statute).

²⁵⁶ See *supra* Parts II.C, III.C (analyzing the DME).

²⁵⁷ See *supra* Part III.D (addressing the additional safeguards); *supra* Part IV.A (providing the text of the proposed model statute).

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taser mode or whether an injury is visible.²⁵⁸ Further, other technological advances, such as the TASER CAM, may eliminate the need to even address the degree of injury because the court could view the incident on tape.²⁵⁹

Finally, critics will likely argue that a statute should include a subsection that bans the use of tasers on certain categories of suspects.²⁶⁰ However, this is not a valid argument because tasers are being used to safely subdue suspects from harming themselves, officers, and others in the community, and sometimes those suspects may fall into a class of people that an officer would be prohibited from tasing.²⁶¹ Thus, supplementing the training requirements that Florida's statute already has in place and including other safety provisions, rather than placing a strict ban on the usage of the taser on classes of suspects, better addresses the issue.

In short, Illinois, Indiana, and Wisconsin should adopt the proposed model statute to provide consistency in the regulation of taser use by law enforcement. The model statute allows suspects, officers, and communities to view the same guidelines and the model statute will provide additional safeguards to further protect both suspects and law enforcement from excessive force claims.

V. CONCLUSION

Had the events from the situation in Part I arisen after Illinois adopted the proposed model statute drafted in Part IV of this Note, the *Abbott* decision would likely have not come to pass.²⁶² First, the officer would have known before going on duty whether he could lawfully use his taser in dart stun mode against a suspect who is only passively resisting. Second, had the officer blatantly ignored the statute and lied about the event leading up to the tasing of Cindy, the lower courts would have had at their disposal, courtesy of the TASER CAM, video evidence that would contradict the officer's lies. Thus the proposed model statute provides the necessary guidelines that officers, the courts, and communities need to successfully regulate law enforcement's use of tasers.

²⁵⁸ See *supra* Part III.C (analyzing medical requirements that may be implemented in a statute)

²⁵⁹ See *supra* Parts II.A, III.D (explaining technological advances and how soon courts may be able to view recorded video of incidents involving tasers).

²⁶⁰ See *supra* Parts II.B-II.C (discussing why these restrictions cannot logically be put into enforcement); *supra* note 73 (providing a quote from Police Chief Grandpre, expressing an officer's inability to control who the suspects are that create threats).

²⁶¹ See *supra* notes 68-73, 113-16 (providing incidents where tasers were lawfully used to deescalate situations to prevent harm done to the suspect or the officers).

²⁶² See *supra* Parts I, II.E (explaining the facts of *Abbott*).

Tasers are a device that can, when properly regulated, be used to safely resolve dangerous situations while protecting those who protect society. The current system is flawed; thus, for the benefit of both officers and the community, the information and guidelines that are available need to be solidified in writing in a state statute. The proposed model statute has the potential to eliminate, or at the very least, lower inconsistencies with the lawfulness of law enforcement officers' use of tasers. Therefore, Illinois, Indiana, and Wisconsin should adopt the proposed statute to eliminate inconsistencies in this area of law, because "[w]hen a police officer is killed, it's not an agency that loses an officer, it's an entire nation."²⁶³

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²⁶³ *About ODMP, supra* note 35 (quoting Chris Cosgriff, the founder of Officer Down Memorial Page).

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