

Report and Recommendations of the  
Committee on Tasers  
to the  
Montpelier City Council

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# Executive Summary

## Introduction

A committee of Montpelier residents was appointed by the City Council and charged to recommend whether the Council should approve buying Tasers for the city police force, and if so, to recommend any conditions, limitations or standards that should pertain. The Committee met weekly from May through October, 2011, taking various forms of evidence on the subject.

The Committee recommends that Montpelier not authorize the purchase of Tasers for the police. The Committee further recommends that should the Council decide to authorize the purchase, certain prerequisites should be in place before a purchase is made and the weapon is deployed, in order to increase community safety and confidence.

## I. A General Orientation to Tasers

The Taser is a pistol-shaped weapon that fires two probes at a person (“probe mode”). The probes are connected to the Taser by wires, and when fired they embed in the person and deliver an electric charge of 50,000 volts. The electric charge is experienced as excruciating pain, full-body muscle contraction, and a loss of physical control. The Taser can also be pressed against the person (“drive stun” mode), which causes extreme pain without muscle contraction. The amount of electricity delivered by a Taser is 100 times that which causes intolerable pain in laboratory studies. Because the Taser probes are propelled by nitrogen (rather than by an explosive propellant), the device is subject to no government oversight or regulation. Further, the device has not been adequately studied to determine its effects on various human populations. The company refers to the device as “less lethal”. It is capable of causing death and serious bodily injury.

## II. Weighing the Risks against the Potential Utility of Tasers in Montpelier

Strong arguments are made on both sides of the question whether to buy Tasers for the Montpelier police. There are hypothetical situations when a Taser could be useful. But the Committee was charged with making an “assessment of need” for the weapon here, in Montpelier; and to do that the Committee focused on what really happens here, not what can be imagined. Many communities have adopted Tasers, in and out of Vermont; many have not. The threshold question for the Committee was whether Tasers are necessary, advisable and appropriate in Montpelier, based on this city’s unique circumstances.

As a guiding rule for this analysis, the Committee looked to the highly respected International Association of Chiefs of Police (IACP), which states, in a position paper on “Use of Force”:

The National Law Enforcement Policy Center does not advocate the use of any specific non-deadly force weapons. The appropriateness of any such weapon depends largely on the needs and desires of each police department in the context of

**the community in which it operates** and in accordance with the **service demands**

and **typical force scenarios** faced by its police personnel. . . . A critical element of that decision-making process is an assessment of the **limitations of each**

**device** or technique, and the **potential for its abuse or failure**. [Emphases added.]

Chief Facos has advocated for Tasers based on his belief that: 1) there have been frequent-enough incidents where Tasers would have been the best option; 2) there have been frequent incidents of assaults on police officers in Montpelier; and, 3) Tasers would lower worker compensation claims. Our research presents a different picture regarding each of these points.

### **1. How Safe Are Tasers? The Research and the Views**

The Taser company has maintained that the risk of death or serious injury from the device is extremely low. But after the company lost two multi-million dollar lawsuits, in 2008 and 2011, due to having insufficiently warned of the dangers of the device, it began to publish more realistic warnings about the device for its user-clients. In 2009, and again in 2010, the company warned users to curtail the use of Tasers to a very limited group of people, to very limited parts of the body, and to very limited situations. As a consequence of these new warnings, any report before 2009 on the dangers and utility of Tasers is outdated in that it likely underestimates the dangers of the device. In the new warnings:

1. The company now says that Tasers should not be used on people who are members of the high risk, or vulnerable, populations, including: those who are physically infirm, elderly, or pregnant; suffering from drug effects, alcohol effects, or cardiac disease; in mental health distress; and suffering one of a long list of pre-existing conditions. **Most of the subjects in typical “street” encounters are no longer safe targets for Tasers.**

2. The company now advises not to shoot at the chest, because of serious cardiac-related concerns. The company further warns not to shoot at the head, throat, chest/breast, known pre-existing injury areas, and eyes. "The preferred target areas are the lower center mass (below chest) for front shots and below the neck area for back shots." **Much of the body is now not safely targetable.**

3. The company now says that people especially at risk of serious injury or death are those who could fall and hit their heads, are on an elevated area, are restrained, are anywhere near a knife, are in motion, or are in water. **Many situations are no longer safe for Taser use.**

The number of deaths associated with Taser use is difficult to calculate. Amnesty International claims 349 such deaths from 2001-2008. Some regard this figure as low, others as high, but that the device has been a contributing cause of numerous deaths, and many more injuries, is undeniable. The company now concedes the risk of death associated with the device.

Single shots of Tasers are regarded by the U.S. Department of Justice as probably safe for "healthy, normal, non-stressed, non-intoxicated persons". But this healthy, normal population is not the one against whom the weapon is predominantly deployed. Most confrontational situations encountered by the police nationally, and virtually all encountered by the Montpelier police, involve either intoxicated or mentally distressed persons – two populations on whom the Taser company itself now warns against use of the weapon.

The company's new warnings likely understate the danger of the weapon. An analysis of various product safety studies that have been conducted on Tasers found that the likelihood of a study concluding Taser devices are safe was 75 percent higher when the studies were either funded by the manufacturer or written by authors affiliated with the company, than when studies were conducted independently.

When all the cautions, prohibitions and limitations are accounted for, it is apparent that a **Taser may only be discharged against a healthy, sober, rational, and clear-headed non-elderly adult who is not pregnant, running, nor in a dangerous environment, and that the device must be capable of being reliably aimed at the abdomen or the back.** All current limitations show that the Taser is now a weapon of extremely limited safe applicability.

Added to this is the fact that Tasers have a high potential for erroneous deployment, with the possibility of tragic consequences. That is because an officer in the field, managing difficult circumstances, simply cannot know enough to know if it is safe to use a Taser. How can he or she know if a suspect has a heart condition, is pregnant, is intoxicated, mentally ill or cognitively impaired, to name just a few of the vulnerable populations on which a Taser must not be used?

A further risk for safe deployment is the fact that the probes from a Taser cannot be aimed as precisely as a gun or pepperball launcher, because the Taser probes move further apart as the distance they fly increases, at the rate of one foot for every seven feet of travel. This difficulty in accurate aiming means it is exceedingly difficult in the field to avoid hitting the prohibited areas of the body. As the company admits: “[T]his is not a precision aiming device. There will be many times when people are hit in head, chest, and eye.”

Overall, the unknowability of the health and circumstances of the subject, coupled with the inherent dangers and imprecision of the device, put police in a stressful conundrum: In the rapidly-evolving and perceptually challenging circumstances of police-citizen confrontation, the police cannot know as much as they need to know about the subject to be able to feel reasonably confident that the device can be safely deployed. As the Maryland Attorney General’s Report states: “[A] use-of-force option that normally is not deadly, may in some instances be lethal even where the officer had no intention of using lethal force, did not believe lethal force was necessary, and used the force tool in a manner that normally would not increase the risk of death”. All the warnings about, and all the trainings in the use of, the weapon cannot remove this dilemma for the officer and this danger to the public.

## **2. Studies Indicate That Tasers: 1) Do Not Cause A Reduction in the Use of Lethal Force, 2) Do Cause an Earlier Resort to Higher Levels of Force, and 3) Are Frequently Recklessly Deployed in Violation of Accepted Standards.**

Taser proponents often assert that when the police have Tasers, the use of firearms goes down. Data from three departments in Arizona that serve 2.3 million residents show that this hypothesis is not true. This study showed no reduction in the use of firearms by police where Tasers were in the arsenal. It also showed that the presence of Tasers was associated with an earlier resort to a higher level of force against subjects.

This same conclusion was reached in a study of the Houston police. The Houston Chronicle reported in 2007 that “officers have shot, wounded and killed as many people as before the widespread use of the stun guns.” Thirty-five per cent of the Taser deployments led to no crime being charged.

And in a just-released study of Taser incidents in New York State, 60% of reported incidents using Tasers did not meet a criterion of aggression by the suspect or a risk of physical injury. More than 25% of Taser incidents involved shocks to the subject’s chest area, in spite of the explicit warnings by the company that targeting the chest can cause cardiac arrest. 85% of tased subjects were neither armed nor believed to be armed.

Thus, the available data indicate that Tasers do not result in a reduced resort to lethal force,

but that they do cause an earlier resort to higher levels of force where less severe force would suffice, thus exposing the citizenry to higher overall levels of force and attendant risks to life and health. The data also indicates an alarming lack of compliance with accepted standards governing the weapon's deployment. These data bear out the concern expressed in many studies and by numerous witnesses before the Committee, for the likelihood of "mission creep".

### **3. Are Tasers Right for Montpelier, in the Light of Our Own Data and Typical Force Scenarios?**

The Committee analyzed various factors and data that bear on the decision whether there is a bona fide need for Tasers in Montpelier.

**a) Use-of Force Reports.** The committee analyzed police reports that document any use of force by police from the latter part of 2008 through June of 2011. These reports reveal that no party, neither officer or suspect, received a single serious injury in any of these incidents. In addition, 12 of the 15 incidents involved vulnerable populations or flight, which constitute populations and a situation in which Tasers are prohibited except in the most extreme circumstances. All fifteen incidents were handled competently and effectively by the police with their present array of skills and weaponry. It is apparent that we do not have "typical force scenarios" here that would warrant the addition of Tasers to our police arsenal.

**b) Assault-on-Officer Reports.** The committee was initially informed by Chief Facos that Montpelier had eight assaults on officers in 2008, and that this was the highest number of any Vermont city or town that reported that statistic. During Committee hearings he reduced this number to five. The committee analyzed documentation of assaults on officers from 2009 to date. They showed that four of the incidents involved no contact or injury whatsoever. Of the remaining 11, some minor injuries occurred, primarily in the nature of scrapes and pain. All the assaults were in the nature of simple assaults, none was aggravated. Again, the officers were able to handle all the incidents efficiently without serious injury to either party with the skills and weapons they have. Importantly, *every one* of these assault-on-officer cases involved an individual who was in a vulnerable population on which a Taser should not be used except when lethal force would be justified.

**c) Different Communities, Different Choices.** At Chief Facos's suggestion, the Committee interviewed the deputy police chief of Burlington and the police chief of South Burlington, both being cities which employ Tasers. For a contrasting approach, the Committee interviewed the chiefs of the Bennington and Middlebury police forces, both being towns which considered but declined to buy Tasers. It is clear that Montpelier's size, crime rate, arrests and typical force scenarios more resemble those of Bennington and Middlebury than those of the "more combative" environments of Burlington and South Burlington. .

**d) A Deeply Divided Community.** The community of Montpelier appears deeply divided over the issue of Tasers. This is borne out by the nearly even split in public opinion on the issue in this year's Doyle Poll. It is also noteworthy that most of the public comment at both the City Council's and the Committee's hearings on the matter indicated strong opposition to acquiring the weapon. Introducing this weapon in such a divided community, where the necessity for it has not been shown, is both unwarranted and could be harmful to the police-community compact, the most important asset of law enforcement.

**e) The Workers Compensation Argument.** Chief Facos asserted that Tasers will lower our worker compensation claims. The Committee analyzed claims from 2008 to the present. These



showed only minor injuries from any cause, and just one claim that led to a loss of work time, stemming from an officer stubbing his toe while walking from a roadway to a sidewalk. There was no incident underlying these claims in which the deployment of a Taser would have been appropriate, or in which its use would have avoided even the minor injuries for which claims were made.

**g) The Expansion of Municipal Liability Exposure.** The effect of the Taser company's recent and extensive limitations on its use is that the manufacturer has insulated itself from the kind of liability exposure it suffered in its 2008 and 2011 litigation losses. This "move" by the manufacturer now removes it as a "deep pocket" litigation target for product liability, and leaves police officers, municipalities and their insurers now standing alone in lawsuits alleging negligent use, excessive force, and substandard training and supervision.

**h) The Real Costs.** The cost of the weapon itself is only one part of the total cost of using Tasers. The Committee brought this up with Chief Facos, upon which he agreed to calculate the cost of the Taser units plus the prudent and necessary items mutually agreed upon, but the Chief did not produce such an estimate. Those agreed items and expenses include, for example, Crisis Intervention Team training, body cameras, defibrillators and data storage. The cost of these items is far above the cost of the units themselves. Any further consideration of Taser purchase by the Council should be preceded by a full and detailed calculation of all related costs, so that everyone, including taxpayers, can understand the true investment this weapon would require, in light of competing city needs and priorities.

### **III. The Police Department Has Not Proposed a Prudent and Protective Policy Regarding Tasers, Raising the Prospect of the Introduction into the Community of a Poorly-Regulated New Weapon.**

A clear and specific use-of-force policy is in everyone's interest, citizens and police alike. As stated by the International Association of Chiefs of Police:

Police administrators should not be hesitant to develop comprehensive, strong, and definitive policies and procedures for fear that they may prove prejudicial to a future court assessment of an officer's conduct. In fact, **failure to adopt a use-of-force policy in clear and unequivocal terms will almost certainly have more serious consequences for the officer's agency and employing jurisdiction.** [Emphasis added.]

The policy that has been proposed by Chief Facos is the model policy provided by the Vermont League of Cities and Towns (VLCT), the insurance company which ensures Montpelier. This policy is primarily written to protect insurance companies from financial liability, not to provide sound police guidance, nor citizen protection from low standards. The policy uses vague and non-mandatory language, poorly defines its terms, offers a confusing and low standard of deployment for Tasers, and purports that citizens have no legal right to sue based on violations of the policy. The insurer's own representative noted that the company does not expect a police force to put their model policy "directly on the shelf", but rather to modify it to fit the community. Unfortunately, this model policy has been taken whole-cloth by Chief Facos, and not modified by him to fit the circumstances and values of this community.

Contrary to his formal request for Tasers for use in "violent encounters", Chief Facos has,

in his proposed policy, advocated the lowest Taser deployment standard used anywhere— that of “active resistance”, which can be satisfied by as little as a “stiffening” “hunching” or pulling away. The standard for use of a Taser here should be “a threat of imminent serious bodily injury,” otherwise known as a lethal force standard. This is the standard that is recommended by several of the organizations that have studied Tasers, as well as the several human rights-oriented attorneys who spoke to the Committee. Any lower standard would be an invitation to the abusive deployment of the weapon that the public most fears, undermining the police-community relationship.

A high deployment standard is also important in light of the fact that our Second Circuit Court of Appeals, which presides over federal court appeals from Vermont, has shown a disturbingly unprotective view toward citizens alleging excessive force by police. This has recently been demonstrated when the court found no constitutional violation in the recent case of the Brattleboro protesters who were tased while passively protesting at a development site. It is a case that all police witnesses, including Chief Facos, said was wrongly decided, and an attitude on the part of the court that Chief Facos conceded is of “concern” to him.

The Chief’s proposed policy would place Tasers on the use-of-force continuum on a par with pepperballs. This is too low in light of the potential lethality of the weapon. Tasers should be located immediately below firearms on the continuum, to recognize their dangerousness, to discourage abusive or premature deployment, and to protect the public.

#### **IV. In Light of the Lack of Objective Showing That Tasers Are Necessary Here, There are Better, More Productive Ways to Spend the Money To Advance Public Safety.**

The City is facing difficult choices, in light of the condition of its infrastructure, schools, and tax base. Given that the evidence demonstrates a wish for Tasers based on hypothetical scenarios but not a real and present need for the device, any further expenditure for law enforcement should be directed toward more effective remedies.

We recommend that Crisis Intervention Team training be required as part of Montpelier police training. Such training in handling mental health issues goes far beyond the Act 80 training that every Montpelier Police Department employee now receives. A strong majority of Committee witnesses, including most of those from the field of mental health, advocated for CIT training to enable police to identify mental health issues and de-escalate difficult encounters. The FBI is a strong proponent of the training, and Chief Facos endorses the idea.

An alternative to CIT training is the funding of a staff position of a police social worker. This person would be trained in crisis intervention techniques, and could accompany officers to a disturbance or be called there quickly in order to de-escalate a confrontational situation and decrease the likelihood of violence.

#### **V. Should the City Council Approve the Purchase of Tasers, The Following Preconditions To Their Purchase and Use Should Be Adopted.**

Should City Council, despite the Committee’s recommendation, approve the purchase of Tasers, it is critical that high standards, strict safety measures, extensive training, and methods for heightened police accountability be implemented before such purchase and deployment. The

following, culled from the major studies of Tasers, are essential preconditions to their acquisition and deployment by the Montpelier Police Department.

**1. Require Crisis Intervention Team training:** The Committee further recommends this training for our officers even if Tasers are not added to the police arsenal.

**2. Create a police social worker position in the police force.**

**3. Require and develop in-depth police training in the use and dangers of the device:** The major research regarding Tasers expresses virtually universal skepticism regarding the company's assurances of safety. There is likewise a universal recommendation that local police forces not rely solely on the company's in-house training in the device, but rather supplement it with more in-depth and objectively arrived-at training standards. Officer certification in Taser use should also include personal exposure to a full-force and full-duration( five-second) discharge.

**4. Adopt an "imminent threat of serious bodily injury" deployment standard:** Tasers should be subject to an "imminent threat of serious bodily injury" deployment standard. The lower "risk of harm" standard is more atmospheric than substantive, does not restrain abusive or premature deployment, and is insufficiently protective of the public.

**5. Position Tasers immediately below firearms on the force continuum.**

**6. Equip officers with body cameras:** Police must be equipped with body cameras, for the protection they offer to everyone involved and to the City itself. Body cameras require policy that requires they be "on" at the beginning of any "street" encounters. Chief Facos has no objection to equipping officers with body cameras.

**7. Carry defibrillators in cruisers and require officer training and competency in their use:** Tasers are especially dangerous for individuals with heart conditions or who are highly agitated, including the intoxicated and the mentally ill. Heart complications, such as ventricular defibrillation, are a serious concern and a prominent suspect in Taser-related deaths. The Committee and Chief Facos agree with the wisdom of placing a defibrillator in every cruiser. Officers must be trained and shown competent in its use.

**8. Collect and preserve data indefinitely:** The Committee believes that it is imperative that Taser-related data be preserved indefinitely. Chief Facos agrees with this.

**9. Add pepper foam to the police arsenal, and consider other less lethal alternatives to Tasers:** The Police arsenal should include pepper foam. This weapon was specifically developed to offset one of the limitations of pepper spray, being that its gasses can be drawn into a ventilation system. The Committee also recommends the police department investigate other, non- and relatively less-lethal weapons, such as projected bean bags, foam batons, and the newly-developed police devices that immobilize by means of intense light.

**10. Create a Citizen Review Board:** The Committee strongly recommends, and Chief Facos believes could be beneficial, the creation of a Citizen Review Board, to review use-of-force incidents. Such a board would not only be a helpful investigatory tool for the city, but would also help maintain or improve police-community relations, especially in light of the deep division of public opinion regarding Tasers. The Committee recommends such a board regardless of whether Tasers are acquired. This board would need sufficient resources, unrestricted access to information, and meaningful powers, for it to have credibility in the community.

**11. Prohibit drive stun mode:** The Committee recommends the prohibition of the device in drive stun mode, to prevent both the aggravation of an encounter and to make less likely the potential for abusive deployment of the device.

**12. Prohibit tasing a fleeing or running subject:** All major studies prohibit deploying Tasers on fleeing or running subjects, due to the increased risk of injury or death.

**13. Use specific, descriptive and mandatory language in written policy:** The proposed VLCT policy is replete with suggestive, non-mandatory language that does not protect the officer or the public. Terms such as “should”, “it is recommended”, “should consider”, and similar non-mandatory language should be replaced with mandatory terms (“must”, “shall”) when possible. The lack of such language fails to guide police and is an invitation to municipal liability.

**14. Include in any policy the current policy’s humane and cautious principles regarding an escalating use of force:** Our current Use of Force policy, on page one, contains several common-sense, humane and cautious principles that the proposed VLCT policy omits. These principles require using escalating force, and only that amount of force which is necessary to control the situation or persons. These principles should be incorporated into any proposed or future use-of-force policy, to protect the public and limit potential city liability.

**15. Fully specify all populations and circumstances relevant to limitations on Taser deployment:** The itemizing of the prohibitions listed earlier in this report, *including the cognitively disabled*, should be set out with specificity in any written use of force policy.

**16. Require warnings when possible before deployment.**

**17. Prohibit use of a taser as a pain compliance weapon or general force tool.**

**18. Prohibit multiple shots and continuous or prolonged exposure except where lethal force would be justified:** Taser shocks should be as brief as possible. The death rate of subjects rises when multiple or continuous shocks are used..

**19. Prohibit Taser use on subjects in restraints except where lethal force would be justified.**

**20. Avoid impairment of respiration:** Respiratory complications are associated with Taser use. Following Taser deployment, an officer must not employ a restraint method that could

impair a subject's respiration.

**21. Provide emergency medical care immediately after *all* taser use.**

**22. Monitor tased subject's health closely while in custody:** Studies indicate that the in-custody death rate rises after the introduction of Tasers.

**23. Reporting, supervision and monitoring:** All Taser incidents must be reported on a use-of-force form extensively detailing events leading up to and following the discharge.

**24. Supervisors should respond to the scene of any Taser deployment as soon as possible.**

**25. Conduct rigorous investigation following each deployment:** A supervisory-level or higher inquiry must be conducted to determine the appropriateness of every deployment and whether there was strict adherence to policy and training. External investigation, by Citizen Review Board or otherwise, occur when a subject dies or is seriously injured, when there has been a substantial deviation from policy or training, when the subject is a restrained, or when a Taser is deployed against a member of a vulnerable population as defined in this report.

**26. Monitor Taser use by the agency:** The police force should use a tracking database that is capable of maintaining detailed information as to each device and each deployment, can reveal the circumstances of every Taser deployment, and can show the extent to which officers are relying on the device compared to other forms and methods of control. This information and data must be available to the public.



# Report and Recommendations

## Introduction and Conclusions

In the spring of 2011, the Montpelier City Council appointed six residents<sup>1</sup> to a committee to investigate and make recommendations regarding an issue which has been before the Council for several years – whether to grant the request of the Police Chief for funding to purchase fourteen electronic control devices (“Tasers”, “ECWs” [electronic control weapons], “ECDs” [electronic control devices], “stun guns”) for distribution to and use by officers in the police force. The appointees were selected from city residents who volunteered for the task. The Committee met weekly from May to November of 2011, hearing from experts, community leaders, and members of the public; reviewing numerous research and reports on Tasers; reviewing various video testimonies on the subject; and interviewing others with relevant information. The Committee deeply appreciates the scores of individuals who gave of their time to inform the Committee on the issues, by direct testimony, telephone interview, email and teleconference. The Committee is especially appreciative of the many Tuesday evenings Chief Facos devoted to this effort. Although this report reflects some differences of view between the Committee and the Chief, we were fortunate to have his strong advocacy a part of our process, and we are fortunate to have his dedicated leadership of the Montpelier Police Force.

The Council’s charge to the Committee was that it recommend:

- 1) whether the Council should approve the purchase of Tasers by the Police Department, and
- 2) if so, under what conditions, limitations and standards.

This report answers those questions in that order, followed by certain specific recommendations. It represents the views of four of the five Committee members. A separate minority report will accompany this one. The Committee concludes:

Recommendation 1: Montpelier should not purchase Tasers for the police.

Recommendation 2: Should the City Council authorize the purchase of Tasers notwithstanding the Committee’s recommendation, then certain conditions and prerequisites should be implemented prior to purchase and deployment in order to increase safety and community confidence.

## I. A General Orientation to Tasers

The Taser (the most common brand of ECW) is a pistol-shaped, hand-held, battery-

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<sup>1</sup> One Committee member resigned in September.

powered device that can be either fired at or pressed against an individual, discharging 50,000 volts of electricity into the subject. In its “probe” mode, two barbed darts are fired at the subject, typically from a distance of up to 21 feet. The darts are connected to the base unit by electrical wires. When both barbs successfully embed in the subject’s body, the Taser, wires and subject’s body complete an electrical circuit, causing a discharge of electricity into the subject. Each electrical discharge lasts for a predetermined five-second interval or, at the officer’s choice, for a continuous, indefinite length of time. In the probe mode the device causes excruciating pain, full-body muscle contraction, loss of physical control, immobilization and falling. In its “drive stun” mode, the base unit makes direct contact with the body. The electrical shock in this mode does not cause muscle contraction and physical immobilization; rather, it is strictly a pain-compliance device in this mode, inducing extreme pain continuously for as long as the device makes direct contact with the person’s body. The Police Executive Research Forum has warned that Tasers used in this manner “may have limited effectiveness” – it can cause the exacerbation of a confrontational situation – and so has discouraged police forces from using Tasers in the drive stun mode, although some forces still permit it, and the company still endorses use of Tasers in this manner.

There are misconceptions as to the force of the electric charge of a Taser.<sup>2</sup> The Taser company publishes the assertion that the X26 model, which is the one sought by Chief Facos, delivers an *average* current of 2.1 milliamps. However, a Taser doesn’t deliver its charge to the subject as an average, but rather as a series of pulses, which series is made possible by a capacitor that, like a bucket, stores power for each pulse. Thus, tased individual experiences the actual “delivered charge”, which for each pulse is approximately 100 micro-coulombs. To put this in perspective, laboratory experiments of human subjects show that intolerable pain is felt at 1.0 micro-coulombs.

In their original form, the Taser relied on a gunpowder-fired probe cartridge, and because of that explosive propellant the device was subject to federal regulation and oversight by the Bureau of Alcohol, Tobacco and Firearms and Explosives. However, since 1994 the the Taser company has manufactured the cartridge with nitrogen as the propellant, thereby removing the device from all meaningful government oversight and regulation.<sup>3</sup> It is conceded by all interested parties, including the company, that the device has not been adequately studied to determine its effects on various human populations.

Tasers are commonly referred to as “less lethal” weapons, indicating they are considered to have less potential lethality than a firearm; they are nevertheless capable of causing death and

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<sup>2</sup> The Committee’s attention was called to this issue by John Burton, a plaintiff’s attorney from Pasadena, California, who won the first successful verdicts against the Taser company, in 2008 and 2011. The explanation of the way the Taser functions electrically, which follows, is taken from Appendix A of the Braidwood Inquiry, a Canadian government study of that country’s use of Tasers, conducted following the 2007 death of a man who was tased at the Vancouver Airport.

<sup>3</sup> The Consumer Product Safety Commission has the legal power to oversee the device, but has conducted no testing of it, nor offered any opinion as to its safety.



serious bodily injury.

## II. Weighing the Risks against the Potential Utility of Tasers in Montpelier

Strong arguments are made on both sides of the question whether or not it would be helpful and prudent to add this weapon to the Montpelier police arsenal. On the one hand is the forceful position that both citizens and officers are protected by Tasers, because they may handle some police-citizen encounters in a manner that controls a difficult situation and subdues a violent individual without serious injury to either subject or officer, or without the resort to a firearm. A companion argument by proponents is that Tasers would lower police workers compensation claims. On the other hand, strong arguments are made that the device is unnecessary here, given: the nature of our crime statistics, the proven ability of the police to handle confrontations effectively and safely with its present skills and weaponry, the inherent dangerousness of the weapon, the ease with which the weapon can be abused, the temptation to make early resort to a Taser (“mission creep”) rather than rely on traditional non-lethal weapons and crisis intervention methods, the true costs of the weapon beyond simply its purchase price, and the effect acquiring this device may have on police-community relations.

It is indisputable that there are hypothetical situations of police-citizen confrontation in which Tasers might be helpful as a control device. In his testimony before the Committee, Police Chief Tony Facos offered frequent descriptions of such possibilities, and even had he not, it takes little effort to imagine such situations occurring anywhere, including here. But if simply being able to imagine and describe dangerous situations where a Taser could be useful were a sufficient and determining factor in the City Council’s decision-making, this Committee would never have been appointed. The City Council, like many around the country, has wrestled with this issue. This Committee was appointed because this decision is far more complex, difficult and multi-factorial than simply whether a situation could arise here in which a Taser could be useful. The complexity of this decision is reflected in the fact that while many cities, from Los Angeles to Chicago and Vermont communities such as Burlington and Barre and Brattleboro and St. Albans have adopted Tasers, many others, from San Francisco to Memphis and Vermont communities such as Bennington, Middlebury, Waterbury, Barre Town and the Washington County Sheriff’s Department<sup>4</sup>, have not.

As will be seen below, the Committee studied the major research and reports nationwide that have been conducted on Tasers. However, the relevant and overarching question that this

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<sup>4</sup> Sheriff Hill of the Washington County Sheriff’s Department was interviewed by a member of the Committee on July 14, 2011 by telephone. He said that although he considers the Taser an “excellent tool”, he has concluded: “I haven’t felt the need for them here”. The typical police-citizen encounter by the Sheriff’s Department involves vehicle stops such as for drunken driving, as well as the transport of prisoners, mental health commitments and juveniles – precisely the typical police-citizen scenarios that generate the use of force on the part of the Montpelier Police Department, as demonstrated by a survey of Montpelier police incident reports, set out *infra*. The Sheriff’s deputies are equipped with the same weapons as the Montpelier police officers and, like the Montpelier police, they have not had many work injuries, and no significant ones, from forceful encounters. *See infra*.

report seeks to answer is not how popular Tasers are among law enforcement agencies around the country or in Vermont, nor whether they could be beneficial in certain extreme circumstances, but rather whether they are advisable and appropriate here, in *this community*, at *this point in time*. As stated by the Maryland Attorney General’s Task Force on Electronic Weapons (“the Maryland Report”):

In deciding whether to add ECWs as a force option, the agency and community must recognize that the inclusion of ECWs will have an impact on an agency’s use-of-force program beyond simply adding a new force option. Agencies and communities that fully consider the many facets of adding ECWs will be in a better position to determine if the tool is right for their community.<sup>5</sup>

With that in mind, it will be seen that this report pays special attention, and gives special emphasis, to our own unique circumstances as a community. A helpful framework to begin that discussion comes from the well-respected International Association of Chiefs of Police (“the IACP”). In a position paper titled “Use of Force”, the IACP’s National Law Enforcement Policy Center states:

The National Law Enforcement Policy Center does not advocate the use of any specific non-deadly force weapons. The appropriateness of any such weapon depends largely on the needs and desires of each police department in the context of **the community** in which it operates and in accordance with the service demands and **typical force scenarios** faced by its police personnel. . . . A critical element of that decision-making process is an assessment of the **limitations of each device** or technique, and the **potential for its abuse or failure**. [Emphases added.]<sup>6</sup>

The Committee made use of this standard as a lodestar in assessing the need and appropriateness of acquiring this weapon, although, as shown below, other factors also entered into the equation. Chief Facos, both before City Council and the Committee, proposed that there exists a strong need for Tasers here. He based his view on what he believed was the safety of the weapon, as well as what he asserted was a history of frequent incidents when the police need to subdue combative subjects in circumstances where a Taser would have been the preferred and prudent force option. He also based his view on what he believed were frequent incidents of assaults on

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<sup>5</sup>Maryland Report at 17. This is the most thorough of the various studies on Tasers, and the City Council is encouraged to read it for a foundational understanding of the subject. Other studies that the Committee found especially competent are the reports of: the American Civil Liberties of California, the National Institute of Justice, Amnesty International, the International Association of Chiefs of Police, the Police Executive Research Foundation, the American Civil Liberties Union of Arizona, and the Braidwood Inquiry (Canada). All are referenced in the bibliography following this report.

<sup>6</sup> Even the Taser company, which has to be regarded as highly motivated by a pecuniary interest to see its product disseminated as widely as possible, mirrored this individualized community approach when it stated, in its training manual: “Each agency is responsible for creating their own use-of-force policy and determining how Taser devices fit into their use-of-force matrix based on legal and community standards”.

police officers here. Last, he based his view on his belief that Tasers would lower police workers compensation claims. The Committee investigated each of these claims by doing extensive research into the safety and limitations of the weapon. The Committee also requested, and received, the department's use-of-force reports and assault-on-officer reports for the past four years, and the department's workers compensation documents for the last several years. This research, and these documents, present a different picture.

### **1. How Safe Are Tasers? The Research and the Views**

The Taser company has steadfastly advocated the safety of the device, maintaining that the risk of death or serious bodily injury is extremely low. Over the nearly two decades since the device has been manufactured in its current general form, the company has assured potential users that Tasers present no significant safety concerns. When it could not achieve an involuntary dismissal of a lawsuit, the company has, over much of the last decade, avoided judgments against it by settling such cases out of court, generally with a confidentiality agreement regarding the amount of the settlement. For that reason it could boast, somewhat disingenuously, that it had never lost in court. That stance changed after 2008, when a federal court jury held the company liable for approximately \$6.2 million in the case of a man who was tased five times by five officers while effecting his arrest.<sup>7</sup> A second jury verdict against the company, for \$10 million, was awarded for the 2008 death of a 17 year-old boy, from cardiac arrest, after he was tased in a Charlotte, North Carolina convenience store for 37 continuous seconds and then an additional 5 seconds.<sup>8</sup> These verdicts were based on the failure of the company adequately to warn of the inherent dangers of the weapon.

On the heels of these verdicts, the company began to publicly recognize more fully the dangerousness of the device, in a series of warnings and alerts beginning in 2009.<sup>9</sup> Technically, the company had made an earlier recognition of the possibility of dangerousness when, in a Form 10-K Annual Report for the year 2005 which it filed with the Securities Exchange Commission, it stated its product "may result in serious, permanent bodily injury or death to those involved. Our products may cause or be associated with these injuries". But the 2009 and 2010 post-verdict warnings by the company went far further and published them in detail to its user-clients. In its September 30, 2009 training alert, it warned:

**Physiologic or Metabolic Effects.** The ECD can produce physiologic or metabolic effects which include, but are not limited to, changes in: acidosis; adrenergic states; blood pressure; calcium, creatine kinase ("CK"); electrolytes (including potassium), heart rate and rhythm; lactic acid; myoglobin; pH;

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<sup>7</sup> *Heston et al. v. City of Salinas, TASER International*. Post trial, the court omitted the jury's \$5.2 million award of punitive damages but it retained the compensatory damages and upheld the verdict.

<sup>8</sup> *Fontenot v. TASER International, Inc.* The City of Charlotte avoided trial by settling with the plaintiff for over \$600,000.

<sup>9</sup> These new warnings require a reevaluation of earlier reports and research that may underestimate the dangers associated with Tasers.

respiration; stress hormones or other biochemical neuromodulators (e.g., catecholamines). . . Adverse physiologic or metabolic effects may increase risk of death or serious injury.

**Higher Risk Populations.** ECD Use on a pregnant, infirm, elderly, small child, or low body-mass index (BMI) person could increase the risk of death or serious injury. ECD Use has not been scientifically tested on these populations. The ECD should not be used on members of these populations unless the situation justifies possible higher risk of death or serious injury.

**Physiologically or Metabolically Compromised Persons.** Law enforcement personnel are called upon to deal with individuals in crises that are often physiologically or metabolically compromised and may be susceptible to arrest-related death (“ARD”). The factors that may increase susceptibility for an ARD have not been fully characterized but may include: a hypersympathetic state, autonomic dysregulation, capture myopathy, hyperthermia, altered electrolytes, severe acidosis, cardiac arrest, drug or alcohol effects (toxic withdrawal, sensitization to arrhythmias, etc), alterations in brain function (agitated or excited delirium), cardiac disease, pulmonary disease, sickle cell disease, and other pathologic conditions. These risks may exist prior to, during, or after law enforcement intervention or ECD Use, and the subject may already be at risk of death or serious injury as a result of pre-existing conditions, individual susceptibility, or other factors. In a physiologically or metabolically compromised person any physiologic or metabolic change may cause or contribute to death or serious injury. Follow your agency’s Guidance when dealing with physiologically or metabolically compromised persons.

As to people in serious mental health and drug-related distress, i.e., subjects who are “exhibiting symptoms of exhaustion, distress or agitated/excited delirium”, the company stated the following month: “These subjects are at significant risk of arrest-related death.” Also new was the warning: “The primary risk of injury or death during ECD deployment is risk related to falls.” Even these cautions by the company must be taken with a concern for possible underestimation of the dangers of the device, in light of a 2011 scientific study of 50 Taser-related research studies that concluded: “These data demonstrate that studies funded by Taser International or written by authors affiliated with the company are nearly 18 times more likely to conclude that Tasers are safe. Research supported by Taser International may thus be significantly biased in favor of Taser safety.”<sup>10</sup>

Earlier in 2009, the American Medical Association had concluded:

Although [Taser] activation in normal volunteers appears to be very safe, these studies do not sufficiently reproduce the risks of Taser exposure among criminal

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<sup>10</sup> Azadani, MD, Teng, MD, et al., “Funding Source and Author Affiliation in Taser Research Are Strongly Associated with A Conclusion of Device Safety” (Am Heart J 2011; 162:533.7)

suspects, in whom coexisting medical and psychiatric conditions, alcohol and drug use, and other factors are often present. Human volunteers report that [Taser] exposure is an extremely unpleasant experience, inducing both physiologic and psychological stress. Some experimental studies have begun to address these confounding factors . . . Such studies cannot fully evaluate the responses of individuals who are confrontational, have taken drugs, or are desperate for escape, highly agitated, and combative.<sup>11</sup>

The previous year, a report by Amnesty International identified approximately 350 Taser-proximate deaths since 2001, noting that “most of the individuals who died were agitated, disturbed and under the influence of drugs, and/or had underlying health problems such as heart disease.”<sup>12</sup> Some reviewers found this an exaggerated figure, others put the correct number at 459. While Amnesty did not claim there was a proven direct causal relationship in each of these cases between Tasers and the deaths that followed deployment (such causal relationship being difficult to determine by a medical examiner), most research reports on Tasers have inferred a causal relationship as to a significant portion of those deaths. In many of these deaths, cardiac arrhythmia is a prime suspect. A 2006 study of people who died following tasings found that 54.1% suffered from cardiovascular disease and 78.4% showed the presence of illegal drugs.<sup>13</sup> As stated in Canada’s Braidwood Inquiry: “Although there is often a lack of physical evidence on autopsy to determine whether arrhythmia was the cause of death, if a person dies suddenly and from no obvious cause after being subjected to a conducted energy weapon, death is almost certainly due to an arrhythmia”.<sup>14</sup>

The Maryland Report took a more nuanced approach to arrive at the same conclusion, saying: “[T]he Task Force did not determine that the medical community has concluded that the ECW’s electrical impulse causes a lethal arrhythmia. However, the Task Force did find sufficient consensus that secondary factors from the restraint and incapacitation caused by an ECW (e.g., a fall or stress caused by being shocked) may cause serious injury or death.”<sup>15</sup> The Braidwood Inquiry goes on to summarize other health hazards from use of Tasers:

The risk of ventricular fibrillation increases significantly in several circumstances – if the subject has cardiovascular disease or in thin subjects who have a smaller skin-to-heart distance. The intense pain, coupled with anxiety and stress, can cause an outpouring of adrenaline that can stimulate the heart and lead to dangerous arrhythmias. Skeletal muscle contractions can lead to acidosis,

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<sup>11</sup>“Use of Tasers by Law Enforcement Agencies”, June, 2009, available at [www.policeone.com/policeone/data/pdfs/Taser\\_eed\\_resolution.pdf](http://www.policeone.com/policeone/data/pdfs/Taser_eed_resolution.pdf) (“AMA report”)

<sup>12</sup> “‘Less Than Lethal’? The Use of Stun Weapons in Law Enforcement”, (hereafter, “Amnesty Report”), Dec. 2008, available at <http://www.amnesty.org/en/library/asset/AMR51/010/2008/en/530be6d6-437e-4c77-851b-9e581197ccf6/amr510102008en.pdf>.

<sup>13</sup> Strote, J., et al., *Taser Use in Restraint-Related Deaths*, Prehospital Emergency Care, Vol. 10, No.4, pp. 447-450 (2006).

<sup>14</sup> “Executive Summary and Recommendations”, at 6. Available at <http://www.braidwoodinquiry.ca/report/>

<sup>15</sup> Maryland Report at 10-11.

which affects the electrolyte balance, making the heart more susceptible to ventricular fibrillation. Also, an electrical current coinciding with the T-wave peak may induce fibrillation with a threshold 25 or more times lower than at other times in the heartbeat cycle. Finally, there are several risks associated with deployment against a subject who is wearing an implanted pacemaker or defibrillator.

Several researchers have raised concerns that the electrical current from a conducted energy weapon may induce spasm in the muscles of respiration (diaphragm and intercostal muscles), interfering with the subject's ability to breathe. This could, in the case of prolonged deployment, lead to acute respiratory failure or acidosis. The body's natural response to acidosis is to hyperventilate, which can be frustrated if the subject is lying face down, if pressure is applied to the chest or neck area, or the officer's attempt to restrain the subject results in the subject struggling. The weapon's electrical current might also cause muscle damage (rhabdomyolysis), which can lead to cardiac arrest or acute renal (kidney) failure.<sup>16</sup>

The above shows the approach of those reports on Tasers that are at the more cautious end of the spectrum. A more permissive approach is that of the National Institute of Justice ("the NIJ Report"), an agency within the U.S. Department of Justice, which states: "There is no conclusive medical evidence in the current body of research literature that indicates a high risk of serious injury or death to humans from the direct or indirect cardiovascular or metabolic effects of short-term CED exposure in **healthy, normal, nonstressed, nonintoxicated persons**" (emphasis added).<sup>17</sup> What is important about this statement is that its population-restricting qualifiers have the effect of excluding most of the actual individuals and circumstances of the vast majority of police-citizen confrontations. As the IACP notes, these are "the very individuals most likely to come into contact with the police."<sup>18</sup> The NIJ made these population restrictions because it found that Tasers contribute to stress that can exacerbate blood pressure and heart rhythms, and so pose special dangers for the intoxicated, mentally ill and individuals with an underlying medical condition.<sup>19</sup> It also concluded that there is simply too little known about this, because the human studies to date have been small, and only involving healthy subjects, "so of questionable value".<sup>20</sup> Notwithstanding the cautions by the NIJ and others against deploying against vulnerable populations, one study, of 1183 tasing cases, found that alcohol and drug intoxication were present in 49.5% of the cases.<sup>21</sup> Similarly, an October, 2011 report by the New York Civil Liberties Union found that 40% of Taser incidents in that state involved vulnerable

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<sup>16</sup> Braidwood Inquiry at 6-7.

<sup>17</sup> "Study of Deaths Following Electro Muscular Disruption", NIJ Special Report, May 2011, at viii.

<sup>18</sup> IACP National Law Enforcement Policy Center, *Electronic Control Weapons: Concepts and Issues Paper*, August, 2005, at 4.

<sup>19</sup> NIJ Report at 18-20.

<sup>20</sup> NIJ Report at 20.

<sup>21</sup> Bozeman, W. et al., Safety and Injury Profile of Conducted Electrical Weapons Used by Law Enforcement Officers Against Criminal Suspects, *Ann. Emerg. Med.* (2008), at 4.

populations.<sup>22</sup>

Various studies document not only the risks to life from Tasers, but also various injuries due to them, some being complications of pre-existing injuries and conditions, and many others due to the subject collapsing forward onto the embedded probes during the full-body muscle contraction. And there are also indications of Tasers causing cognitive deficits. An Illinois study of tased and non-tased police officers concluded: “Profile analyses compared neuropsychological performances and found significant differences in profiles of Tased and non-Tased participants for the domains of processing speed, attention, memory, and executive function.”<sup>23</sup>

Most police encounters, and virtually all that occur in Montpelier, involve (as will be shown below) either intoxicated or mentally distressed persons, both being vulnerable populations. It can be said that Tasers are deemed relatively safe *except* with regard to the individuals on whom they are primarily used. The question of whether to acquire and deploy Tasers in Montpelier raises serious life and health concerns for the subjects in almost all cases that comprise Montpelier’s “typical force scenarios”.

## **2. The Widely-Recognized Dangers, Cautions and Limitations Pertaining To the Use of Tasers**

The IACP policy, *supra*, sets out a further criterion in deciding whether to acquire a weapon: “A critical element of that decision-making process is an assessment of the limitations of each device or technique, and the potential for its abuse or failure.” Every report on the Taser, whether from law enforcement interests or from civil and human rights organizations or from the Taser company itself, recognizes the dangerousness of Tasers, and proscribes its use in certain situations and locations, against certain classes of individuals (“vulnerable populations” or “at risk” individuals), and on certain parts of the body. Barring an emergency where there is not other way to prevent death or serious bodily injury, it is forbidden to use a Taser on these individuals.<sup>24</sup>

- elderly
- children
- physically frail or infirm
- alcohol- or drug-intoxicated
- serious mental disturbance
- hearing impairment or cognitive disability<sup>25</sup>

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<sup>22</sup> “Taking Tasers Seriously”, available at [http://www.nyclu.org/files/publications/nyclu\\_TaserFinal.pdf](http://www.nyclu.org/files/publications/nyclu_TaserFinal.pdf)

<sup>23</sup> See Bagley, A., “The Neurological Effects Associated with Taser Administrations” (2008).

<sup>24</sup> This list of limitations is culled from the major studies of Tasers and from the company’s own warnings.

<sup>25</sup> The intoxicated and mentally ill are widely recognized among the populations especially vulnerable to death or serious bodily injury from Tasers. Tina Wood, a representative of Disability Rights Vermont, a non-profit designated by the governor of Vermont to assure compliance with the federal disability rights acts, made the important point to the Committee that many of the disabled are similarly vulnerable, due to conditions such as cognitive impairment, deafness, and language processing problems. The Committee agrees with the Coalition, and so includes the disabled among the categories of vulnerable populations.

- cardiac condition, pacemaker, seizures, sickle cell, pulmonary disease, or other significant disease; also osteopenia, osteoporosis, spinal injury, previous muscle, disc, ligament, joint, bone or tendon damage or surgery
- pregnant
- thin physique
- highly agitated (“excited delirium”)<sup>26</sup>

Forbidden circumstances regarding a subject include:

- flight or running
- operating a motor vehicle or machinery
- near flammable substance
- in water or mud
- standing on a height (ledge, roof, etc.)
- restrained, handcuffed, incapacitated or immobilized

And most of the frontal area of the body is forbidden for targeting, including:

- head
- face
- neck
- chest
- groin and genitals

As a practical matter, these limitations and prohibitions leave only the belly (“lower center mass”) and legs as frontally targetable areas of the body. The back of an individual is considered a much safer target zone than the front. However, in light of the proscription against using a Taser on a running/fleeing person, it is highly unlikely that an officer would have the opportunity to discharge a Taser into the back of a stationary individual. A further limitation is that the device is not effective against a subject wearing heavy clothing.

Nor is this a precise weapon to aim. Unlike a firearm or a pepperball launcher, which fire a single projectile and can be aimed with a fair degree of precision, a normal Taser cartridge, with a 21-foot range, fires two darts that spread vertically at the rate of one foot for every seven feet of travel. Thus, following the universal warning not to aim above “lower body mass” (the belly), firing at a target fifteen feet away would create a two-foot spread of the probes where they hit the body. To expect an officer in the field, under difficult and perceptually challenging

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<sup>26</sup> The American Medical Association describes “excited delirium” as follows: “Although not a validated diagnostic entity . . . , ‘excited delirium’ is a widely accepted entity in forensic pathology and is cited by medical examiners to explain the sudden in-custody deaths of individuals who are combative and in a highly agitated state. Excited delirium is broadly defined as a state of agitation, excitability, paranoia, aggression, and apparent immunity to pain, often associated with stimulant use and certain psychiatric disorders. The signs and symptoms typically ascribed to “excited delirium” include bizarre or violent behavior, hyperactivity, hyperthermia, confusion, great strength, sweating and removal of clothing, and imperviousness to pain. Speculation about triggering factors includes sudden and intense activation of the sympathetic nervous system, with hyperthermia, and/or acidosis, which could trigger life-threatening arrhythmias in susceptible individuals. . . The intense pain associated with [Taser] exposure, the psychological distress of incapacitation, and hazards associated with various restraint methods also could contribute.” “Use of Tasers by Law Enforcement Agencies” (2009), pp. 6-7, available at [http://www.policeone.com/policeone/data/pdfs/Taser\\_ecd\\_resolution.pdf](http://www.policeone.com/policeone/data/pdfs/Taser_ecd_resolution.pdf)



circumstances, to be able to reliably calculate his/her distance from the subject, as well as the spread of the darts at the point where they will hit the subject's body, all the while avoiding the chest and above while also trying to hit a leg but at the same time avoid the groin and genitals, is to expect too much. The Taser company has, since 2009, recognized as much. In its training alert of October 15, it called attention to "the reality that an arrest situation is fast moving and dynamic, and that exact shot placement in a preferred target zone is not always going to be possible. In addition, it may not even be possible to intentionally aim the ECD, but rather point and shoot."<sup>27</sup>

Thus, the limitations on targetable body areas, coupled with the imprecision of the aim of the device, will mean that an officer deploying the weapon will do so with the substantial risk of hitting the subject in a proscribed area of the body, with an unacceptable risk of serious injury or death. Even more to the point, the company said, in an October 29, 2009 customer teleconference: "**[T]his is not a precision aiming device. There will be many times when people are hit in head, chest, and eye**"<sup>28</sup> [Emphasis added.]

When all the cautions, prohibitions and limitations are accounted for, it is apparent that a Taser may only be discharged against a healthy, sober, rational and clear-headed adult non-elderly subject who is not pregnant, running, nor in a dangerous environment, and that the device must be able to be reliably aimed at the abdomen ("lower center mass") or the back. The only exception to the limitations as to the subject and the surrounding circumstances occurs when there exists an imminent threat of death or serious bodily harm to someone. Overall, the extensive limitations on and imprecision in the use of the Taser render it a weapon of **extremely limited safe potential applicability**, as well as one that carries with it a **high potential for erroneous deployment** and potentially tragic consequences. That is because **an officer in the field, managing difficult circumstances, simply cannot know enough to know if it is safe to deploy the weapon**. He or she often cannot know, for instance, when someone has a heart condition, or is intoxicated, or mentally ill, or cognitively impaired, or pregnant, or subject to any of the host of other conditions that must be, but often cannot be, known before a deployment. As the Stanford Report notes:

[I]n most circumstances, an officer will find it nearly impossible to anticipate whether a subject suffers from any of the conditions listed. For example, except where pregnancy is fairly advanced, an officer is not likely to know a woman is pregnant. No officer would likely be able to discern that an individual suffers from a pre-existing injury or condition such as osteoporosis, osteopenia, spinal injuries, diverticulitis, or previous muscle, disc, ligament, or tendon damage. An officer is unlikely to know whether a subject suffers from a respiratory impairment such as asthma, or from a pre-existing cardiovascular condition.<sup>29</sup>

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<sup>27</sup> Taser Training Bulletin 15.0 Regarding Medical Research Update and Revised Warnings" at 2.

<sup>28</sup> Notes of the teleconference hosted by the company, which fielded clients' questions and concerns following the company's release of Training Bulletin 15.0.

<sup>29</sup> Stanford Report at 6.

Moreover, with respect to pregnancy, the Taser company warns against use of a Taser on a pregnant woman because of the risk that she would suffer from involuntary muscle contractions, thereby increasing the risk that she will fall and damage the fetus.<sup>30</sup>

The Maryland Report sets out the unknowable features of a subject's serious mental illness:

Maryland mental health advocates urged in testimony to the Task Force that priority should be placed on integrating crisis intervention and de-escalation techniques into law enforcement use-of-force policies and procedures. Mental health experts noted that police are often called as first responders by family members to deal with emotionally disturbed individuals who display extreme behaviors. In such crisis situations, emotionally disturbed individuals are often at an impaired level of consciousness; they may not know who or where they are; they may be delusional, anxious, or frightened; and they may be unable to process or comply with an officer's commands. When police arrive, such individuals can become even more anxious and appear even more dangerous.

The unanimous position of mental health experts is that the best practice in such situations is to de-escalate the agitated suspect with a crisis intervention approach instead of a typical command-and-control approach. This type of crisis intervention approach is used safely and effectively in numerous police departments nationwide and a few Maryland jurisdictions.<sup>31</sup>

The Maryland Report further notes that this unknowability presents a police officer with a "unique and difficult conundrum":

[T]he challenge for law enforcement in avoiding ECW use against persons at heightened risk of injury is twofold. First, more research is needed to determine which populations are at a heightened risk of death or injury and the extent of that risk. Second, in many situations it may not be readily apparent to a law enforcement officer faced with a rapidly evolving situation whether an individual falls within one of these groups. . . [A] *use-of-force option that normally is not deadly, may in some instances be lethal even where the officer had no intention of using lethal force, did not believe lethal force was necessary, and used the force tool in a manner that normally would not increase the risk of death.*<sup>32</sup> [Emphasis added.]

It is for this reason that the Vermont State Police and Disability Rights Vermont, the organization named by the governor to oversee enforcement of the federal statutes protecting the developmentally disabled and the mentally ill, have just entered into an agreement following the

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<sup>30</sup> *Id.*

<sup>31</sup> Maryland Report at 40

<sup>32</sup> Maryland Report at 37

tasing of a 23 year-old Vermont man with Downs Syndrome who pulled away from the police when they were trying to escort him to a new placement. The new police policy will recognize a higher deployment standard before a Taser is used against a disabled person, and will require that other reasonable options first be exhausted.<sup>33</sup>

**3. Studies Indicate That Tasers: 1) Do Not Cause A Reduction in the Use of Lethal Force, 2) Do Cause an Earlier Resort to Higher Levels of Force, and 3) Are Frequently Recklessly Deployed in Violation of Accepted Standards.**

It is frequently asserted that the introduction of Tasers reduces the use of firearms by police. This is countered by the assertion that Tasers cause an earlier resort to a higher level of force than is necessary. As to the latter concern for premature deployment, common sense counsels that officers in the field will, on at least some occasions, reach for a Taser when it is on his/her belt in circumstances that would be better, and previously, handled by lower levels of force and by reliance on crisis intervention skills. For example, although all studies of Tasers require that they not be used as a “pain compliance” or general force tool, the Taser company acknowledged in 2003 that over one-third of cases of Taser use were simply for “verbal non-compliance”.<sup>34</sup>

A June, 2011 study of police use of Tasers by the American Civil Liberties Union of Arizona (“the Arizona Report”), using data collected from twenty law enforcement agencies, showed that, with the introduction of Tasers, there was no reduction in the use of firearms, but there was an earlier resort to a greater level of force.

[T]he data revealed no relationship between the deployment of Tasers and the use of firearms. At the same time, officers began using Tasers as frequently as other non-lethal force techniques, so the deployment of a Taser became as routine as pepper spray and batons. The information provided by departments thus suggests that Tasers have been deployed in situations where lethal force would not be allowed, and where less severe uses of force are available.<sup>35</sup>

In accord with this Arizona study is an analysis conducted by the Houston Chronicle of Taser use by that police force and reported January 14, 2007:

Since the Houston Police Department armed itself with Tasers, touted as a way to reduce deadly police shootings, officers have shot, wounded and killed as many people as before the widespread use of the stun guns . . . Officers have used their Tasers more than 1,000 times in the past two years, but in 95 percent of those cases they were not used to defuse situations in which suspects wielded weapons

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<sup>33</sup> See “Vermont State Police to make revisions to Taser policy”, Burlington Free Press, October 22, 2011.

<sup>34</sup> Cited in Silverstein, “Tasers: evaluating claims of excessive force”, presented at the National Police Accountability Project Skills Seminar, October 19, 2006, at 4.

<sup>35</sup> “A Force to be Reckoned With”, American Civil Liberties Union of Arizona, at 17.

and deadly force clearly would have been justified. Instead, more than half of the Taser incidents escalated from relatively common police calls, such as traffic stops, disturbance and nuisance complaints, and reports of suspicious people. In more than 350 [of the 1000] cases, no crime was committed. No person was charged or the case was dropped by prosecutors or dismissed by judges and juries, according to the Houston Chronicle's analysis of the first 900 police Taser incidents, which occurred between December 2004 and August 2006. Of those people who were charged with crimes, most were accused of misdemeanors or nonviolent felonies.

Confirming the trend of this data is the just-released study of Tasers across New York State by the New York Civil Liberties Union, which found that nearly 60 percent of reported Taser incidents in that state did not meet expert-recommended criteria that limit the weapon's use to situations of the middle-range deployment standard.<sup>36</sup> The study also found:

- More than one-third of Taser incidents involved multiple or prolonged shocks, which experts link to an increased risk of injury and death.
- More than a quarter of Taser incidents involved shocks directly to subjects' chest area, despite explicit warnings by the weapon's manufacturer that targeting the chest can cause cardiac arrest.
- In 75 percent of incidents, no verbal warnings were reported, despite expert recommendations that verbal warnings precede Taser firings.
- 85 percent of documented Taser incidents involved people who were not armed or believed to be armed.

Thus, the available data indicate that Tasers do not result in a reduced resort to lethal force, but that they do cause an earlier resort to higher levels of force where less severe force would suffice, thereby exposing the citizenry to higher overall levels of force and attendant life and health dangers. The data also indicates an alarming lack of compliance with accepted standards governing the weapon's deployment. These data bear out the concern expressed in many studies, and in the testimony of numerous witnesses before the Committee, for the likelihood of "mission creep". As the New York report summarized its finding:

The pattern of misuse and overuse of Tasers fall into seven distinct categories: the use of Tasers where the suspect poses no demonstrated danger or risk of injury to any person; the administration of excessive numbers of or excessively long shocks; dangerous targeting of vulnerable areas of the body, such as the chest, neck or genitals; the failure to warn a subject prior to using a Taser; the over-reliance on drive-stun as opposed to probe mode; the use of Tasers on vulnerable populations or in dangerous situations; and the

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<sup>36</sup> The broad range of threshold deployment standards among Taser studies and among jurisdictions is discussed *infra*, Section III(C).

disproportionate use of Tasers on people of color.<sup>37</sup>

#### 4. The Montpelier Use-of-Force Reports and Their Meaning

The Committee requested and received from Chief Facos documentation of police incidents in which force was used, from the latter part of 2008 through June of 2011.<sup>38</sup> These fifteen reports document any use of force on the police force continuum, which can range from as little as physical control or restraints at one end of the spectrum, to firearms at the other. What the reports reveal is that **no party – neither an officer nor a suspect – received a single serious injury in any of these incidents.** (See “Use-of-Force Reports, Summary”, separately submitted.) All fifteen incidents were well-handled by the police with the current force continuum at their disposal, which in these incidents included handcuffs, physical tactics such as armbars and pull-downs and bear hug, leg irons, pepperballs, pepper spray, a helmet, and the display of a firearm. There is no indication that a Taser would have been appropriate, prudent or necessary in any one of the incidents, especially since nearly all of the incidents involved intoxicated or mentally ill people, i.e., members of **vulnerable populations.** To the extent there were any injuries to officer or suspect in any of these Montpelier incidents, they were limited to superficial cuts and abrasions, a kick to an officer’s groin, along with one suspect sustaining a swollen eye. None of these incidents resulted in an officer injury causing lost work time, as shown in the workers compensation discussion *infra*. Digesting the use-of-force summary, we see:

- one incident involved a child at school showing indications of mental disturbance, who needed to be held and carried (5/26/10);
- five cases of fleeing subjects (11/01/08, 07/27/09, 11/17/09, 12/11/09, 03/20/10,);
- a case of a non-compliant female with an unknown medical condition (1/25/09) and a case of an elderly man with a heart condition and mechanical heart valve (10/29/10);
- at least five cases of intoxication (12/11/09, 03/05/10, 09/05/10, 05/23/11, 06/18/11);
- five cases where the subject evidenced serious mental disturbance requiring mental health screening (03/05/10, 03/20/10, 05/26/10, 07/20/10, 10/29/10), one of which (10/29/10) involved an elderly man with known schizoaffective disorder who was being served with an involuntary mental examination warrant.

What these reports show is that, of the fifteen reported cases over a three-year period in which some degree of force was used, twelve involved vulnerable populations or flight, in which use of a Taser would have been inappropriate except in the most extreme circumstances when no other force means could not have provided protection. Of the remaining three, one case involved the successful officer employment of an arm bar and handcuffs (11/01/09), and another, which

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<sup>37</sup> New York Report at 17.

<sup>38</sup> These individual incident reports are submitted with this report.

involved a stolen vehicle, was managed successfully by the officer's display of a gun, use of an arm bar, and handcuffs (06/19/11). There was no officer injury in any of these three cases. There were minor cuts to the subjects in two of the three cases.

These police reports indicate that Montpelier does not have what the International Association of Chiefs of Police notes as being a critical criterion in assessing whether to acquire a non-deadly weapon, i.e., whether the "typical force scenarios faced by its police personnel" warrant the addition of the weapon. By all indications, the Montpelier police have been able to fully, competently and effectively manage its typical force scenarios with the array of skills and weaponry at hand. In fact, the police have effectively managed *all* its force scenarios with the skills and weaponry at hand.

### **5. The Montpelier Assault-on-Officer Reports and Their Implication**

The Committee was initially informed by Chief Facos, as he had also informed the City Council, that Montpelier incurred the highest frequency of assaults on officers of any Vermont city or town that report this statistic. He represented that Montpelier sustained eight of the 64 such cases reported by Vermont cities and town for the year 2008. During Committee hearings he corrected that number to five. The Committee then requested and received from him the actual incident reports from 2008 to date.

It bears emphasizing that the Committee's perspective on what these incident reports reveal in no way indicates a lack of awareness on the Committee's part of the dangerousness of police work and the courage of officers who have to take risks in dealing with the public. Being a police officer is challenging, both from the potential and inherent dangers involved in contact with subjects, as well as from the spectrum of emotions that the public harbors toward the exercise of police authority, from praise and appreciation on the one hand, to suspicion and hostility on the other. The Committee's comments here and elsewhere in this report in no way diminish the members' deep appreciation for the difficult task that all police officers face on an almost daily basis in their effort to keep the public safe and secure. Rather, the Committee's analysis is aimed at casting an accurate light on the true officer safety record here in encounters with citizens.

Under Vermont law, "assault" has two forms, simple and aggravated. All of the reported incidents of assault on officers provided to the Committee were logged in as simple assaults, none as aggravated. Simple assault is statutorily defined as the intentional causing of "physical pain, illness or any impairment of physical condition". 13 V.S.A. §1023.

Of the 15 reports from 2009 to date that were submitted to the Committee as indicating assaults or attempted assaults on officers, four of the incidents involved no contact or injury whatsoever. Of the remaining 11, they included a possible thumb sprain, an incident of "sore testicles", a minor skin tear, and several instances of a kick, a scratch, or a punch. Here, as with the use-of-force reports previously discussed, the data strongly indicates that our typical scenarios involving aggression toward officers are in the nature of simple assaults causing pain and, in several instances, minor injuries. Many of these cases, as would be expected, are repeats

of the use-of-force incidents, set out above. *Every one* of these assault-on-officer cases involved individuals who were highly intoxicated, or mentally ill, or evidencing a serious medical condition, or known to have developmental disabilities, or a child – all being precisely the conditions and circumstances when a Taser should not be used unless lethal force would be justified. Furthermore, in virtually all of these cases the officer was in close proximity to a subject who exhibited a sudden aggressive movement – situations in which use of a Taser generally is not feasible. Finally, the officers were universally able to control the situations competently and adequately with the force options at hand, without serious injury to any party. Had Tasers been available, one would not have wanted their deployment in these cases. Rather, traditional law enforcement skills and devices were what were used, and what should have been used, resulting in no more than superficial injuries to both officer and arrestee, generally in the nature of abrasions and bruises.

## **6. Putting Our “Typical Force Scenarios” in a Taser Context**

### **a) A Montpelier Case Example**

To make further sense of these statistics for purposes of this “typical force scenarios” analysis, it is helpful to determine whether the use of a Taser would have been prudent in any or many of these reported incidents. (To some extent, this analysis depends on what are the generally recognized limitations on the allowable use of the weapon, as will be more fully discussed in other sections of this report.) Like the Use-of-Force summary document, the Assault-on-Officers summary document (separately submitted) shows that nearly all of these incidents involve precisely the types of scenarios in which Tasers are forbidden, i.e., situations involving “vulnerable populations”: youth, elderly, frail, drug or alcohol intoxicated, suffering from a heart condition, fleeing, evidencing mental disturbance, highly agitated, as well as situations where the officer and subject are in close range (and thus Taser deployment is not practical). There were but a couple of incidents among the fifteen provided the Committee in which the subject was not in one of these vulnerable populations, and these confrontations were not of an aggravated nature. The police handled each of them effectively and without injury with the currently available force continuum. These were not “Taser situations” by any stretch of the imagination.

An incident among the 15 reported helps illustrate the difference in view around the assessment of whether Montpelier needs Tasers. In our Committee hearings, Chief Facos frequently referred to one of these incidents as particularly exemplary of when the use of a Taser would have been beneficial and warranted. The incident in question occurred on 10/29/10, when Washington County Mental Health called for police assistance to serve a mental health examination warrant on an elderly patient living at home. The individual suffered from schizoaffective disorder, a serious cardiac condition and reliance on a mechanical heart valve. The patient was also non-compliant as to his medications, causing his psychiatrist enough concern to take out the involuntary mental examination warrant. The officers, aware of these facts, indicated in their incident report that they knew the subject was susceptible to a stress-related cardiac arrest, that his medical non-compliance was potentially life-threatening, and that he was “extremely agitated and appeared to be paranoid”. Upon entering his home without the

subject's permission to serve the warrant, the police found the man swinging a board "wildly" at them and running toward them.

If anyone would qualify as a member of a "vulnerable population" against whom Taser use is forbidden except in the most exigent circumstances when there is no alternative and lethal force is warranted, it was this man, being elderly, suffering from a serious mental disorder, and a patient with a life-threatening cardiac condition. For any one of these three health conditions, the research on Tasers, and the Taser company's own 2009 (and since) training alerts, caution the police not to use the device. Had the police at the scene had access to a Taser and used it as Chief Facos would have supported, there is a reasonable possibility that the incident could have ended in tragedy. Instead, the police used their skills and their current force options exactly as they should have – they partially retreated, they then subdued the individual with multiple rounds of pepperballs, they restrained him, and they safely transported him to the hospital.

Ironically, Chief Facos's own proposed Response to Resistance policy mandates that a Taser not be deployed under the circumstances of the above-discussed incident. Section (IV)(F)(b)(xxiv) mandates: "**Alternative tactics shall be utilized** where the officer has prior information that **the subject suffers from a disability** which would increase the danger to that person by using the Electronic Restraint Device, i.e., a person at the scene tells an officer that the subject has a heart condition." Here, the officers knew the subject suffered from not one, but three, such disabilities. Use of a Taser under these circumstances would have violated the mandatory language in the Chief's own proposed policy.

Chief Facos regarded this incident, as well as the incidents of December 11 and 12, 2009 (see incident reports), as ones in which Tasers could have been deployed. The Committee disagreed with him as to how to regard these three incidents. First, all three incidents (over a three and a half year period) involved subjects who were either elderly, intoxicated, mentally ill, or a combination of these – all at-risk subjects. Second, whether a potentially lethal weapon legitimately could have been deployed in a situation depends, of course, on whether a permissive or restrictive deployment standard controls as a matter of policy. If the Chief's proposed standard of "active resistance" – the lowest standard used anywhere – controls, then it follows that it will be quite easy to rationalize after the fact that use of a Taser was permitted in many instances where they were not necessary or prudent, i.e., where lower levels of force were sufficient. Third, and most important, the difference in perspective on that part of the Committee and the Chief highlights how he and the Committee were differently focused when finding the *meaning* of Montpelier's documented "typical force scenarios". The Chief framed his view with the question of whether an incident would have *allowed* the use of a Taser. The Committee was more concerned with whether a Taser was *necessary* to control a situation, or, put differently, *whether the police were able to gain control with the weaponry currently in their arsenal – which in all cases they were able to do, and without any significant injury to any party*. The Committee believes its framework, looking to the issue of *necessity*, is closer to the Council's charge that the Committee make an "assessment of need" for this additional weapon.

## **b) Comparing Montpelier to Some Other Vermont Communities**



There is no rule of thumb regarding which cities and towns tend to adopt Tasers and which tend to decline them. But it is instructive to look at Vermont examples of each. For towns or cities that have declined to adopt Tasers, we looked to Bennington and Middlebury. For ones that have adopted them, we looked to Burlington and South Burlington.

From the standpoint of size and typical force scenarios, Middlebury and Bennington are, like Montpelier, medium-size communities by Vermont standards. Paul Doucette is the Chief of the Bennington Police Department, the fifth largest in the state. He was interviewed for the Committee by telephone. Doucette considered acquiring Tasers and underwent Taser training with the State Police. He believes the weapon has definite utility, but opted not to acquire it. Among his reasons were that Tasers are expensive, that they do not work all the time, and that the Bennington force has found that its use of pepper spray and pepperball launchers have been sufficient to cause people to comply with police demands. In considering Tasers, he said, "it's a lot more than just buying the Taser itself".

Thomas Hanley has been Chief of Police in Middlebury for the past twenty years, and related to the Committee the following, also by telephone interview. Middlebury crime statistics are "in the middle of Vermont communities". The town experiences mostly property crime, "not a lot of violent crime", and has a high number of cases involving mental health issues and substance abuse. It has not had a high level of officer workers compensation claims from violent encounters. To the extent there are such injuries, they are mostly in the nature of bites, lacerations, abrasions, punches, one broken hand bone. Officer injuries have thus been from close contact, and not requiring hospitalization. Chief Hanley posed the question to himself, in considering Tasers: "Is this a tool we need, or a gadget sitting on an officer's belt. You're not going to go into a high risk situation with Taser drawn, you'll have your gun drawn. A Taser can give a false sense of security."

In addition to that view and those crime and officer injury statistics, Chief Hanley added the concern that Tasers are expensive when one factors in not just the purchase price but also the attendant costs such as continual training, recurring costs for maintenance, and replacement costs. Instead, the Middlebury force has emphasized physical fitness, training, officer skills and pepper spray for handling difficult situations non-lethally. Based on these factors, Chief Hanley concluded: "We're not seeing, day-to-day or historically, the need for Tasers. If I were in a more combative environment I might think twice about it."

That "more combative environment" is better exemplified by Burlington and South Burlington, both of which have Tasers. Chief Facos highly recommended that the Committee hear from representatives from both of those forces. Deputy Chief Walter Decker of the Burlington force testified that he worked Tasers into their arsenal over a six-year period, to where there are now sixty units deployed. He appreciates them for being fast and immobilizing, and for decreasing officer injuries and time away from work, but also recognizes their potential for incorrect or malicious use. The Burlington force uses Tasers in conjunction with body cameras on the officers, because those are more effective at recording the entire incident than the Taser-mounted camera, which only records "the last part of the story", i.e., the actual

deployment against an individual. He stated that for their written policy standard for Taser use, Burlington chose a “middle-range” standard, requiring that there be both “active aggression” on the part of the subject plus a “risk of harm”. He stated that Tasers have on occasion been used instead of a firearm, in surprising contrast to Chief Facos’s adamant opposition to using the device as a substitute for lethal force. Burlington’s incidents of use of force number 400-500 a year, dwarfing Montpelier’s statistics in this regard. And unlike Montpelier, he noted that there was no apparent community opposition to the introduction of Tasers in Burlington. Finally, Decker noted that Burlington has, unique among Vermont cities and towns, a Police Commission which stands ready to review use-of-force incidents.

Trevor Whipple, Chief of the South Burlington force and formerly chief of the Barre force, noted that Tasers were already present when he took over the force in 2006, but that he has heard there was no public opposition to them at the time they were acquired. They do not use cameras with Tasers. His officers receive a training in Taser use based on the Taser company’s curriculum, of six hours or less, with a yearly update. An officer warns a subject three times before deploying. Like Burlington, the South Burlington force does not use the model Response to Resistance policy which Chief Facos is proposing for Montpelier, and which was supplied by Montpelier’s insurer (see *infra*). Whipple recognizes the potential danger of the weapon, and relies on accountability, use of force reviews, and checks and balances to offset the danger, noting that, unlike Burlington, South Burlington requires a use of force report for *every* force incident. He guessed there were 50-60 use of force incidents in South Burlington yearly, and said while the brandishing of Tasers has gone down since 2008, actual deployments per year have remained steady at between four and six. He agrees that their deployment standard, in not requiring a risk of harm from the subject’s conduct, “sounds lower than Burlington’s”. Like Decker, Whipple was not able to compare his city’s typical force scenarios or data to Montpelier’s.

One sees, from the above, examples of two distinctly different views of Tasers in Vermont law enforcement. The larger cities of Burlington and South Burlington, with higher crime statistics and more aggravated law enforcement circumstances, favor the device. Middlebury, a smaller town with less violent crime and a low officer injury rate (like Montpelier), does not, and prefers to rely on traditional weaponry and crisis intervention skills, as does Bennington. The Committee saw more similarity between Montpelier and the Bennington-Middlebury profile, than that of our larger (and only) metropolitan area. Our use-of-force incidents are relatively few and effectively handled by the weapons and skills at hand. Our officer injury rate is small, and officer workers compensation claims from violent encounters virtually non-existent (see *infra*). Our community is, unlike those of Burlington and South Burlington, quite divided over the issue of Taser acquisition,

In summary, the data supplied the Committee by the Police Department reveals that Montpelier does not have the “typical force scenarios” that reasonably would justify the acquisition of this weapon. Neither the nature nor the frequency of our police-citizen confrontations calls for this additional force option. Our rate and degree of suspect and officer injury is low and minor. It is difficult not to believe that almost any city or town of Montpelier’s

size or larger would be happy to trade statistics and “typical force scenarios” with those of Montpelier.

### **7. The Community Views and the Police-Community Relationship**

The IACP framework for the consideration of an additional non-deadly weapon, set out *supra*, also recommends cognizance of “the community in which it [the police force] operates”. While a scientific poll has not been conducted here on the issue of Tasers, a reasonably large sampling took place when the question appeared on the 2011 Town Meeting Day Poll, known as the Doyle Poll. Seven hundred residents responded to the question whether Tasers should be acquired here. The result was that 42% were opposed and 40% in favor.<sup>39</sup> Adding to that sense of the community is the fact that the large majority of speakers at both the City Council’s and the Committee’s public comment hearings spoke in opposition to acquiring the weapon.

The Committee believes the City Council should be especially cautious about authorizing this weapon in a community that appears deeply divided over it. Unquestionably, the police need adequate force options, including lethal force, in order to do their job effectively. But the heart of community safety lies not in weaponry beyond what has been shown to be sufficient for our local force scenarios, but rather in the police-community compact. Introducing a weapon so controversial and so opposed by a substantial proportion of the residents poses a prospect of weakening that compact. “The application of physical force may potentially have devastating consequences, not only for the suspect and the officer but also for the law-enforcement agency, the community, and police–community relations.”<sup>40</sup> In light of the highly questionable utility of the weapon here, the Montpelier police-community rapport is the far more important public safety element to preserve and protect.

### **8. The Workers Compensation Argument**

The argument is made that Tasers lowers workers compensation claims, and it is an argument that Chief Facos raised in the Council and the Committee. To investigate that possibility, the Committee requested from him all statistics and documentation regarding workers compensation claims by department employees from 2008 to the present, and that he link any such claims to specific police-citizen confrontations, so that the Committee could also evaluate whether such incidents were ones in which a Taser, had it been present, would have been the preferred weapon to use. Chief Facos responded with his own summary (separately submitted) of five workers compensation claims since 2006 but declined to give the original workers compensation documentation, claiming they were statutorily protected.

Without the actual documented linkage of these incidents to specific events, the Committee was unable to do its own investigation of the relevance of these workers compensation claims to the issue of whether Tasers would have made a difference. It was clear, just on the face of Chief Facos’s summary, that Tasers would not have made a difference in at

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<sup>39</sup> This result was in contrast to the poll results from most other Vermont towns, where majorities favored Tasers.

<sup>40</sup> White, M. and Ready, J., “Examining fatal and nonfatal incidents involving the Taser”, *Criminology and Public Policy*, Vol. 8, Issue 4, at 866.

least four of these five incidents. One incident entailed a foot injury during a foot pursuit, a situation that use of a Taser is strictly proscribed. Another incident involved a subject head-butting an officer, causing him a swollen lip, a situation of close proximity and unpredictable behavior that a Taser could not have prevented. Another involved restraining an intoxicated person – another circumstance where Taser use is proscribed. Another involved exposure to blood while arresting two subjects who had been cutting themselves and each other, i.e., a circumstance of likely mental impairment. (At any rate, exposure to blood is the inevitable circumstance for officers arriving at a scene where individuals have been engaged in cutting themselves.)

The Committee reiterated its request for the original documents, citing 1 VSA §318, upon which it received from the City Manager eighteen “First Report of Injury” documents pertaining to police incidents.<sup>41</sup> (separately submitted). These reports show only minor injuries, and that in only one incident, occurring on 5/28/09, was there any loss of work time. That officer lost several days’ work due to stubbing a toe while walking from a roadway to a sidewalk. Chief Facos’s summary, and the subsequently-received “First Report of Injury” documents, show there is no significant, bona fide workers compensation factor to be weighed in favor of acquiring Tasers in Montpelier.

### **9. The Expansion of Municipal Liability Exposure**

Since the 2008 and 2011 verdicts against the Taser company, it has embarked on a different, and more self-protective, course. As shown above, its 2009 and 2010 training alerts publicly acknowledged the more obvious dangers of the device and cautioned against using the device in certain circumstances and against certain populations, among them intoxicated persons and mentally ill persons, as well as against using it across a subject’s chest area and using it for too long a duration. The effect of this shift on the part of the Taser company is that municipalities are becoming the primary target of Taser-related lawsuits, which are being filed at the rate of about one per week nationally.<sup>42</sup> This shift by the company is seen in language such as contained in its September 30, 2009 alert: “These warnings do not create a standard of care . . . Law enforcement agencies are force and force tool experts and are solely responsible for their own Guidance.” Buried in footnote 6 of the 2010 training alert is the note: “Law enforcement agencies, government entities, and Users are sophisticated purchasers, sophisticated users and learned intermediaries with respect to law enforcement weapons (including ECDs), force, force use, legality of force use, and reporting.” In an effort to remove potential for liability for its training of police in use of the weapon, the company states in footnote 5: “Law enforcement agencies are force and force tools experts and are solely responsible for their own Guidance. ‘Guidance’ includes but is not limited to policy, procedure, rule, order, directive, training, continuum, and standard. Taser has no power or authority to . . . establish standards of care or conduct.” Perhaps ludicrously, the company attempts a reassuring tone when it states that it is the subject, not officers and municipalities, who bears all the risks: “Resistance to law

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<sup>41</sup> These reports do not represent 18 separate incidents; some of the reports are from several officers at a single event.

<sup>42</sup> Teleconference with John Burton, Pasadena, California, referenced *supra*.

enforcement action incurs substantial risk of death or serious injury and subjects who resist law enforcement assume all such risks of death or serious injury.”

Municipalities have always had liability exposure for Taser use alongside the manufacturer itself. But as the Taser company has taken measures to insulate itself from liability, it is city governments which now bear the increased exposure, both directly and through their insurance carriers, for allegations of injury and death from excessive force, negligent operation, and substandard training. “An officer may be liable for an unreasonable Taser use and municipalities may be liable for policies that promote Taser overuse or misuse, and for the failure to adequately supervise and train their officers.”<sup>43</sup> Municipalities will no longer, as in *Heston* and other cases, be able to settle as easily with plaintiffs who allege excessive force on the part of police, because the Taser company is no longer a “deep pocket” co-defendant who is vulnerable to the charge of negligent warnings. This isolation of municipalities as the sole litigation target for improper Taser deployment is a factor that weighs against whether to acquire the weapon, and all the more so in a community where the need for the weapon is not otherwise clearly shown.

#### **10. A Realistic Appraisal of the True Total Costs**

Chief Facos, in his application to the City Council for a budget line to purchase Tasers, represented that the cost to the City would be \$11,400. This is an accurate representation of the purchase price of fourteen units. The Committee was told that the Council raised a question of other, accompanying costs but did not receive a fuller estimate from the Chief. The Committee raised this issue on its own, asking Chief Facos to also calculate the costs of other items and measures (see below) that both the Committee and the Chief agreed were prudent should Tasers be introduced here. The Chief said he would produce a five-year estimate of all such costs, but did not do so. It is the Committee’s view that, should Tasers be acquired here, certain protective prerequisites would have to be implemented by the City, which would significantly raise costs above the purchase price of the Taser itself. The following are the additional costs that both the Chief and the Committee agreed were either necessary or prudent:

- Crisis Intervention Team (CIT) training
- Hiring of or certification of a Taser-approved trainer
- Replacement of the device (amortization of the cost)
- Maintenance of the device
- Replacement of the spent cartridges
- Body Cameras
- Data Storage
- Defibrillators in cruisers

The Committee was able to approximate some of these additional costs.

1. Training: Training should include Crisis Intervention Team training, described below in this report. Such training would have to take place in a nearby state, since Vermont does not

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<sup>43</sup> New York Report at 12

conduct it in-state, and would require each officer to be away for the five-day course. The Committee on its own was not in a position to accurately assess the exact cost of such absence, but it estimates that each Montpelier officer's absence for a week would have to cost at least \$2000 (wages, overtime substitute coverage, transportation, room, board) plus the cost of the training itself. The Committee is uninformed as to the likely cost of CIT tuition.

2. Defibrillators: Chief Facos agreed that with an introduction of Tasers here, a defibrillator in each cruiser would be prudent, in light of the proven dangers of the device when deployed against vulnerable populations such as individuals with heart conditions or in high states of agitation.<sup>44</sup> The cost of a defibrillator is approximately \$1200-2400.

3. Body cameras: The Committee and Chief Facos agreed that cameras provide a video record of police-citizen confrontations for the legal protection of all parties involved and of the city itself. There are two types of police video cameras for Taser use, one that attaches to the camera itself, and one that the officer wears on his/her body. The body camera is far superior, in both the Chief's<sup>45</sup> and Committee's view, in that it records everything related to an incident, including the precursors to any Taser deployment. The Taser-mounted camera is inadequate in that it records only the event from the moment the safety on the device is taken off. The Taser-mounted camera is thus not able to preserve the most critical information pertaining to the justification for deployment. The Taser company body camera costs approximately \$3000 per unit. Less expensive brands include one manufactured by Viewue Corp., which costs \$899. The likely life of a body camera is unknown to the Committee.

4. Data storage: Storage of Taser's body camera data costs \$1200 per year. Chief Facos was not sure whether that cost was per camera or per department.

It is apparent that to acquire Tasers along with the recommended equipment and training would far exceed Chief Facos's submitted estimate for just the initial hardware. The Committee believes that if this device should be approved by City Council, that should only happen after a full and accurate calculation of all related costs, which would not only give both Council members and taxpayers a clear-eyed understanding of the proposal, but also put them in a better position to make an informed decision of whether Tasers are needed here in light of competing City needs and priorities.

### **III. The Police Department Has Not Proposed a Prudent and Protective Policy Regarding Tasers, Raising the Prospect of the Introduction into the**

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<sup>44</sup> In agreeing with the Committee's preference for defibrillators in cruisers, Chief Facos noted that they can be less effective when exposed to the coldest winter temperatures.

<sup>45</sup> While agreeing with the view that body cameras are valuable for their ability to record an event, the Chief expressed an uncertainty as to whether this community would accept them.

## **Community of a Poorly-Regulated New Weapon.**

Chief Facos has the city's best interests in mind in recommending the acquisition of Tasers. The Committee does not doubt the sincerity of his dual motivations of protecting officers and subjects from potential injury. The Committee agrees with and supports those goals. The disagreement is over whether acquiring Tasers is the best, a safe-enough, and a necessary way to accomplish those goals.

Essential to the operation of a good police force is the adoption of thorough, deeply considered written policies that are tailored for the particular community – written policies which, while they can never entirely remove the element of discretion on the part of officers in the field, are nevertheless specific and binding in a manner that fully informs officers about specific requirements governing their conduct. Such policy-making inevitably entails a tension between a wish for vague and non-binding policy that allows the police to exercise maximum discretion with a minimum of interference, and on the other hand the more legitimate interest that the police, in whom tremendous, lethal and potentially oppressive power has been invested, be held accountable to specific standards of conduct. Ultimately, a clear and precise use-of-force policy is in everyone's interest. As stated by the International Association of Chiefs of Police:

Police administrators should not be hesitant to develop comprehensive, strong, and definitive policies and procedures for fear that they may prove prejudicial to a future court assessment of an officer's conduct. In fact, failure to adopt a use- of-force policy in clear and unequivocal terms will almost certainly have more serious consequences for the officer's agency and employing jurisdiction.<sup>46</sup>

The need for clear, specific, binding and community-tailored policies is especially the case in Montpelier, where the police chief has, by law, nearly absolute autonomy in adopting policies and spending his budget, exercising his powers over law enforcement free of any advise and consent by another branch of government, i.e., free of the checks and balances that normally characterize our system of government. *See* 24 V.S.A.§1931(b). The unique exception to this in Vermont is the City of Burlington, which has by charter created a Police Commission which may subject actions of the police chief to concurrence or modification. Given the gravity of the decision whether to acquire Tasers, and the importance of well-considered and prudent written policies – especially regarding the use of weapons against members of the public – the Committee spent considerable time assessing both the current “Use of Force Policy” (separately submitted ) of the Montpelier Police Department, as well as the one proposed by Chief Facos to replace it and to accompany the acquisition of Tasers, titled “Response to Resistance” (separately submitted). For the reasons set out below, this proposed policy is grossly inadequate to assure the safety of both police officers and the community.

The proposed policy, titled Resistance to Force, which Chief Facos submitted to City

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<sup>46</sup> IACP National Law Enforcement Policy Center, “Use of Force”, February, 2006.

Council, is the exact policy given to him by the Vermont League of Cities and Towns (VLCT) – the document even bore the VLCT logo as well as that of the Legal and Risk Management Institute (LRMI) on its first page.<sup>47</sup> The VLCT, despite its organizational-sounding name, is a private insurance company that insures most Vermont cities and towns, including Montpelier. The company can be expected to operate with an understandable bias toward minimizing its own pecuniary exposure. The LRMI is also a private entity, owned by a former police chief. It contracts with various insurance companies, including the VLCT, to provide “model” written policies. The LRMI does this by way of working groups who prepare these suggested policies. Its police policy-making panel is composed solely of current and retired police chiefs and officers.

Given the interests of their creators, these model policies must be taken with a more than a pinch of salt. The VLCT’s own employee-underwriter, Joe Damiata, acknowledged that the vague, non-specific language of the Response to Resistance policy has a “c.y.a.” purpose, and that insurers and police organizations sometimes favor such vagueness in policy for that reason.<sup>48</sup> “Our ultimate goal is to reduce the exposure and liability of municipalities”. Mr. Damiata further acknowledged that he can understand how a committee such as this one might be concerned that the Response to Resistance policy, aimed at risk management for the insurer and municipality, might not weigh all the countervailing interests, such as citizen protection from low policy standards, or the interest that there not be too early a resort to a particular level of force due to a low deployment standard.

Perhaps most important was Mr. Damiata’s comment that, as to a model police policy such as Response to Resistance, “police departments should go through it and customize it, make sure it fits their department. We don’t tell them to take these and put them [directly] on the shelf.” Disturbingly, putting this insurance company-generated use-of-force policy directly on the shelf, unconsidered and untailed to this community, is precisely what happened here, which raises serious concerns about it, including the following.

#### **A. The Introductory Language of the Proposed Policy Seeks to Make Its Provisions Legally Unenforceable By A Citizen Aggrieved By Police Use of Force.**

The proposed Response to Resistance policy begins with the following disclaimer:

This policy is for internal use only and does not enlarge an employee’s civil liability in any way. The policy should not be construed as creating a higher duty of care, in an evidentiary sense, with respect to third party civil claims against employees. A violation of this policy, if proven, can only form the basis of a complaint by this department for non-judicial administrative action in accordance

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<sup>47</sup> The only amendment to the proposed Response to Resistance policy by Chief Facos occurred when the Committee pointed out to him that his proposed policy does not provide for Tasers. He then added a single entry regarding Tasers and removed the two aforementioned logos.

<sup>48</sup> Interview with Joe Damiata, VLCT employee-underwriter, in VLCT office, Montpelier, July 28, 2011.



with the laws governing employee discipline.

The Chief told the Committee he “can’t say why” that paragraph introduces his proposed policy. Mr. Damiatu conceded that this language purports to give no legal rights to citizens based on violations of the policy, and would have the effect of discouraging a citizen from believing he/she possessed any such rights under the policy. This attempt to insulate the insurer from liability does not serve the larger interests of the City – public safety and police accountability. If precise, protective and transparent policies are prudent and necessary, those policies are largely meaningless unless citizens are able to compel adherence to them and to seek legal redress if they are violated. A legally unenforceable policy would gravely undermine citizens’ security and the police-community relationship. It is for this reason that many cities and towns in Vermont, including Burlington, have no such disclaiming language in their policies. To adopt such a disclaimer here would ultimately make this a more dangerous environment for law enforcement and for the citizens.

### **B. The Proposed Policy Locates Tasers Dangerously Low on the Use of Force Continuum, Encouraging Early and Premature Resort to a Potentially Lethal Weapon.**

Pages two<sup>49</sup> and four of the VLCT policy would place Tasers on “the same level of force as chemical spray”.<sup>50</sup> The Committee views this as a misguided and dangerous placement on the continuum, given that the Taser is a potentially lethal weapon, whereas pepper spray, though it comes with its own dangers to the subject, is not regarded as potentially as lethal as a Taser. To locate them as equivalents on the use of force continuum would have to have the effect of causing officers to resort to Tasers earlier than they otherwise would, and not necessarily resort to chemical spray even if it would be effective in gaining safety and control. This feature of the VLCT policy may serve insurance companies who have an eye on possible litigation, but does not serve the interest of the City in making sure this weapon would not be an early weapon of choice in the field. Such an outcome would only confirm the expressed fears by those opposed to Tasers regarding how they would be used, and confirm the findings of the Arizona Report that the introduction of Tasers cause an earlier use of a higher level of force. It should be noted that the current Use of Force policy, at page two, calls for resort to pepper spray before resorting to other less-lethal weapons on the continuum. The Chief’s proposed VLCT-sponsored policy

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<sup>49</sup> The pages are not correctly and sequentially numbered. References are to the actual page rather than the number indicated at the bottom of each page.

<sup>50</sup> The proposed policy seeks to replace the traditional and still widely-used term “use of force continuum” with the new term “force options”. This is an obvious attempt by the VLCT to try to substitute a “tool kit” approach for the more protective “continuum” approach. The “tool kit” approach only vaguely lays out the force options, telling the officer to select what he/she believes appropriate under the circumstances. The “force continuum” approach gives the officer more precise guidance regarding the stepped increase in force. That the VLCT model policy still implicitly recognizes the escalation of the forms of force, but is attempting to make this less important by a change in nomenclature, is shown by the actual placement of the different force forms on pages two and three, beginning with “command presence” and “verbal commands”, moving through pepper spray and Tasers, and finally ending at the level of deadly force.

would eliminate that requirement and **effectively lower the standard for the use of potentially lethal force.**

### **C. The Proposed Policy Chooses A Vague and Dangerously Permissive Standard to Govern When Tasers May Be Used on Subjects.**

In addition to where Tasers would fall on the use of force continuum, another critical issue is the standard for when it can be deployed. There is a range of such standards among research recommendations and among police forces themselves. This range includes:

#### **1) The Maryland Attorney General Report:**

“only when an individual poses an imminent threat of physical injury to themselves or others”, also called “significant injury”, with “physical injury” defined as “any impairment of physical condition excluding minor injuries”.

#### **2) The Braidwood Inquiry (Canada):**

causing or will imminently cause bodily harm AND no lesser force option has been or will be effective AND de-escalation and/or crisis intervention have not been/will not be effective in eliminating risk of imminent bodily harm. De-escalation and/or crisis intervention is required re: emotionally disturbed persons unless it will not be effective in eliminating risk.

#### **3) The National Institute of Justice:**

(makes no recommendation on a preferred deployment standard)

#### **4) The ACLU of Northern California:**

only where there is an imminent threat of serious physical harm to the officer or another individual”, and “[never] to simply gain compliance, even if the subject is being physically evasive or uncooperative”. “Passive resistance or non-threatening acts such as ‘tensing’ one’s arm to avoid being handcuffed, without more, should not justify CED [Taser] use.” Use only in “life-threatening situations”. The drive-stun mode should only be used in “exigent circumstances”. Warn before use, and brandish only when use is justified.

#### **5) Amnesty International:**

“imminent threat of death or serious (potentially life-threatening) injury which cannot be contained by less extreme options.” Tasers should only be deployed by “specialist officers”, and “never used as a general force tool”, but rather to “avoid the resort to lethal force or firearms”.

#### **6) The Stanford Report:**

“Tasers should be considered as a lethal force option on the use of force continuum . . . Tasers should be the preferred method of use of force in life-threatening situations, and should not be used otherwise.”

#### **7) Police Executive Research Forum (PERF) Model Policy (2005):**

where subject is “actively resisting or exhibiting active aggression, or to prevent

individuals from harming themselves or others”. “Active resistance” is defined as “physically evasive movements to defeat an officer’s attempt at control, including bracing, tensing, pushing, or verbally signaling an intention to avoid or prevent being taken into or retained in custody”. “Active aggression” is defined as “a threat or overt act of an assault (through physical or verbal means), coupled with the present ability to carry out the threat or assault, which reasonably indicates that an assault or injury to any person is imminent”. “Aggravated active aggression” is a “deadly force encounter”.

8) **The International Association of Chiefs of Police (IACP) guidelines:**  
to subdue “violent or potentially violent individuals”

9) **Barre, Vermont:**

“The suspect must be actively aggressive and/or resisting and presenting a risk of injury to the officer(s), him/herself or others.”

10) **Burlington, Vermont:**

“individuals who are posing a risk of injury to themselves or others”

11) **Montpelier:**

a) Current: The City’s **current Use of Force policy** does not state an actual deployment standard for any weapons, including Tasers. The policy does say, as a general matter, that officers should use “progressive” and “escalating” force along the continuum “to the extent possible”; that pepper spray is first of the less lethal weapons; and that less lethal weapons are in the family of “compliance techniques” which are meant “to counter the subject’s enhanced degree of resistance”, but no definition is provided. (pp 1-2)

b) Proposed: The **VLCT’s Response to Resistance policy proposed by Chief Facos** allows Tasers to be discharged where there is “[a]ctive resistance/active aggression”. (p. 4)

It is apparent, from the above, that there is a range of Taser deployment standards, from the permissive to the restrictive, as follows:

- active resistance
- active aggression
- imminent threat of harm
- imminent threat of physical injury, excluding superficial injury
- imminent threat of serious physical injury or death

In coining the standard of “active resistance/active aggression”, the proposed VLCT policy 1) confusingly merges two distinctly different use-of-force standards (“active resistance” and “active aggression”), having the practical effect of allowing deployment based on the lower of

those two (“active resistance”) while giving misleading reassurance that “active aggression” may be required; and 2) in so doing, would allow Taser use based on **the lowest standard found anywhere** in the research and literature on Tasers.

The PERF Model Policy referenced above defines the key terms. “Active resistance” is shown by “physically evasive movements to defeat an officer’s attempt at control, including bracing, tensing, pushing, or verbally signaling an intention to avoid or prevent being taken into or retained in custody”. This lowest of all standards can be satisfied by as little as a subject “stiffening” his/her arms, “hunching” or even “tensing”. It is a standard that requires virtually nothing to satisfy, and exceeds only the standard of “passive resistance”, which is found nowhere in the literature as sufficient for Taser deployment. “Active aggression” requires more. As defined by PERF, it is “a threat or overt act of an assault (through physical or verbal means), coupled with the present ability to carry out the threat or assault, which reasonably indicates that an assault or injury to any person is imminent”. However, even this next-higher standard does not rule out simple assault causing no more than pain or superficial injury like a scratch or abrasion, which has been found inadequate by many of the studies and recommendations, such as the Maryland Report, which requires a threat of imminent harm greater than that of superficial injury.

The proposed VLCT policy tries to combine two distinctly different standards and thereby blur the distinction between them, with the result that Taser deployment would always be justified by the lower “active resistance” (“tensing”, “hunching”, “stiffening”) one. Chief Facos agreed in discussions with the Committee (August 2, 2011) that it is a “valid concern” that active resistance and active aggression are not defined in the proposed policy, and he agreed that he would want a higher standard than just, for example, the subject simply “stiffening” his/her body. He further stated he “likes” the Burlington policy requiring “a risk of injury to themselves or others”, but that he would not agree to the higher standard of “imminent threat of serious bodily injury”.<sup>51</sup> Confusingly, the Chief’s written request to the City Council for Tasers was proposed as a helpful tool for “violent” encounters. This purpose is at odds with his proposed policy’s deployment standard at the lowest end of the spectrum. This contradiction, between how it was asked for and how it would be used added to the Committee’s concerns regarding whether this request by the Chief had been researched and proposed with the care and caution it deserves.

The Committee believes both the active resistance and active aggression standards are inadequate for this community. If Tasers are permitted here, their use should be governed by a **threat of imminent serious bodily injury or death** standard, otherwise known as a **lethal force standard**, such as is recommended by the Stanford Report, the Amnesty International Report,

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<sup>51</sup> Chief Facos further stated that if the Committee was unsatisfied with the proposed policy’s “active resistance/active aggression” standard, the Committee could propose it’s own standard. The Committee was perplexed, as to this matter and other policy matters that are mentioned in this report, why the Chief was proposing a policy that did not reflect his better judgment, and why he was not amending it to do so, rather than suggesting the Committee rewrite it. Here, as elsewhere, it appears the Chief had not adequately studied the VLCT policy and rewritten it to suit the needs of this particular community.

and the ACLU of Northern California.<sup>52</sup> It is also the standard recommended by the several human rights-oriented attorney-witnesses who spoke to the Committee, including Allen Gilbert, Executive Director of the American Civil Liberties of Vermont; Dan Barrett, Staff Counsel of the same organization; Robert Appel, Executive Director of the Vermont Human Rights Commission; and Jack McCullough, Director of the Mental Health Law Project of Vermont Legal Aid.

One might argue for a deployment standard that only requires a simple “risk of harm” rather than a “threat of imminent serious bodily injury” standard, in order to give the police some “leeway”. The Committee sees a simple “risk of harm” standard as lax and unenforceable. It could be justified by almost any aggressive words or uncooperativeness reported by the officer. And, given the great deference afforded police officers’ assessments of situations in the field, it would be virtually impossible to question an officer’s claim of a simple “risk of harm”. It is a standard that would be an invitation to the very abusive deployment of the weapon that the public most fears, and would likely undermine the police-public relationship. Tasers are weapons which should be used only in the most exigent circumstances.

It is true that a “risk of serious injury” standard does not allow deployment in all situations in which an officer might find Tasers useful. But a “threat of imminent serious bodily injury” standard helps prevent a premature and abusive resort to the weapon; requires deployment of lower levels of force when they would be adequate for the situation; avoids Taser deployment in the relatively routine push or kick encounters; encourages greater reliance on an officer’s crisis intervention skills; pays heed to the unknowability of whether a subject is a member of a vulnerable population and in so doing prevents unnecessary serious injury or death from Tasers; and is mindful of the reluctance of a substantial portion of this community to add Tasers to the police arsenal.

**D. A High Policy Standard Regarding the Deployment of Tasers is Especially Important for Public Protection, in Light of the Low Standard Used by the Federal Court Regarding Allegations of Excessive Force.**

As the Committee learned from lawyers who testified before it, a state or municipality is always capable of creating a policy that is more protective than one found in the federal Constitution, so long as a local standard does not undermine the federal one. This ability to create a higher local excessive force standard underlies the national debate about a prudent standard for Taser deployment.

The federal Constitutional right not to be subject to excessive force derives from the Fourth Amendment protection against unreasonable searches and seizures, which has been

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<sup>52</sup> During discussions between the Committee and Chief Facos, it was proposed to him that an acceptable deployment standard for Montpelier, should Tasers be approved, could be, “where the subject has the means and intent to cause imminent serious bodily harm”. Chief Facos said he would consider and report back to the Committee about the acceptability of this proposed standard, but did not do so.

interpreted by the United States Supreme Court in the case of *Tennessee v. Garner* (1985) to require that government employ “objectively reasonable” force in light of the circumstances. In that case, deadly force was prohibited “unless it is necessary to prevent the escape and the officer has probably cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others”. In 1989, the Court revisited the issue of excessive force in *Graham v. Garner*, where it said the assessment of objective reasonableness “is not capable of precise definition or mechanical application”, but that the analysis should include consideration of the severity of the crime, whether the suspect posed an immediate threat to the safety of the officers or others, and whether the suspect was actively resisting arrest or attempting to evade arrest by flight.

The broad principles mentioned in *Graham* are, like many constitutional standards, left to the lower courts to apply and further define, and it is left up to states and local government to create standards that more fully reflect local conditions and values. “Reasonable force” is only a litigation standard to assess when the police exceeded their authority. **It is not a standard for how a community wishes its police to use force and weaponry on a daily basis.** That is why virtually all research and recommendations regarding Tasers, and virtually all local police policies, are more explicit and descriptive of when lethal and potentially lethal force can be used.

All cases originating in Vermont that raise a federal excessive force issue are reviewed by the Second Circuit Court of Appeals, sitting in New York City. That Court has shown a disturbingly unprotective view of citizens who have been subject to tasings, exemplified in the recent Vermont case of *Crowell v. Kirkpatrick* (2010).<sup>53</sup> There, two entirely non-violent protestors at a commercial development site in Brattleboro were directed to leave by the police, and refused to do so. The police then sought to arrest them for the misdemeanors of trespass and resisting arrest. The two protestors had devised a method to make their removal more difficult – they chained themselves to a weighted barrel drum, and, though they had the means to unchain themselves from it, refused to do so. The chief of police, who was not present at the scene, instructed the police not to take extraordinary action. Nevertheless, the police on the scene warned the two protestors that they would be tased if they did not leave. Upon the protestors’ continued refusal to unchain themselves, the police tased them, using the device’s painful “drive stun” mode, upon which the two relented and were arrested.

The Vermont federal court found this use of force by the police to be reasonable. A unanimous panel of the Second Circuit Court of Appeals affirmed that decision, finding that the use of a Taser by the police was necessary to overcome the protestors’ “active resistance” and distinguishing it from “purely passive” resistance. It is important to note that this is the same “active resistance” standard found in Chief Facos’s proposed use-of-force policy. It is also significant that the City of Brattleboro retained an outside person to review the case, who concluded that the city had used excessive force in the incident.

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<sup>53</sup> [http://www.ca2.uscourts.gov/decisions/isysquery/b62220bf-a646-414a-abcd-b00b6ddab834/1/doc/09-4100-cv\\_so.pdf](http://www.ca2.uscourts.gov/decisions/isysquery/b62220bf-a646-414a-abcd-b00b6ddab834/1/doc/09-4100-cv_so.pdf)

Chief Facos, like the representatives of the Burlington and South Burlington forces who spoke to the Committee, and like the Vermont Attorney General, states that he disagreed with the decisions of the district and appellate courts in *Crowell*, and agreed that Tasers should not have been used under those circumstances. But it was also Chief Facos who answered the City Council's inquiries, at its Taser hearings last January, that his proposed "active resistance" use-of-force deployment standard posed no problem, because the legal issue of excessive force is easily and reassuringly handled by *Graham's* nostrum that all force must be "objectively reasonable". In taking that position, the Chief confused, and continued in the Committee's hearings to confuse, a court-created legal standard to look back at a concluded event to decide whether a minimal federal Constitutional standard has been met, with a positive and locally-attuned standard – representing local scenarios and local values – for when potentially lethal force may be used. If *Graham* solved all use-of-force issues for local communities, as Chief Facos assured the Council and the Committee, we would not see the intense debate and the profusion of standards around the country for when lethal and potentially lethal weapons may be used.

The disheartening lesson of *Crowell* is that the federal appellate court that reviews Vermont cases will uphold the use of Tasers in all fact situations that involve conduct that is anything more than "going limp". This permissive and unprotective attitude by the court toward the use of Tasers makes it crucial that local community standards for Taser deployment be high, strict, and clear, so that the public has a greater margin of safety against improper Taser deployment, and that the public anxiety over the use of this weapon might be at least partially assuaged. Neither the paltry "active resistance" nor the unenforceable "risk of harm" standard meet that need. Only a standard requiring a "threat of imminent serious bodily injury" does that.

#### **IV. In Light of the Lack of Objective Showing That Tasers Are Necessary Here, There are Better, More Productive Ways to Spend the Money To Advance Public Safety.**

The Committee is aware of the difficult economic decisions facing the city and the City Council. The disrepair of city infrastructure, the deterioration of our tax base, and the budget constraints of our schools are causing the city to have to prioritize in new ways. Given that the evidence demonstrates a wish for Tasers based largely on hypothetical scenarios but not a real and present need for the device, the Committee believes any further expenditure for law enforcement should be directed toward more effective remedies. Two of those alternatives are described below

1. **Crisis Intervention Team training:** Thanks to Chief Facos's wisdom in the matter, all Montpelier police officers receive the six-hour elective "Act 80" training in mental health matters at the Vermont Police Academy. This is commendable, since not all Vermont departments make this course mandatory. But the attendance of police officers at this course is far from sufficient to reassure that they are trained well enough given the lethal and potentially lethal weapons they carry, and the given the difficult street encounters with which they have to deal. This is not just the Committee's view. Cindy Taylor-Patch, an Act 80 Task Force member

and the Police Academy trainer and curriculum developer for the mental health course, informed the Committee that the course “only scratches the surface” of the mental health issues relevant to police knowledge and conduct in the field. Chief Facos, in comments before the Committee, agreed with this appraisal of the training. Ms. Taylor-Patch further stated that the Police Academy course involves no testing or appraisal of an attendee’s knowledge of the course content, just the acknowledgment that an officer attended. In the words of Laurie Pontbriand of Washington County Mental Health and also an Act 80 Task Force member, with reference to the Police Academy course, some officers “get it”, others do not; and the Police Academy course does not deal extensively in crisis intervention. The Committee heard from many members of the mental health patient and advocacy communities with regard to both Tasers and CIT training:

- **Cindy Taylor-Patch**, with backgrounds in both mental health and law enforcement, is “ambivalent” about Tasers.

- **Mary Moulton**, Director of Intensive Care for Washington County Mental Health (WCMH), oversees the agency’s “screeners” who perform emergency mental health interventions, sometimes in conjunction with the police, with a typically twenty-minute lag time before WCMH screeners are able to respond to a police call. Moulton also expresses “ambivalence”. She believes the Montpelier police have handled these difficult situations well. Her ambivalence about Tasers stems from her belief that in a few situations there could have been police resort to a firearm, but she also recognizes that the major studies have recommended Tasers not be used on this population. If the proposed Taser money came to her agency instead, she would hire crisis intervention trainers to do cross-training with WCMH and the police in suicide risk assessment, hostage negotiation, better training about how people react to substances, stress reaction, and trauma. WCMH has applied for a grant for a Street Outreach Interventionist, who would be able to give a more immediate response to police calls than screeners are able to do, but such funding has not been approved. Burlington has such a position, funded through the Howard Center for Mental Health.

- **Gary Gordon**, the leader of a mobile crisis team for Washington County Mental Health, was the sole Committee witness in this field who appeared to clearly favor Tasers. He feels the Montpelier police do a good job de-escalating situations.

- **Jack McCullough**, Director of the Mental Health Law Project of Vermont Legal Aid, believes Tasers would be a “serious mistake”, in that police often cannot know if someone has an underlying mental or physical condition. He believes Tasers will lower the threshold for the use of force, and too often be used against uncooperative or “nuisance” subjects who pose no threat.

- **Mike Sabourin**, a patient advocate at the State Hospital and board member of Disabilities Vermont, finds no need for the device here given the other weapons in the police arsenal.

- **Steven Morgan**, the Director of Another Way, an organization serving psychiatric survivors and at-risk individuals here, opposes Tasers and supports the police using de-escalation techniques, much as the State Hospital uses “least restrictive means” to control difficult individuals. In his experience, outcomes are different if individuals expect aggression.

- **David Callahan** helped establish Another Way. He says Tasers would be a wrong step to take here, being, in his opinion, a tool of fear and subject to being easily abused. He believes that what the police need instead of Tasers is mediation skills, and that their ability to negotiate



will be worse if they have Tasers.

– **Laura Ziegler** is an Act 80 Task Force member who opposes Tasers here. She noted that the mentally ill cannot always understand or communicate with officers, and that they are especially prone to lack of impulse control. She also believes “when something is expedient, you resort to it, especially when it is billed as safe . . . People need to be subdued, it’s true, but not this way.” She also noted the combination of psychiatric or cognitive disabilities with intoxication can dangerously affect the heart and seizure activity.

– **Deb Sargent**, a local psychotherapist, would allow “a few” Tasers here, based on her experience of once having been stalked by a client.

Although there was not unanimity among these witnesses with expertise in the field about the wisdom of introducing Tasers, most found an insufficient showing of need for them in Montpelier. Beyond that question, every one of these witnesses who expressed an opinion about it – which was most of them – agreed that Crisis Intervention Team (CIT) training is what is critically missing in our police training, whether or not Tasers are adopted here. Unlike Vermont’s six-hour course in mental health matters, CIT training is an in-depth, 40-hour training that takes place in various places around the country (including Maine, Connecticut and New York), although not in Vermont.<sup>54</sup> Some in Vermont, like Taylor-Patch, have taken the training in Maine, and she, along with Mary Moulton and Laurie Pontbriand, have sought to find the funding to establish the training here. Other cities have implemented the training, and Memphis, Tennessee has created the highly-respected “Memphis Model” based on it, as an alternative to Tasers. This Model was created in 1988 when

. . . the Memphis Police Department joined in partnership with the Memphis Chapter of the National Alliance on Mental Illness (NAMI), mental health providers, and two local universities (the University of Memphis and the University of Tennessee) in organizing, training, and implementing a specialized [volunteer] unit. This unique and creative alliance was established for the purpose of developing a more intelligent, understandable, and safe approach to mental crisis events.<sup>55</sup>

It is a model which the Federal Bureau of Investigations has endorsed: “Overall, research supports the use of a specialized law enforcement response to address the needs of persons with mental illness. In particular, the Memphis CIT model is functional, generally accepted by police departments, and, most important, effective.”<sup>56</sup>

Chief Facos voiced support for CIT training (although he questioned whether the City

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<sup>54</sup> A major national CIT training organization is Non Abusive Psychological and Physical Intervention (NAPPI) available at <http://www.nappi-training.com/index.cfm>.

<sup>55</sup> See Memphis Police Department’s website for this program, <http://www.memphispolice.org/Crisis%20Intervention.htm>.

<sup>56</sup> FBI Law Enforcement Bulletin, October, 2011, available at <http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/october-2011/responding-to-persons-with-mental-illness>

Council would be willing to allocate money for his officers to receive it). As Laura Usher, a former Vermonter and the CIT Coordinator for the National Alliance on Mental Illness, informed the Committee, CIT training is, ideally and by design, a regional and multi-agency approach, but she and Taylor-Patch and others shared the opinion that even if funding for that kind of expansive regional program cannot yet be found here, individual officer CIT training is far superior to the Act 80 course at the Academy in educating officers to identify and deal with citizens' mental health conditions and crises.

As the police use-of-force reports clearly demonstrate, many of the difficult police-citizen encounters here involve subjects with serious mental health disturbances. The police cannot be expected to identify and non-violently intervene in such situations, nor to know when a potentially lethal weapon is warranted against these individuals, without having an in-depth understanding of mental health issues and an in-depth skill-set for de-escalating those encounters.

**2. Police social worker:** A different approach adopted by some cities has been the creation of a police force staff position of "police social worker". This position, especially relevant to law enforcement during nights and weekends, keeps at the ready a social worker highly trained in crisis intervention techniques, who could accompany officers to or be quickly called to the scene of a disturbance, and who could engage subjects in ways that could de-escalate a confrontational situation, making a violent outcome on either side less likely.

Both of the above alternatives are endorsed by the mental health professional community. Either of them would be a better choice than Tasers for enhancing public safety.

## **V. Should City Council Approve the Purchase of Tasers, The Following Preconditions To Their Purchase and Use Should Be Adopted.**

Should the Council approve the purchase of Tasers notwithstanding the Committee's recommendation, it is critical that high standards, strict safety measures, extensive training, and vehicles for heightened police accountability be implemented before such purchase and deployment. The Committee believes the following, culled from the major studies of Tasers, are essential preconditions to Taser acquisition by the Montpelier Police Department.

**1. Require Crisis Intervention Team training:** No officer should be allowed to possess or use a Taser until he/she has successfully completed a 40-hour CIT training course. The Committee further recommends this training for our officers even if Tasers are not added to the police arsenal.

**2. Create a police social worker position in the police force:** A police social worker is not a substitute for CIT training, but in the absence of such training for the police force at large, a police social worker would provide the next-best level of crisis intervention and de-escalation skills in confrontational situations involving the police.

### **3. Require and develop in-depth police training in the use and dangers of Tasers:**

When one reads the major research regarding Tasers, there is virtually universal skepticism regarding the company's assurances of its safety.<sup>57</sup> There is likewise a universal recommendation that local police forces not rely solely on the company's in-house training in the device, but rather supplement it with more in-depth and objectively arrived-at training standards. This is because the Taser company's materials "focus primarily on technical proficiency, but they do not provide use-of-force training. In addition, Taser International's materials have downplayed the risks of injury and death resulting from Taser use."<sup>58</sup>

When presented with this fact, Chief Facos – who has not been trained in the use of the weapon and acknowledged only "scanning" the training materials – took the position that supplemental training would be no problem, in light of the training that Montpelier officers already undergo. This indicates a misunderstanding of the concept of "supplemental training" regarding Tasers, by which is meant training in the device itself, not just, more broadly, in the police practices in which our officers are already trained. Any presence of Tasers in this community must be in conjunction with in-depth training in the device that does not solely or primarily rely on the company's materials – and must be training that requires the officer not just to attend, but to be tested and evaluated, on a yearly basis, as to his/her competency with regard to the device. Officer certification in Taser use should include personal exposure to a full-force and full-duration (five-second) discharge.

### **4. Adopt an "imminent threat of serious bodily injury" deployment standard:**

Should the City Council decide to purchase Tasers, it should do so only conditioned on a "threat of imminent serious bodily injury" deployment standard, putting Tasers on a par with firearms. This standard is endorsed by the Stanford Report, Amnesty International Report and the American Civil Liberties of Northern California Report, and is appropriate for this community. By Chief Facos's own admission, the "active resistance" standard is insufficient to the extent it requires only, for example, "stiffening" or "hunching" on the part of the subject. Some reports, such as the Braidwood Inquiry and the Burlington use of force policy (which Chief Facos approves of), purport to go further than "active resistance" by vaguely requiring there be a "risk of bodily injury" or "risk of harm" posed by the subject. The Maryland Report goes a step further by requiring a "risk of physical injury . . . excluding minor injuries". These standards, in the Committee's view, offer an illusory restraint on the use of the weapon, for what difficult encounter could not be rationalized afterwards as containing a "risk of harm"? The simple "risk of harm" standard is more atmospheric than substantive, and insufficiently protective of the public. Only a "threat of imminent serious bodily injury", akin to the lethal force standard for

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<sup>57</sup> See Silverstein, *supra*, at 3-4, who reports that the Securities and Exchange Commission investigated allegedly deceptive statements by the company following reports in the Arizona Republic and the New York Times questioning its safety claims, company reliability studies, and marketing practices. The Taser company agreed to modify its "nonlethal" claims about the weapon, and in 2006 settled a stockholder lawsuit for \$20 million.

<sup>58</sup> "Conducted Energy Devices Guidelines and Limitations", American Civil Liberties Union of Northern California, at 2. Available at [http://www.aclunc.org/docs/criminal\\_justice/police\\_practices/aclu\\_of\\_northern\\_california\\_conducted\\_energy\\_devices\\_guidelines\\_and\\_limitations.pdf](http://www.aclunc.org/docs/criminal_justice/police_practices/aclu_of_northern_california_conducted_energy_devices_guidelines_and_limitations.pdf).

In agreeing with this proposal, Chief Facos stated he believed

firearms, is meaningfully restrictive as to when this weapon may be used, and provides an enforceable restraint against abusive or premature deployment. It would prevent unfortunate Taser incidents that have occurred in Vermont, such as the groundless tasing of a homeless woman outside a convenience store in Barre, the tasing of a 23 year-old man with Downs Syndrome by the State Police for pulling away from an officer during an effort to escort him to a new placement, the tasing of the protesters in Brattleboro, and the tasing of a Fairlee man who was experiencing a seizure. None of these, and other incidents, should have happened, and they are far less likely to happen with a “serious bodily injury” standard of deployment.

**5. Position Tasers immediately below firearms on the force continuum:** The VLCT model policy that Chief Facos has proposed would place Tasers far down the use of force continuum, akin to pepper spray, and below canines, batons and physical measures. Such a placement on the continuum does not appreciate that this device is termed “less lethal” by its manufacturer because it can be lethal. Low placement on the continuum will only encourage the premature resort to the weapon when other, non-lethal weapons and methods would suffice to control a situation. For these reasons, Tasers should be placed immediately below firearms on the use of force continuum.

**6. Equip officers with body cameras:** Tasers should not be adopted without the concurrent adoption of body cameras, such as are used by many police forces, for the protection they offer to everyone involved in police-citizen encounters and to the City itself. Chief Facos told the Committee he had no objection to body cameras. And he agreed that, since body cameras make full recordings of such encounters, they were superior to Taser-mounted cameras, which only begin recording when the weapon’s safety is taken off, thereby offering no record that demonstrates the justification of a deployment. The deployment of body cameras must be with policy rules including that the cameras “on” at the beginning of all “street” encounters.

**7. Carry defibrillators in cruisers and require officer training and competency in their use:** Tasers are especially dangerous for individuals with heart conditions or who are highly agitated. Such agitation is often seen in incidents involving an intoxicated or mentally unbalanced individual. Heart complications, such as ventricular defibrillation, are a serious concern and a prominent suspect in Taser-related deaths. The Committee and Chief Facos agree with the wisdom of placing a defibrillator in every cruiser. Officers must be trained and shown competent in their use.

**8. Collect and preserve data indefinitely:** The VLCT-proposed policy would have Taser-related data kept for no more than 30 days unless an unnamed records employee in the police department determines, for unstated reasons, that some particular data should be kept longer. It is imperative that Taser data be preserved indefinitely. Chief Facos agrees with this.

**9. Add pepper foam to the police arsenal, and consider other non- and less-lethal alternatives to Tasers:** The Montpelier Police arsenal should include pepper foam. This weapon was specifically developed to offset one of the limitations of pepper spray, that it can give off gas that can be drawn into a ventilation system. While not a perfect answer to all pepper

spray concerns since even foam gives off some amount of gas, it nevertheless goes a long way to enlarge the capability of oleoresin capsicum to handle difficult encounters and prevent recourse to Tasers. The Committee believes pepper foam would be a wise addition to the police arsenal regardless of whether Tasers are acquired. It also recommends the police department investigate other less lethal and non lethal weapons such as projected bean bags, foam batons, and the newly-developed police devices that immobilize by means of intense light.

**10. Create a Citizen Review Board:** The Committee strongly recommends the creation of a Citizen Review Board to review use-of-force incidents, and Chief Facos agrees such a board could be beneficial.<sup>59</sup> Such a board would not only be a helpful investigatory tool for the city, but would also help maintain police-community relations, especially in light of the deep division of public opinion regarding Tasers. The Committee recommends a review board regardless of whether Tasers are acquired. Such a board would need sufficient resources, unrestricted access to information, and meaningful powers, for it to have credibility in the community.<sup>60</sup>

**11. Prohibit drive stun mode:** Some reports on Tasers would recommend allowing the drive stun mode in exigent circumstances to prevent death or serious bodily injury. Other studies recommend this mode never be permitted, because in that mode the device does not immobilize, but only causes excruciating pain, which some subjects can “fight through”, with the result of the aggravation of the already-tense encounter. The Committee recommends the prohibition of the device in drive stun mode, to prevent both the aggravation of an encounter and to make less likely the potential for abusive deployment of the device.

**12. Prohibit tasing a fleeing or running subject:** All major studies prohibit deploying Tasers on fleeing or running subjects, due to the increased risk of injury or death.

**13. Use specific, descriptive and mandatory language in written policy:** The proposed VLCT policy is replete with suggestive, non-mandatory language that may suit the insurance company but does not protect the officer or the public. The policy makes continual use of “should”, “it is recommended”, “should consider”, and similar vague and non-mandatory language. Police officers must, by necessity, use their discretion in the field. But that discretion must be guided by policy that cabins discretion with mandates (“must”, “shall”) to the extent prudent and possible. The lack of such policy language is an invitation to municipal liability.

**14. Include in any policy the current policy’s humane and cautious principles regarding an escalating use of force:** Our current Use of Force policy, on page one, contains common-sense, humane and cautious principles that the proposed VLCT policy omits. They include:

- “[T]he degree of force employed should generally be in direct relationship to the amount of resistance employed by the person or the immediate threat the person poses to the officer or

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<sup>59</sup> In agreeing with this proposal, Chief Facos stated he believed the members of a review board should be educated with regard to use-of-force matters. He also said he would need to consult with legal counsel about this proposal.

<sup>60</sup> A leading resource for understanding and creating citizen review boards is the National Association for Civilian Oversight of Law Enforcement (NACOLE), found at [www.nacole.org](http://www.nacole.org).

others.

- “The use of force by officers of the department will generally be progressive in nature.”
- “Officers must weight the circumstances of each case and employ only that amount of force which is objectively reasonable to control the situation or persons.”
- “[T]hey shall, to the extent possible, utilize an escalating level of force . . . .”

These concepts are either missing or severely diluted in the proposed VLCT policy, and in so doing the proposed policy backs away from the injunctions that police use only the force necessary, and only in an escalating fashion to the extent possible. The omission of these principles increases danger to the public and liability to the city. Any Montpelier policy must embrace the principle that “[n]on-force options should be tried where feasible before using an ECW or other force options.”<sup>61</sup>

**15. Fully specify all populations and circumstances relevant to limitations on Taser deployment:** The proposed VLCT policy states: “Officers should consider the particular subject and any vulnerabilities they may have, such as: juveniles, pregnant women, persons who are small in stature, and the elderly. Alternative tactics shall be utilized where the officer has prior information that the subject suffers from a disability which would increase the danger to that person by using the Electronic Restraint Device, i.e., a person at the scene tells an officer that the subject has a heart condition.” (IV)(F)(b)(xxiii and xxiv). In light of the extensive prohibitions that have developed from the research, any written policy must **specify** the precise vulnerable population categories, as set out *supra*, and reiterate that Tasers may only be deployed against them in the extreme circumstance of a **threat of imminent serious bodily injury or death**.

As alarming as the policy’s lack of specification and guidance regarding vulnerable populations, is its treatment of a recognized one. Section (IV)(F)(b)(vi) states: “Multiple Electronic Control Device deployments against an individual may increase the likelihood of serious injury where the individual is suffering from other [*which?*] symptoms such as cocaine intoxication.” It leaves up to the officer to guess what other symptoms may fall under this section. But then it goes on: “Policy and training should encourage officers to minimize the successive number of discharges against an individual where possible.” In other words, officers are not instructed to refrain from deploying against these unspecified populations unless lethal force would be justified – rather, they are only told not to deploy *successive* discharges. This is at least negligence, if not recklessness, in policy development.

Many other situations and vulnerable populations and prohibited circumstances are unspecified in this policy, too numerous, and perhaps unnecessary, to point out. Suffice to say the itemization of these prohibitions, as set forth earlier in this report, *and including the cognitively disabled*, should be set out with specificity in any Montpelier use-of-force policy.

**16. Require warnings when possible before deployment:** The proposed VLCT policy states: “A warning prior to discharge is preferred but not always necessary for this type of force to be considered reasonable.” (IV)(F)(b)(xvii)). This is insufficient guidance to the officer in the

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<sup>61</sup> Maryland Report at 69.

field, causes unnecessary danger, and invites liability. While pre-tasing warnings are not always possible in exigent circumstances, such warnings should be mandatory when they would not clearly jeopardize the law enforcement objective, and written policy should make this clear. (*Accord*: Maryland Report at 71)

**17. Prohibit use of a Taser as a pain compliance weapon or general force tool.** The proposed VLCT policy states: “Officers are prohibited from using the device as a punitive measure.” (IV)(F)(b)(xv). This is insufficient, in light of the view of the major reports on Tasers that go beyond punitive use, to also prohibiting use for compliance and as a general force tool.

**18. Prohibit multiple shots and continuous or prolonged exposure except where lethal force would be justified:** Taser shocks should be as brief as possible. Multiple shots against a subject are significantly associated with Taser-proximate fatalities, particularly if the subject was emotionally disturbed, drug intoxicated or showed continued resistance.<sup>62</sup>

“An officer should only administer an additional ECW discharge after the initial discharge if the officer has reevaluated and concluded that the subject still poses an imminent threat of significant physical harm and other options are not appropriate. Repeated or prolonged (*i.e.*, beyond the 5-second standard cycle) discharges should be avoided whenever possible.” (Maryland Report at 71)

**19. Prohibit Taser use on subjects in restraints except where lethal force would be justified.** (*Accord*: ACLU of Northern California report at 4). The ability of a subject to cause a threat of harm while in restraints is not eliminated but is greatly reduced. Other forms of control must be used in this circumstance unless the subject poses an ongoing threat of causing imminent serious bodily injury.

**20. Avoid impairment of respiration:** Given the respiratory complications that are associated with Taser use, an officer must, following use of a Taser, not employ a restraint method that could impair a subject’s respiration.

**21. Provide emergency medical care immediately after *all* Taser use:** Emergency care should be provided immediately after all Taser deployments. The subject, who may be intoxicated or mentally ill, cannot be relied on to request or agree to such care. Medical care should be called in advance and on the scene if an officer believes use of a Taser is reasonably possible.

**22. Monitor tased subject’s health closely while in custody:** Studies indicate that the in-custody death rate rises after the introduction of Tasers. All tased people must be closely monitored while in custody, even after receiving medical care.

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<sup>62</sup> White and Ready, *supra*, at 863.

**23. Reporting, supervision and monitoring:** All Taser incidents must be reported on a use-of-force form detailing events leading up to and following the discharge. Data to be reported include but are not limited to: a detailed description of the subject's behavior, the facts and level of aggression presented by the subject, the officer's reasons for concluding there was a likelihood of imminent harm by the subject, the number of cycles and the duration of shock, the duration between shocks, all witnesses, the range, the mode used, the distance fired, the point of impact on the body, whether there was any indication that the subject was a member of any vulnerable population as described earlier in this report, the time and type of medical care provided, and any injuries suffered by any person.

**24. Supervisors should respond to the scene of any Taser deployment as soon as possible:** The quick presence at the scene of a deployment by a supervisor would both ensure to officer and the public the seriousness with which the police force and the city regard Taser deployment, and also assure an immediate assessment of the appropriateness of the deployment.

**25. Conduct rigorous investigation following each deployment:** A supervisory-level or higher inquiry must be conducted to determine the appropriateness of every deployment and whether there was strict adherence to policy and training. Such investigations should include interview of witnesses; review of video, photographic and data evidence, test results on the weapon; and other relevant information. Such investigation must also be conducted externally, by Citizen Review Board or otherwise, when a subject dies or is seriously injured, when there has been a substantial deviation from policy or training, and when the subject is a restrained or a vulnerable person as defined in this report.

**26. Monitor Taser use by the agency:** The police force should use a tracking database that is capable of maintaining detailed information as to each device and each deployment, can reveal the circumstances of every Taser deployment, and shows the extent to which officers are relying on the device compared to other forms and methods of control. This information and data must be available to the public.



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