Constitutional Law—Ninth Circuit Characterizes Taser as "Intermediate" Level of Force Requiring Justification of Strong Governmental Interest—*Bryan v. MacPherson*, 630 F.3d 805 (9th Cir. 2010)

When analyzing a claim under 42 U.S.C. § 1983 that a law enforcement officer used excessive force during the course of a seizure, courts typically use the objective reasonableness standard of the Fourth Amendment.[1] In *Bryan v. MacPherson*,[2] the Court of Appeals for the Ninth Circuit considered whether a police officer's use of an electronic control device (ECD)—commonly known as a Taser—during a traffic stop for failure to use a seatbelt violated the plaintiff's Fourth Amendment rights.[3] Because of the significant level of force delivered through Tasers like the one the officer used in this case, the court determined that ECDs may only be used when justified by a strong governmental interest.[4] As the officer had no reason to suspect the plaintiff was a dangerous felon or presented an immediate threat to the officer or others, the Ninth Circuit held that the use of an ECD violated the plaintiff's right to be free from excessive force.[5]

1. *See* U.S. CONST. amend. IV (outlining citizens' protections against unreasonable searches and seizures); 42 U.S.C. § 1983 (2006) (providing federal civil remedy for claims of constitutional violations against state government officials); *see also* Graham v. Connor, 490 U.S. 386, 394-95 (1989) (articulating appropriate approach for analyzing excessive force claims arising from investigatory stops or arrests); R. Wilson Freyermuth, Comment, *Rethinking Excessive Force*, 1987 DUKE L. J. 692, 692 (1987) (noting Court's use of different standards of review for excessive force claims under Fourth and Eighth Amendments). The Fourth Amendment's reasonableness standard requires an officer's actions to be "'objectively reasonable' in light of the facts and circumstances confronting them." Graham v. Connor, 490 U.S. 386, 396-97 (1989). "Seizure" occurs when a police officer, by show of "force or authority," has in some way restrained an individual's liberty, and does not require an arrest or detainment for the Fourth Amendment's protections to apply. *See* Terry v. Ohio, 392 U.S. 1, 16-21 (1968) (applying Fourth Amendment scrutiny to all pre-arrest police and civilian interaction).

2. 630 F.3d 805 (9th Cir. 2010).

3. *Id.* at 822-23 (outlining issue before court).

4. *Id.* at 825-26 (declaring holding). The ECD Officer MacPherson used was a Taser X26 model that—when used in "dart firing" mode, as in this case—has a range of up to twenty-five feet and propels aluminum darts tipped with stainless steel barbs towards its intended target, temporarily overriding the target's central nervous system upon impact. *Id.* at 824; *see also Taser X26 ECD*, TASER, http://www.taser.com/products/law/Pages/TASERX26.aspx (last visited Mar. 18, 2011) (giving detailed description of product's capabilities). Those who absorb the electrical charge of the Taser X26 model used in "dart firing" mode will experience "uncontrollable muscle contractions" which may cause "pain, stress and/or panic." *See* AMNESTY INT'L, 'LESS THAN LETHAL'? THE USE OF STUN WEAPONS IN US LAW ENFORCEMENT 8-9 (2008), http://www.amnesty.org/en/library/asset/AMR51/010/2008/en/530be6d6-437e-4c77-851b-9e581197ccf6/amr510102008en.pdf (describing psychological effects of Taser X26 model's electrical charge). Though the Taser X26 model is capable of creating a 50,000-volt charge, its target will not absorb that entire amount. *See* 630 F.3d at 824 n.4 (contesting claim Taser X26 model "delivers" 50,000-volt charge to target). Rather, according to the manufacturer, such a charge is necessary merely to propel the electrical current through the air towards the target, who absorbs a smaller maximum charge of 1200 volts. *See id.*

5. 630 F.3d at 831-32 (describing key factors court considered in determining Officer's use of ECD

Carl Bryan left Camarillo, California early during the morning of July 24, 2005—clad only in the boxer shorts and tee shirt in which he slept the previous night—and drove south towards Coronado, California with his brother.[6] After being stopped by a California highway patrolman and issued a citation for speeding, the twenty-one-year-old Bryan became so upset that he began to cry, at which point he removed his shirt to wipe away the tears and apparently forgot to buckle his seatbelt when he embarked on the remainder of his journey.[7] A short time later, Officer MacPherson, positioned at an intersection to monitor motorists' compliance with seatbelt laws, stopped the now-shirtless Bryan because he was not wearing his seatbelt.[8] After pulling over, an agitated Bryan stepped out of his car and, standing between fifteen and twenty-five feet away from Officer MacPherson, began hitting his own thighs in frustration and speaking "gibberish."[9] It is unclear whether Bryan stepped toward Officer MacPherson before Officer MacPherson—without warning—shot Bryan with his Taser X26 model, injuring him.[10]

Based on this encounter, Bryan sued Officer MacPherson under § 1983 for using excessive force in violation of the Fourth Amendment.[11] Upon motion for summary judgment, the district court declined to grant Officer MacPherson qualified immunity, leaving him subject to liability arising from Bryan's § 1983 claim.[12] On Officer MacPherson's appeal from the denial of summary

excessive).

6. *Id.* at 822 (introducing factual background giving rise to conduct at issue).

7. *Id.* (summarizing Bryan's earlier citation).

8. *Id.* (explaining Officer MacPherson's reason for stopping Bryan's car). Officer MacPherson stepped in front of Bryan's car and ordered him to stop. *Id.* After Bryan stopped the car, Officer MacPherson approached and requested that Bryan turn down the volume of his car radio and pull over to the curb. *Id.* Bryan complied with the requests but became quite agitated, hitting the steering wheel and cursing at himself in apparent frustration for being subject to a potential second citation in the same morning. *Id.*

9. 630 F.3d at 822, 826-28 (detailing Bryan's erratic behavior and other circumstances of encounter with Officer MacPherson once outside vehicle). At trial, there was a factual dispute as to whether Officer MacPherson commanded Bryan to stay in his car before Bryan exited it. *Id.* at 822. This factual dispute was significant because if Bryan had heard, understood, and failed to comply with a lawful order, Bryan potentially engaged in several misdemeanors in addition to his failure to wear a seatbelt. *Id.* at 828-89. These additional infractions may have influenced the Ninth Circuit's analysis of Officer MacPherson's ECD use under the Fourth Amendment's reasonableness standard, as the court indicated the severity of Bryan's actual offenses alone offered little basis for the use of the Taser X26 model. *See infra* note 36 and accompanying text (describing court's analysis of additional offenses Bryan potentially committed). During the encounter, Officer MacPherson had knowledge that backup was en route. 630 F.3d at 828-31.

10. 630 F.3d at 822 (describing Officer MacPherson's use of ECD and its effect on Bryan); *see also supra* note 4 and accompanying text (describing functionality and capability of Taser X26 model's electrical charge). Bryan testified that he did not advance towards Officer MacPherson, while Officer MacPherson testified that Bryan took a single step towards him. 630 F.3d at 822. There is nothing in the record to indicate that Officer MacPherson warned Bryan prior to firing the ECD or that Bryan made any threats to Officer MacPherson or others at any time during the encounter. *Id.* The shock immobilized Bryan and debilitated his central nervous system, causing him to collapse, fracturing several teeth and causing facial abrasions. *Id.*

11. 630 F.3d at 821-23 (summarizing Bryan's legal claims).

12. *Id.* (outlining procedural history prior to appellate review); *see also infra* note 16 (defining doctrine of qualified immunity).

judgment, the Ninth Circuit held that MacPherson's use of the ECD was excessive because it was not justified by a strong governmental interest due to the fact that Bryan was clearly unarmed and not resisting, was not a flight risk, and was positioned far enough away from Officer MacPherson and others that he did not pose an immediate danger to anyone.[13] On Officer's MacPherson's appeal on the basis of qualified immunity, however, the court reversed the district court's denial of summary judgment because the law regarding proper Taser use was not clearly established at the time of the challenged conduct.[14]

In 1871, Congress passed § 1983 to provide a federal civil remedy for constitutional violations by state officials because its members reasoned that state governments often refused to enforce existing laws that theoretically provided the same substantive protections.[15] Nevertheless, because § 1983 lacked a clear culpability standard for various types of violations—including the use of excessive force—many courts initially applied the due process standard the Court of Appeals for the Second Circuit set out in *Johnson v. Glick*.[16] Twelve years after *Glick*, the U.S. Supreme Court attempted to provide clarity in the landmark case of *Tennessee v. Garner*,[17] in which the

13. *See* 630 F.3d at 831-32 (pointing to evidence supporting holding of excessive force).

14. *See id.* at 832-33 (holding MacPherson could have made "reasonable mistake of law" about constitutionality of Taser use).

15. *See* 42 U.S.C. § 1983 (2006) (allowing citizens to bring suit against state for federal constitutional violations in state or federal court); *see also* Monroe v. Pape, 365 U.S. 167, 174-80 (1961) (describing southern states' refusal to enforce constitutional rights of newly freed slaves during Reconstruction Era).

16. 481 F.2d 1028, 1032-33 (2d Cir. 1973) (holding prison guard's brutal treatment of prisoner violated general liberty interest Fourteenth Amendment protects); *see also* Graham v. Connor, 490 U.S. 386, 393-94 (1989) (outlining and rejecting generic due process analysis for all claims of excessive force); Jill I. Brown, Comment, *Defining "Reasonable" Police Conduct:* Graham v. Connor *and Excessive Force During Arrest*, 38 UCLA L. REV. 1257, 1260-69 (1991) (tracing history of due process standard established in *Glick*). In *Glick*, the Second Circuit defined excessive force as force that "shocks the conscience" and established a four-part analysis for courts to use when analyzing claims of excessive force. *See* Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973). *Glick*'s four factors are: the need for the use of force; the relationship between that need and the amount and type of force used; the amount of injuries caused by the use of force; and—a wholly subjective factor—whether the force was applied in good faith or "sadistically" to intentionally cause harm. *See id.* After *Glick*, many courts applied this generalized test to all § 1983 claims of excessive force. *See* Graham v. Connor, 490 U.S. 386, 393 (describing generic due process analysis *Glick* popularized); *see also* Brown, *supra*, at 1262 (noting *Glick* factors became "predominant" approach among circuits); Michael C. Fayz, Comment, Graham v. Connor*: The Supreme Court Clears the Way for Summary Dismissal of Section 1983 Excessive Force Claims*, 36 WAYNE L. REV. 1507, 1509-11 (1990) (noting courts' view of excessive force as related to general due process rights). Typically, in § 1983 claims, state actors will use the doctrine of "qualified immunity" as an affirmative defense for any constitutional violation. *See* Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (defining qualified immunity as tantamount to entitlement to not face burdens of litigation); *see also* 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, 769-72 (2010) (defining and explaining concept of qualified immunity). Qualified immunity analysis requires a two-part test that asks whether a constitutional violation occurred, and, if so, whether the right infringed upon was "clearly established" prior to and at the time of the alleged violation. *See* Saucier v. Katz, 533 U.S. 194, 206-10 (2001) (clarifying components of qualified immunity analysis). *But see* Pearson v. Callahan, 129 S. Ct. 808, 818 (U.S. 2009) (holding courts have discretion to determine appropriate sequence of *Saucier*'s two-prong inquiry).

17. 471 U.S. 1 (1985).

Court held that the Fourth Amendment's objective reasonableness standard applied to the use of deadly force against a fleeing felon because such conduct by law enforcement officials clearly constitutes a seizure under the Fourth Amendment.[18] Despite *Garner*'s instruction to the contrary, however, many courts still applied the due process standard to all excessive force claims, including those arising from seizures.[19]

In the 1989 case of *Graham v. Connor*,[20] the U.S. Supreme Court made explicit what it thought was implicit in *Garner*—namely, that all § 1983 claims must identify the "specific constitutional right allegedly infringed" by the challenged conduct, whereupon the court will apply the relevant standard, rather than simply apply a generic due process standard to all claims.[21] Additionally, for § 1983 claims involving excessive use of force, the *Graham* Court set out a highly fact-sensitive balancing test to determine whether a use of force was objectively reasonable.[22] The test weighs the level of intrusion on the individual's Fourth Amendment interests caused by the use of force against the governmental interests in using that level of force.[23] Critically, courts evaluate the use of force from the perspective of a reasonable officer in the actual officer's situation—not from the perspective of an officer with the

18. *See* Tennessee v. Garner, 471 U.S. 1, 7-11 (1985) (maintaining any restraint upon citizen's freedom to walk away constitutes seizure). The *Garner* Court struck down as applied a Tennessee statute authorizing law enforcement officials to use deadly force against all fleeing felons, regardless of whether those felons were violent or nonviolent. *See id.* at 11 (describing lack of "immediate" threat nonviolent burglar posed).

19. *See* Fayz, *supra* note 16, at 1512-13 (tracing various courts' post-*Garner* application of due process analysis to all excessive force claims). Such inconsistency highlights the difficulties courts faced arriving at a clear, consistent standard applicable to governmental use of force, particularly as it applies to the Fourth Amendment. *See generally* Rachel A. Harmon, *When is Police Violence Justified?*, 102 NW. U. L. REV. 1119 (2008) (describing inadequacies of U.S. Supreme Court's "impoverished" Fourth Amendment jurisprudence).

20. 490 U.S. 386 (1989).

21. *See* Graham v. Connor, 490 U.S. 386, 393-95 (1989) (faulting courts for "indiscriminately" applying due process analysis and establishing specificity requirement for § 1983 claims). In *Graham*, the Court held that police officers used excessive force against a diabetic suffering from "sugar shock" who they felt was resisting their investigatory traffic stop of the vehicle in which he was a passenger by exiting the car as his condition worsened, contrary to their instructions. *See id.* at 399. In addition to setting forth a process for properly analyzing a § 1983 claim, the Court held that the Fourth Amendment's "reasonableness" culpability standard was objective, and thus criticized the *Glick* balancing test's subjective intent element. *See id.* at 397.

22. *See* Graham v. Connor, 490 U.S. 386, 396-97 (1989) (listing factors relevant to "totality of the circumstances" analysis). The Court recognized that the test for objective reasonableness is not "capable of precise definition or mechanical application," and includes considerations of when and how the force was used. *See id.* at 396. As such, courts have the flexibility to focus on the specific facts, methods, and relative relationship between the amount and the type of force used to effect any particular seizure. *See* Deorle v. Rutherford, 272 F.3d 1272, 1279 (9th Cir. 2001); Chew v. Gates, 27 F.3d 1432, 1441 (9th Cir. 1994). This analysis ignores the subjective intent of the state official involved. *See* Graham v. Connor, 490 U.S. 386, 396 (1989).

23. *See* Graham v. Connor, 490 U.S. 386, 396 (1989) (announcing requirement of balancing test). In analyzing the intrusion, courts have not required police officers to use the least intrusive level of force available in order for more intrusive levels of force to be considered objectively reasonable. *See* Forrett v. Richardson, 112 F.3d 416, 420 (9th Cir. 1997) (allowing police officer to use justifiable deadly force prior to exhausting every alternative); Collins v. Nagle, 892 F.2d 489, 493 (6th Cir. 1989) (noting Fourth Amendment does not require exhausting alternatives before using justifiably intrusive force).

benefit of the "20/20 vision of hindsight" or the perspective of the victim.[24] The Court stressed that the reasonableness standard of the Fourth Amendment requires "careful attention" to the circumstances of each case, including, but not limited to: considerations of the severity of the underlying crime giving rise to the use of force; whether the suspect posed an "immediate" threat to the officer or others; and whether the suspect was "actively" resisting or attempting to flee arrest.[25]

The development of ECDs and their widespread use by law enforcement agencies required courts to apply the *Graham* test to a type of instrument and force that law enforcement officials did not use until many years after *Graham* was decided.[26] Many § 1983 claims of excessive force resulted from the widespread use of Tasers by law enforcement officials, and courts struggled to consistently apply *Graham*'s fact-sensitive balancing test to the myriad of circumstances in which law enforcement officials use Tasers.[27] Although

24. *See* Graham v. Connor, 490 U.S. 386, 396 (1989) (emphasizing officer-focused perspective of excessive force inquiry).

25. *See* Graham v. Connor, 490 U.S. 386, 396 (1989) (highlighting factors courts should consider when evaluating reasonableness of any use of force). This analysis applies to both lethal and non-lethal force. *See id.* at 395. Conspicuously absent from the "totality of the circumstances" analysis is any examination of the nature and extent of the injuries the particular use of force caused—a consideration that was clearly a part of *Glick*'s four-part due process analysis. *See id.*; *see also* Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973); *supra* note 16 and accompanying text (describing history and factors of *Glick*'s due process test). Despite this, *Graham*'s concept of an "intrusion" has been interpreted to include considerations of the nature and extent of the injuries caused by force. *See* Headwaters Forest Def. v. Cnty. of Humbolt, 240 F.3d 1185, 1200 (9th Cir. 2000) (describing effects of pepper spray and its ability to inflict more than minimal intrusions). In *Headwaters*, the Ninth Circuit held that the use of pepper spray was excessive under *Graham*, based partly on the theory that a reasonable jury could find such extensive injuries—those resulting from police officers' application of pepper spray directly to protesters' eyes—constituted more than a "minimal intrusion" on protesters' Fourth Amendment rights. *See id.*

26. *See* Taser International, Inc., FUNDING UNIVERSE, http://www.fundinguniverse.com/company-histories/Taser-International-Inc-Company-History.html (last visited Mar. 18, 2011) (outlining company's growth and eventual establishment as supplier of weapons to law enforcement agencies). In 1974, NASA scientist Jack Corver invented the first "stun gun"—or Taser—and in 1993 formed Air Taser, Inc., with co-founder Rick Smith. *See id.* By 2000, hundreds of law enforcement agencies used Taser International's ECDs, which are categorized as "less-lethal" weapons by the U.S. Bureau of Alcohol, Tobacco, Firearms, and Explosives, the U.S. Department of Justice (DOJ) and the United States Marshals Service. *See id.*; *see also* EVALUATIONS AND INSPECTIONS DIV., U.S. DEP'T OF JUSTICE, REPORT NO. I-2009-003, REVIEW OF THE DEPARTMENT OF JUSTICE'S USE OF LESS-LETHAL WEAPONS 48-50 (2009), *available at* http://www.justice.gov/oig/reports/plus/e0903/final.pdf (providing overview of DOJ's use of less-lethal weapons and categorizing Taser as such). Despite these characterizations, others suggest Taser ECDs are lethal. *See* AMNESTY INT'L, *supra* note 4, at 27-28 (contending Tasers capable of deadly force); Jared Strote & H. Range Hutson, *Taser Use in Restraint-Related Deaths*, *in* 10 PREHOSPITAL EMERGENCY CARE 448-49 (2006) (highlighting results of medical study concluding "sudden deaths can and do occur after Taser use").

27. *Compare* Buckley v. Haddock, 292 F. App'x 791, 794 (11th Cir. 2008) (upholding constitutionality of Tasering handcuffed and motionless suspect after traffic stop), *and* Draper v. Reynolds, 369 F.3d 1270, 1278 (11th Cir. 2004) (justifying Tasering of belligerent, uncooperative and pacing suspect during course of traffic stop), *with* Brown v. City of Golden Valley, 574 F.3d 491, 494-96 (8th Cir. 2009) (holding unconstitutional Tasering of passenger who refused to exit car during traffic stop for speeding), *and* Casey v. City of Federal Heights, 509 F.3d 1278, 1285-86 (10th Cir. 2007) (denying officer's motion for summary judgment on constitutionality of Tasering without warning and in disproportion to underlying offense). In *Buckley*, a

Tasering a suspect who "actively" or aggressively resists law enforcement officials has typically been held constitutional, the law is less clear regarding the constitutionality of Tasering suspects who merely resist "passively" by refusing to respond to or follow police officers' verbal commands.[28]

In *Bryan*, the Ninth Circuit considered whether the use of a Taser on a passively resisting suspect constituted excessive force under the Fourth Amendment's objective reasonableness standard.[29] Guided by *Graham*, the court first examined the intrusiveness of the force.[30] Although it acknowledged ECDs are "non-lethal" weapons, the court held that Tasers constitute a significant or "intermediate" level of force because of the power of their electrical charge and the "high levels of pain and foreseeable risk of physical injury" their use causes.[31] The *Bryan* court considered the extent of injuries in

handcuffed arrestee being led to a police car dropped to the ground and began weeping, at which point the arresting officer warned him prior to Tasering him several times. Buckley v. Haddock, 292 F. App'x 791, 792-93 (11th Cir. 2008) (stating facts giving rise to Tasering). In upholding the use of force, the court reasoned that police resources were limited to such an extent that a lone officer's use of a Taser against a passively resisting arrestee was a reasonable alternative to calling for backup to assist in the arrest. *See id.* at 796-99 (describing practical factors court considered). In *Draper*, the suspect was verbally combative and aggressive towards the police officer, yelling loudly, pacing, and repeatedly complaining about the officer's use of a flashlight during a nighttime traffic stop. *See* Draper v. Reynolds, 369 F.3d 1270, 1273 (11th Cir. 2004) (describing facts of case). The court held that this conduct created a potentially immediate threat to the police officer's safety, which justified the use of a Taser. *See id.* at 1273, 1278 (discussing suspect's excited demeanor prior to Tasering). In contrast, under the facts of *Brown*, officers arrested the driver for speeding. Brown v. City of Golden Valley, 574 F.3d 491, 494-96 (8th Cir. 2009) (detailing facts of arrest). The driver's wife—a passenger in her husband's car who was ignorant of the reason for her husband's arrest—became frightened and refused to exit the car when commanded to do so. *See id.* The court held that Tasering Mrs. Brown was an unreasonably disproportionate level of force due to her passive resistance and the lack of severity of the underlying crime. *See id.* at 497-98 (emphasizing Mrs. Brown's passivity and lack of threat in holding force excessive). Taking its own approach, the Ninth Circuit does not consider the factors articulated in *Graham*'s balancing test to be exhaustive and, therefore, added two additional considerations: whether the officer gave a warning prior to the use of the ECD, and whether the officer properly considered less intrusive alternatives prior to the use of the ECD. *See* Deorle v. Rutherford, 272 F.3d 1272, 1283-84 (9th Cir. 2001) (concluding failure to warn about imminent force factor properly considered in *Graham* test); Chew v. Gates, 27 F.3d 1432, 1443 (9th Cir. 1994) (requiring police officers to consider less intrusive tactics available to effect arrest).

28. *See generally* John C. Desmedt, *The Use of Force Paradigm for Enforcement and Corrections*, PROTECTIVE SAFETY SYSTEMS, INC., http://pss.cc/uofm.htm (last visited Mar. 18, 2011) (describing appropriateness of various levels of force applied in differing situations). Some police forces describe "active" resistance as including, but not limited to, evasive physical movements in an attempt to defeat an officer's control and verbally or physically evincing intent to commit an assault or flee. *See* CINNCINNATI, OH., POLICE DEPARTMENT, PROCEDURE MANUAL § 12.545 (2007), http://www.cincinnati-oh.gov/police/downloads/police_pdf13379.pdf (setting forth City of Cincinnati's Use of Force guidelines). "Passive" resistance includes failing to respond to commands. *See id.* Many circuit courts appear to support the Tasering of actively resisting suspects, but are less clear with regard to passively resisting suspects. *See* Fabian, *supra* note 16, at 782-83 (noting some factors will not justify Tasering of passively resisting suspects); *supra* note 27 and accompanying text (providing examples of case law in several circuits).

29. *See* 630 F.3d at 823-27 (detailing issue before court).

30. *See id.* at 823 (considering whether Officer MacPherson utilized constitutionally permissible force); *see also supra* note 25 and accompanying text (outlining balancing test described in *Graham*).

31. *See* 630 F.3d at 822-25 (evaluating pain and injuries Taser X26 model's "dart firing" mode causes). The *Bryan* court agreed with the consensus of its "sister circuits" by defining ECDs as non-lethal force. *See id.*

its "intrusiveness" analysis, determining the use of the Taser X26 model was intrusive despite producing merely temporary pain because that pain was extensive and intense, and carried with it a significant risk of serious injury.[32] Because their intrusion on a victim's "physiological functions" is much greater than that of other types of non-lethal force, the court held that ECDs may only be used in situations where a governmental interest exists that is strong enough to "compel" their use.[33]

The Ninth Circuit then evaluated the government's interest in the use of force against Bryan, viewing the facts in the light most favorable to Bryan.[34] Despite Bryan's "unusual" and "erratic" behavior, the court held that he did not pose an immediate threat to Officer MacPherson or others because he was clearly unarmed and never made any verbal or physical threats.[35] The court noted that the minor offenses Bryan committed were not inherently violent.[36]

at 825. Nevertheless, it correctly noted that, under *Graham*, all types of force must be "justified" under the law. *See id.* at 825; *see also supra* note 25 and accompanying text (discussing reasonableness of varying levels of force).

32. *See* 630 F.3d at 825-26 (considering extent of injuries and determining use of Taser X26 model intrusive). The court analogized to the use of pepper spray analyzed in *Headwaters*, noting the Taser X26 model was "far more" intrusive than pepper spray because the pain delivered by the Taser is not "localized, external, gradual, or within the victim's control" as is the pain by pepper spray delivers. *See id.* at 826; *see also* Headwaters Forest Def. v. Cnty. of Humbolt, 240 F.3d 1185, 1200 (9th Cir. 2000) (describing effect of pepper spray).

33. *See* 630 F.3d at 823-26 (summarizing court's holding on "intrusiveness" prong of *Graham*'s balancing test). The court acknowledged the analysis under *Graham* should not use "monolithic" categories but rather evaluate the nature of the "specific" force used in any particular factual situation. *See id.* at 826. In light of the Taser X26 model's importance to law enforcement, the court held that their use was constitutionally permissible only if such an "intermediate or medium, though not insignificant quantum of force" is justified by a sufficiently compelling government interest. *See id.*; *see also supra* note 22 and accompanying text (emphasizing importance of relationship between amount of force used and nature of seizure effected).

34. *See* 630 F.3d at 826 (describing second prong of two-pronged test for excessive force under Fourth Amendment). Applicable precedent required the court to "assume the version of the facts asserted by the non-moving party" when disputed issues of material fact exist, and Bryan was the non-moving party on the motion for summary judgment. *See id.* at 823 (explaining all reasonable inferences must be drawn in favor of Bryan).

35. *See id.* at 826-27. The court noted that, because Bryan was dressed only in boxer shorts and shoes and did not have a place to hide a weapon, it was unreasonable for Officer MacPherson to assume Bryan was potentially armed. *See id. at 826.* Although the court acknowledged that Bryan's behavior was bizarre and perhaps even unsettling to observe, it noted that Bryan was only yelling at himself, not others, and at no point made any verbal threats to Officer MacPherson or others. *See id. at 826-27.* The court also noted that Bryan stood at least fifteen feet away from Officer MacPherson throughout the encounter, and never "advanced" towards Officer MacPherson. *See id. at 827.* Thus, even if the court resolved the disputed material fact of whether Bryan took a single step towards Officer MacPherson in Officer MacPherson's favor, that step would not be enough to create a reasonable fear of an "immediate" threat to Officer MacPherson because of the distance between the two men and Bryan's "apparent" unarmed status. *See id.*

36. *Id.* at 828-29 (stating traffic violations generally insufficient underlying crimes for use of significant force). Bryan's initial violation was failure to wear a seatbelt, which is a nonviolent, minor offense that, according to the court, made the need for force substantially lower than if Bryan had been suspected of a serious, perhaps violent crime. *Id.*; *see also supra* note 18 (noting *Garner* Court recognized government's reduced interest in use of force against non-violent offenders). The *Bryan* court dismissed MacPherson's argument that the government's interest was heightened as a result of misdemeanors that amounted to "serious . . . criminal activity" by noting that even if Bryan had committed those offenses—resisting a police

The court also determined that Bryan's conduct—when considered from the view of a reasonable officer on the scene—was "at most" passive resistance because Bryan was not aggressive and the only order he failed to comply with was the order he contended he did not hear.[37] Additionally, the court held that Officer MacPherson did not properly consider "less intrusive" alternatives to the use of an ECD and failed to warn Bryan about the impending Tasering, even though it was feasible for Officer MacPherson to have done so prior to firing his ECD.[38] In light of these circumstances, the court held that Officer MacPherson's use of the Taser X26 model was excessive under the Fourth Amendment's objective reasonableness standard.[39]

In *Bryan v. MacPherson*, the Ninth Circuit contradicted *Graham*'s requirement to view the facts from the perspective of a reasonable officer at the scene when evaluating the governmental interest in the use of force, and instead improperly analyzed the case largely from the perspective of the Tasered driver.[40] In particular, the way the court addressed the question of whether

officer and failure to comply with a lawful order—they were all inherently nonviolent, and did not provide a sufficient governmental interest necessary to justify the use of a Taser. 630 F.3d at 828-29.

37. *See* 630 F.3d at 831. Even if Bryan heard and did not follow Officer MacPherson's alleged command to remain in the vehicle, the court observed that such "resistance" would not be "active" and did not justify a substantial use of force. *See id.* at 829-30; *see also supra* note 28 and accompanying text (describing distinctions between active and passive resistance). The *Bryan* court noted that "resistance" is a continuum that "runs the gamut from [a] purely passive protestor who simply refuses to stand, to the individual . . . physically assaulting the officer." 630 F.3d at at 830. Even when reviewing Bryan's conduct from the subjective perspective of a reasonable officer on the scene, the court reasoned that the conduct was "closer to" the passive resistance of the peaceful protestors in *Headwaters* than it was to active resistance. *See id.* at 830; *see also supra* note 25 (discussing *Headwaters*). On the other hand, the court distinguished Bryan's conduct from that of the arrestee in *Draper*, noting that the arrestee in *Draper* was aggressive and argumentative and there was no question that the arrestee heard the officer's commands and "not only failed to comply, but engaged the officer in an increasingly heated argument." *See* 630 F.3d at 827-28; *see also supra* note 27 (discussing *Draper*).

38. *See* 630 F.3d at 831 (relying on two additional considerations beyond explicit *Graham* factors). Regardless of whether Bryan would have complied with Officer MacPherson's commands in light of a warning, the court believed there was ample time for the officer to issue a warning of impending Taser use. *See id.* at 831. The court rejected Officer MacPherson's claim that he warned Bryan because Officer MacPherson's testimony "belies [that] claim." *Id.* at 831 n.14. The *Bryan* court also noted that Officer MacPherson failed to consider "clear, reasonable, and less intrusive" alternatives, a factor that Ninth Circuit precedent requires. *See id.* For example, the court reasoned, Officer MacPherson knew that backup was en route to the scene and should have known that their arrival would "change the tactical calculus" of the situation and perhaps create avenues in which to resolve the issue without the need for an intrusive level of force. *See id.*

39. *See id.* at 831-32 (summarizing factors supporting holding force used against Bryan unconstitutionally excessive). The court noted that there was simply "no immediate need to subdue" Bryan prior to Officer MacPherson's fellow officers arriving on the scene. *See id.* at 832.

40. *See id.* at 830 (stating court did not review Bryan's conduct "solely" from the officer's subjective point of view). When it evaluated Bryan's resistance, the court noted that, "even if we were to consider his degree of compliance solely from the officer's subjective point of view, this case would be closer to . . . passive resistance . . . than it would be to active resistance." *Id.* This statement implies that the court did not examine Officer MacPherson's conduct solely from his perspective, even though the U.S. Supreme Court—in both *Graham* and *Garner*—held that the Fourth Amendment's reasonableness standard is an objective test with but a single subjective element—that is, to view the facts from the viewpoint of a reasonable officer at the scene. *See* Graham v. Connor, 490 U.S. 386, 395-97 (1989) (stressing importance of viewing facts leading to challenged conduct from officer's perspective); Tennessee v. Garner, 471 U.S. 1, 9 (1985) (implying officer's subjective

Bryan posed an immediate threat to Officer MacPherson was dismissive of how Bryan's conduct likely would have appeared to a reasonable officer acting in a tense situation without the benefit of hindsight or any knowledge of the events giving rise to Bryan's agitated state.[41] Although Bryan claimed he did not hear Officer MacPherson's commands to remain in the car, in evaluating this disputed material fact, the *Bryan* court improperly discounted the reasonableness of Officer MacPherson's belief that Bryan did hear those commands yet chose to actively disobey the commands by exiting the car and remaining within one car-length of Officer MacPherson during the bizarre outburst.[42] Thus, the court's analysis of the governmental interest in the use of

intent irrelevant and test turns on objective reasonableness of officer's conduct); *see also* Brown, *supra* note 16, at 1264, 1268-69 (noting *Garner* and *Graham* hold Fourth Amendment's reasonableness standard as properly viewed from officer's perspective). Such an inquiry misreads clear U.S. Supreme Court precedent requiring courts to consider the only relevant question—whether a reasonable officer who observed Bryan's angry, unexplained behavior would have viewed that conduct as resistance and a potential threat sufficient to justify the use of the Taser X26 model to effect the arrest. *See* Graham v. Connor, 490 U.S. 386, 395-97 (1989) (ignoring perspective of victim of police use of force in favor of perspective of officer); *see also* Fabian, *supra* note 16, at 774 (noting courts' wide adoption of "officer's point of view" when analyzing excessive force claims).

41. *See* 630 F.3d at 830 (stating facts viewed in light most favorable to Bryan); *see also* Graham v. Connor, 490 U.S. 386, 396 (1989) (indicating officers due some degree of deference because they lack benefits of hindsight). The *Graham* Court warned courts not to use the benefits of "20/20 hindsight" to evaluate decisions made by officers in "tense" and "rapidly-evolving" situations, but the *Bryan* court seems to have ignored this direct instruction. *See* Graham v. Connor, 490 U.S. 386, 396-97 (1989). Courts have upheld police use of Tasers against suspects whose resistance was arguably less than or equal to Bryan's. *See* Buckley v. Haddock, 292 F. App'x 791, 794 (11th Cir. 2008) (upholding Tasering of sitting, handcuffed, and weeping suspect who passively resisted); Draper v. Reynolds, 369 F.3d 1270, 1278 (11th Cir. 2004) (justifying Tasering of agitated, yelling and unarmed suspect). Like in *Buckley*, where the court held that the state's interest in "effective law enforcement" and officer safety are factors to consider in a *Graham* test, here, the *Bryan* court should have similarly viewed Bryan's bizarre conduct and the active steps he took to disobey repeated commands as frustrating Officer MacPherson's ability to engage in effective law enforcement. *See* Buckley v. Haddock, 292 F. App'x 791, 796-99 (11th Cir. 2008) (outlining reasons for justifying governmental interest in use of force against arrestee). Although the *Bryan* court distinguished *Draper*, because there was "no question" that the *Draper* suspect actively refused to comply with the officer's commands, the correct analysis under *Graham* would proceed from the assumption that a reasonable officer would have made and that Officer MacPherson contends he did make—namely, that Bryan heard the repeated commands yet disobeyed them by exiting the car and thus increasing the threat he presented to Officer MacPherson. *See* 630 F.3d at 827-28 (comparing Bryan's resistance to suspect's in *Draper*); *see also supra* note 24 and accompanying text (highlighting importance of officer's perspective in balancing test under Fourth Amendment's reasonableness standard). With regard to the importance of the underlying crime at issue, the suspects in both *Draper* and *Buckley* were initially stopped by law enforcement for minor traffic violations, like the arrestee in *Bryan*. *See* Buckley v. Haddock, 292 F. App'x 791, 792 (11th Cir. 2008); Draper v. Reynolds, 369 F.3d 1270, 1272 (11th Cir. 2004). Although the Eighth Circuit held that Tasering the passively resisting suspect in *Brown* was excessive, those facts can be distinguished from the facts in *Bryan* because, in *Brown*, the woman remained in the car at all times, was not agitated, and was surrounded by several officers, whereas Bryan exited the car after being repeatedly told to remain in the vehicle, and proceeded to engage in bizarre, loud conduct, all while Officer MacPherson was the sole officer on the scene. *See* Brown v. City of Golden Valley, 574 F.3d 491, 497-98 (8th Cir. 2009) (noting suspect's passive resistance and presence of other officers); *supra* notes 8-10 and accompanying text (outlining series of events and circumstances preceding Officer MacPherson's use of Taser X26 model).

42. *See supra* notes 8-10 and accompanying text (outlining key facts of encounter giving rise to Officer

the Taser X26 model was flawed because it was too deferential to Bryan's version of the events, which is contrary to *Graham*'s instruction to defer to the officer's perspective on the issues of the suspect's level of resistance and the threat that resistance posed.[43]

In regard to the "intrusiveness" prong of the *Graham* test, the court correctly concluded that the Taser X26 model constitutes a significant quantum of force because of the power of its electrical current and the intense, lasting pain and disruption it causes.[44] The court's analysis is consistent with U.S. Supreme

MacPherson's use of the ECD); *see also supra* notes 22-25 and accompanying text (setting forth *Graham*'s balancing test for § 1983 claims of excessive force under Fourth Amendment). Rather than focusing on defining the level of Bryan's resistance, the court should have concentrated on Officer MacPherson's perspective and what he reasonably could have believed while at the scene, even if the court assumed that Bryan did not hear Officer MacPherson's repeated commands. *See* Graham v. Connor, 490 U.S. 386, 396 (1989) (reiterating *Terry*'s focus on perspective of reasonable officer at scene). When viewed from that correct perspective, the court should have considered that it was reasonable for Officer MacPherson to believe that Bryan heard his repeated commands to remain in the vehicle yet actively disobeyed them, all while remaining within close range of Officer MacPherson. *See supra* notes 8-10 and accompanying text (summarizing facts of Officer MacPherson's encounter with Bryan). This conduct, coupled with Officer MacPherson's understandable ignorance of the reasons for Bryan's highly agitated state and whether Bryan was armed, arguably supported Officer MacPherson's reasonable belief that Bryan's conduct constituted passive resistance and may have created an immediate threat. *See* 630 F.3d at 830 (considering Bryan's actions analogous with passive resistance if viewed solely from Officer MacPherson's perspective). Taken together, these circumstances, when evaluated properly under *Graham*, justify the use of intermediate force. *See* Graham v. Connor, 490 U.S. 386, 395-97 (1989) (recognizing police officers' right to use force when reasonable).

43. *See* 630 F.3d at 830 (stressing court's emphasis on interpreting events from perspective of Tasering victim); *see also supra* note 24 and accompanying text (discussing *Graham*'s requirement to defer to perspective of arresting officer). The Ninth Circuit's two additional components of the *Graham* test for analyzing the governmental interest in the use of force—the requirement that the officer consider less intrusive alternatives, and the failure to give a warning prior to the use of force—are clearly permissible under *Graham*'s "totality of the circumstances" framework, which gives courts flexibility to consider factors not explicitly included in *Graham*'s holding. *See supra* note 22 and accompanying text (emphasizing balancing test not "mechanical" and highly dependent on specific facts and circumstances of seizure); *supra* note 38 and accompanying text (discussing additional requirements Ninth Circuit precedent established). The court mischaracterized Officer MacPherson's alleged failure to "consider" less intrusive alternatives prior to discharging his ECD, because Officer MacPherson testified that there were no alternatives available, a conclusion that—correct or incorrect—could only be drawn after he "considered" the issue. *See* 630 F.3d at 831. Additionally, even if Officer MacPherson's conclusion about the availability of less intrusive levels of force was incorrect, no law existed compelling him to use the least intrusive alternative available, a fact noted in previous Ninth Circuit cases. *See* Forrett v. Richardson, 112 F.3d 416, 420 (9th Cir. 1997) (approving use of deadly force without exhausting all available alternatives). Officer MacPherson claimed that he warned Bryan prior to using the ECD, but the court dismissed this evidence as being belied by Officer MacPherson's other testimony, providing no explanation other than the fact that Officer MacPherson testified to commanding Bryan to remain in the vehicle. *See* 630 F.3d at 831. *Graham* instructs courts to view the facts from the perspective of the officer at the scene, so the issue of whether Officer MacPherson actually warned Bryan, if it is properly a factor to consider under a *Graham* analysis, should have been examined from that perspective, not necessarily in the light most favorable to Bryan. *See supra* note 24 and accompanying text (highlighting importance of deference to officer's perspective of events).

44. *See supra* note 4 and accompanying text (discussing Taser X26 model and its effects on victims). As the *Graham* court failed to explicitly define "intrusiveness" and did not require proof of a significant injury caused by the use of force, the *Bryan* court was consistent with *Graham* by continuing its practice of considering the injuries and discomfort caused by the use of force as the key component of its intrusiveness. *See supra* notes 31-32 and accompanying text (stressing importance of injuries caused in evaluations of

Court precedent because of the flexibility *Graham* affords courts to treat the extent of the injuries the use of force causes as a factor to be balanced when analyzing its intrusiveness.[45] Although Bryan suffered only minor external injuries to his arm and jaw as a result of being Tasered, the court correctly considered the internal pain the ECD caused and declined to require "significant" injuries as a prerequisite for successful § 1983 claims, which is consistent with *Graham*.[46]

Tasers and other ECDs are widely used by law enforcement agencies throughout the United States, but courts have inconsistently applied the Fourth Amendment's reasonableness standard to their use against passive resisters.[47] This is partly because the *Graham* Court failed to provide clear, "mechanical" rules regarding acceptable levels of force in different situations, and instead gave lower courts wide latitude to analyze these issues.[48] By departing from the clearest component of *Graham*'s holding—that courts examine the

"intrusiveness").

45. *See* Graham v. Connor, 490 U.S. 386, 395-97 (1989) (listing certain factors of balancing test and stressing fact-specific nature). The *Bryan* court's consideration of the nature and extent of injuries was an explicit component of *Glick*'s now-inapplicable due process standard, yet it seems to have survived in modern Fourth Amendment jurisprudence via *Graham*'s "intrusiveness" inquiry. *See* Graham v. Connor, 490 U.S. 386, 395-97 (1989) (highlighting factors courts should consider when evaluating reasonableness of any use of force). Although some disagree, it is difficult to imagine what the *Graham* Court meant by this term, aside from considerations of the severity of the force with regard to its consequences for recipients. *See id.* (setting forth "intrusiveness" inquiry). *But see* Brown, *supra* note 16, at 1274 (arguing *Graham*'s balancing test eliminated consideration of severity of injuries). The *Graham* Court observed that the "totality of the circumstances" should guide the inquiry, as well as "careful" consideration of all the facts and circumstances. *See* Graham v. Connor, 490 U.S. 386, 395-97 (1989) (noting flexibility of standard and its inconsistency with "mechanical" application). Thus, it strains the imagination to suggest that the nature and extent of the injuries caused by the use of force are not captured under such a comprehensive and flexible framework and, as such, the *Bryan* court was correct in considering the extent of the injuries the Taser X26 model caused as a component of its "intrusiveness" inquiry. *See id.*; *see also supra* note 31 and accompanying text (discussing painful injuries Taser X26 model caused).

46. *See supra* note 10 and accompanying text (describing pain Taser X26 model caused and Bryan's injuries from fall ECD caused). Because it undoubtedly caused pain, which is a reasonable factor to consider when evaluating the "intrusiveness" of any use of force under *Graham*, the *Bryan* court was correct in weighing that pain heavily in its analysis of the intrusiveness of the Taser X26 model as used by Officer MacPherson. *See* 630 F.3d at 825-26 (noting ECDs more than minimally intrusive and describing them as "intermediate" quantum of force); *see also supra* note 45 and accompanying text (discussing many facets of "intrusiveness" concept espoused in *Graham*); *supra* note 26 (highlighting studies purporting to show ECDs cause serious injury and death).

47. *See supra* note 26 (providing statistics about widespread use of ECDs by law enforcement agencies); *see also* Fabian, *supra* note 16, at 783-89 (discussing "complicated and murky process" of evaluating constitutionality of Tasering both active and passive resisters). Some scholars note that the precedent *Graham* provided can lead to "inconsistent rulings." *See* Fabian, *supra* note 16, at 788-89 (opining *Graham*'s fact-sensitive approach tends to "confound" excessive force analysis); *supra* note 27 and accompanying text (providing examples of justified and unjustified Taserings with little predictability among rulings relative to facts).

48. *See* Graham v. Connor, 490 U.S. 386, 395-97 (1989) (relying on fact-sensitive, nebulous inquiry); *see also* Fabian, *supra* note 16, at 774 (observing *Graham* test creates uncertainty and leaves "basic questions unanswered"); *supra* note 22 and accompanying text (stressing courts should not rely on broad characterizations when applying *Graham* test).

reasonableness of the use of force from the perspective of an officer at the scene—the *Bryan* court arguably created more confusion in this area of the law, making it more difficult for officers and citizens to calibrate their behavior in conformity with a predictable set of legal rules.[49]

In *Bryan v. MacPherson*, the Ninth Circuit considered whether the use of a Taser X26 model on an unarmed and bizarrely behaving suspect was excessive under the Fourth Amendment's objective reasonableness standard, as analyzed according to the balancing test the U.S. Supreme Court created in *Graham*. The court held that when the facts were viewed in the light most favorable to the suspect, the governmental interest in the use of an intrusive, "intermediate" level of force was not justified against an individual who posed no immediate threat and was not a violent criminal. However, by neglecting to thoroughly follow *Graham*'s explicit instruction to view the events preceding the use of force from the perspective of a reasonable officer in a tense situation, the *Bryan* court impermissibly expanded the Fourth Amendment's protections because it inaccurately evaluated the strong governmental interest in officer safety the use of the Taser X26 model represented.

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49. *See Graham*, 490 U.S. 386, 395-97 (1989) (emphasizing importance of analyzing conduct from perspective of officer in tense and rapidly evolving situations).