

# LESS LETHAL FORCE

Proposed Standards for Massachusetts  
Law Enforcement Agencies



## **Table of Contents**

Executive Summary .....	i
I. Introduction .....	1
II. Less Lethal Weapons .....	2
A. Types of Less Lethal Weapons .....	2
1. Chemical Sprays .....	2
2. Pepper Spray .....	3
3. Impact Projectiles .....	4
a. Bean Bag Rounds .....	4
b. Rubber Bullets .....	4
c. Pepper Spray Projectiles .....	5
d. Wooden Bullet Projectiles .....	5
4. Electroshock Weapons .....	5
5. Other Devices .....	6
B. Studies Regarding Physiological Effects of Less Lethal Weapons .....	7
III. Legislation Regarding Less Lethal Weapons .....	8
IV. Legal Issues Regarding Less Lethal Weapons .....	11
A. Overview .....	11
B. Cases Involving Less Lethal Force .....	12
1. Pepper Spray .....	12
2. Projectiles .....	13
3. Tasers .....	14

V.	A Survey Of The Current Less Lethal Force Policies Of Select Metropolitan Police Departments .....	16
A.	General Police Department Use of Force Policies .....	16
1.	Boston Police Department .....	16
2.	New York Police Department .....	19
3.	Seattle Police Department .....	19
4.	Los Angeles Police Department .....	20
B.	Training Requirements .....	21
1.	Boston Police Department .....	21
2.	Other Police Departments .....	21
C.	Reporting Requirements .....	23
1.	Boston .....	23
2.	Seattle .....	24
3.	Los Angeles Police Department .....	24
D.	Additional Miscellaneous Policies .....	25
1.	Boston .....	25
2.	Other Police Departments .....	25
E.	Department of Justice Actions and Guidelines .....	26
F.	Summary of Issues Raised by Review of Police Department Policies .....	28
VI.	Proposed Less Lethal Force Policy for the Boston Police Department .....	29
A.	Before Less Lethal Force is Used .....	30
1.	Preliminary Review .....	30
2.	Training .....	30

B.	Use of Less Lethal Force .....	31
C.	After Use of Less Lethal Force .....	33
D.	Monitoring the Use of Less Lethal Force .....	34
VII.	Conclusion .....	35



## **Less Lethal Force: Proposed Standards for Massachusetts Law Enforcement Agencies**

### **Executive Summary**

In Massachusetts and around the country, police departments are adopting so-called “less lethal” weapons technology for use in situations in which the use of firearms is neither required nor justified. While intended only to incapacitate or restrain a dangerous or threatening person, these weapons are potentially capable of causing death or serious physical injury. The fact that they are less lethal than firearms should not in any way detract from the need to insure that particular weapons are appropriate for law enforcement use, and to regulate and monitor their use by police officers.

In July 2004, Massachusetts became the forty-ninth state to allow law enforcement officials to use electroshock weapons -- known as “stun guns” or “Tasers” -- without any legislative standards regarding the training in or use of these weapons. Since 2001, over 100 people have died in the United States after being stunned with a Taser. As a result, police departments nationwide – notably Chicago and the State of New Jersey – have suspended or delayed the use of Tasers citing safety concerns following fatal incidents.

The death in October 2004 of Victoria Snelgrove, who was killed after being shot in the eye by a Boston Police officer with a pepper spray ball, led the Boston Police Department to call for a review of its less lethal force policy through the creation of the Stern Commission. The American Civil Liberties Union of Massachusetts has prepared this report to support efforts by the Stern Commission, the Boston Police Department, and police departments throughout the Commonwealth to establish appropriate standards for the adoption and use of less lethal weapons.

The report begins with a review of the types of less lethal weapons currently available to law enforcement, including chemical sprays, pepper spray, impact projectiles, electroshock weapons, and other devices (Section II). It then examines national legislative and legal landscape regarding less lethal weapons, including a review of recent lawsuits against police departments arising from the use of less lethal force (Section III and IV). A survey of current less lethal policies of major metropolitan police departments is set forth in Section V, covering Boston, New York, Seattle, and Los Angeles.

The final section offers specific recommendations to the Boston Police Department and other Massachusetts law enforcement agencies considering the use of less lethal force. The recommendations include specific guidelines for (1) preliminary review; (2) training; (3) use; (4) post-use practices; and (5) monitoring of less lethal force weapons

ACLU of Massachusetts recommendations include:

## 1. **Preliminary Review**

In spite of their widespread use and their proven power to seriously injure or kill their intended target, there are presently no government standards for the design and use of less lethal weapons. For this reason, the Department should, before approving any new weapon for use by its officers, require an independent evaluation of the weapon. This would include:

- ▶ an evaluation of the physiological effects of the use of the weapon on its intended target and the officers who use it;
- ▶ assessment of the risk of death or serious injury that it poses;
- ▶ consideration of its appropriate uses and limitations;
- ▶ the specific training which it will require, and
- ▶ proposing regulations governing its use.

## 2. **Training**

A police department should have well-defined training programs that include both a comprehensive initial program and yearly follow-up training.

- ▶ The training courses should be administered by the police department itself, related state or local agencies, or neutral third parties. Manufacturers and distributors of less lethal weapons should not administer the training, as these parties may tend to emphasize the advantages and downplay the disadvantages of less lethal force as part of their sales pitch.
- ▶ The quantity and quality of training regarding less lethal force should be evaluated and increased, if necessary, to address the numerous issues relevant to the use of less lethal weapons.
- ▶ First and foremost, the training should include a component regarding how to avoid confrontations or prevent them from escalating.
- ▶ Other issues to be addressed include, but are not limited to, the underlying technology and operation of the weapons themselves, the physiological effects upon an individual against whom such a weapon has been used, the proper use of the weapon (i.e., minimum distance between subject target, length of time that officer should activate weapon, the appropriate place of impact on the target's body), a review of the Fourth Amendment and its relationship to the use of force, and the circumstances under which the weapon should or should not be used.
- ▶ Training should also address the use of less lethal force with respect to certain populations, including children, the elderly, and the mentally ill. This portion of

- the training should have a strong emphasis on de-escalation of the use of force.
- ▶ Training should include instruction directed to a use of force continuum. The program should emphasize that the use of force continuum should be treated as a guide that will provide an officer with a suggestion about the appropriate level of force that would be used in a somewhat analogous situation.
  - ▶ A well-developed practical component of the training program is also essential for preparing officers to use less lethal force in the field, including interactive exercises and hands-on training and practice in deploying the weapon, which may include use of the weapon against an officer volunteer.
  - ▶ The department should also hold yearly “refresher” courses regarding the use of less lethal force.

### 3. Use of Less Lethal Force

The foundation of a police department’s less lethal force policy should be a use of force continuum, as set forth in the Comments to Article 3 of the United Nations Code of Conduct for Law Enforcement Officials, which was adopted by the General Assembly in December 1979.

- ▶ The amount of force used by a police officer should be proportionate with the threat posed to the police officer or to the public.
- ▶ Officers should begin at the lowest levels of force necessary to effect an arrest or to control and contain a threat, and escalation of force to the next level should occur only when the officer has determined that such an escalation is reasonably necessary.
- ▶ Contrary to the present Boston Police Department policy, officers should not (in any circumstances) use a level of less lethal force that exceeds soft-handling/passive restraints when arresting a subject that is passively resisting.
- ▶ Situations in which crowd control will be needed can often be predicted in advance, since certain events will tend to give rise to large crowds (e.g., protests for which permits are required, parades, celebrations following sporting events). Therefore, before the event occurs, a police department should review the types of less lethal weapons that an officer may use for crowd control purposes and authorize the officers assigned to the event to use only those weapons that it deems appropriate.
- ▶ In view of the proposed use of a force continuum, Boston Police Department Manual Rule 304 should be revised. Rule 304 does not prohibit the use of “incapacitating agents” when used against a subject who is less than two feet away, who is enclosed in an unventilated area, or who lacks normal reflexes or is otherwise incapacitated. Instead, the rule only indicates that “officers should be aware of” the potential for serious injury when an incapacitating agent is used in these circumstances. We propose that Rule 304 should be amended to prohibit the use of incapacitating agents with respect to each of the circumstances enumerated in the rule.
- ▶ A lower level of force should always be used with respect to certain populations. Members of these populations often have physiological or mental impairments

that render them especially susceptible to permanent injury or death following the use of non-lethal weapons. These populations include pregnant women; children (i.e., persons below the age of sixteen years); the elderly (i.e., persons over the age of fifty years); individuals with mental disabilities or impairments; individuals with altered mental states due to use of narcotics, hallucinogenics, or other drugs; and individuals who appear to be suffering from cardiac or respiratory problems.

- ▶ Less lethal weapons carried by an officer should be plainly distinguishable from each other to reduce the risk of confusing the two weapons in a stressful situation.

#### **4. After Use of Less Lethal Force**

A police department should also have clear policies regarding the procedures that shall be followed after less lethal force is used.

- ▶ First, the policy should contain clear instructions about the medical treatment that an officer should provide to a person upon whom he has used less lethal force.
- ▶ Second, the officer who has used less lethal force should be required to complete and submit individual reports before the end of his tour of duty. The individual reports should include at least the following information:
  - The type of force used
  - The circumstances that gave rise to the use
  - The duration of the use of force
  - The distance between the officer and the victim
  - The name, age, sex, weight, and height of the victim
  - Whether the victim was intoxicated or under the influence of drugs
  - Whether the victim was pregnant
  - Whether the officer informed the victim that less lethal force would be used if the victim did not obey the officer's orders
  - Observations regarding the general physical condition of the victim following the use of force
  - Whether the victim received medical attention following the use of force
  - Photographs of any injuries to the victim following the use of less lethal force

#### **5. Monitoring the Use of Less Lethal Force**

Monitoring the use of less lethal force should be an essential part of a police department's policy related to these weapons. The foundation of monitoring is strict reporting requirements.

- ▶ Records that indicate the frequency of use of less than weapons by police precinct and by the individuals within that precinct will provide valuable data indicating whether more restrictive policies should be considered or if a particular individual is abusing the privilege of using less lethal force.

- ▶ Individual and cumulative records of the use of less lethal force should be maintained by the department. As noted above, an officer who has used less lethal force should be required to complete and submit a report before the end of his tour of duty.
- ▶ The report should be reviewed by appropriate channels and forwarded to the Office of Internal Investigations and the Training and Education Division, which maintains a comprehensive file of all the use of force reports. These reports should be maintained in paper form and added to a centralized database, similar to the “TEAMS” database (discussed supra) used by the Los Angeles Police Department.
- ▶ Each month, a member of the Office of Internal Investigations should compile statistics regarding the use of less lethal force. These statistics should include (1) the number of times each type of less lethal weapon was used in one month, (2) the number of times each officer used less lethal force, and (3) the number of times a precinct used less lethal force. Any notable trends in less lethal weapons, including repeated instances of use by the same officer or precinct, should be reported to a supervisor for further evaluation and possible corrective action.

### **Conclusion**

The ACLU of Massachusetts believes that implementation of the policy recommendations for controlling the use of less lethal force by police officers will benefit both the police and the general public. The public will receive some measure of protection against the excessive use of less lethal force. The police will be given much-needed guidance regarding the use of less lethal force. Finally, municipalities may limit the risk of having to compensate those against whom less lethal force was improperly used.

## I. Introduction

In Massachusetts and around the country, police departments are adopting so-called “less lethal” weapons technology for use in situations in which the use of firearms is neither required nor justified. While intended only to incapacitate or restrain a dangerous or threatening person, these weapons are potentially capable of causing death or serious physical injury. The fact that they are less lethal than firearms should not in any way detract from the need to insure that particular weapons are appropriate for law enforcement use, and to regulate and monitor their use by police officers.

In July 2004, Massachusetts became the forty-ninth state to allow law enforcement officials to use electroshock weapons -- known as “stun guns” or “Tasers” -- without any legislative standards regarding the training in or use of these weapons. Since 2001, over 100 people have died in the United States after being stunned with a Taser. As a result, police departments nationwide – notably Chicago and the State of New Jersey – have suspended or delayed the use of Tasers citing safety concerns following fatal incidents.

The death in October 2004 of Victoria Snelgrove, who was killed after being shot in the eye by a Boston Police officer with a pepper spray ball,<sup>1</sup> led the Boston Police Department to call for a review of its less lethal force policy through the creation of the Stern Commission. The American Civil Liberties Union of Massachusetts has prepared this report to support efforts by the Stern Commission, the Boston Police Department, and police departments throughout the Commonwealth to establish appropriate standards for the adoption and use of less lethal weapons.

The report begins with a review of the types of less lethal weapons currently available to law enforcement, including chemical sprays, pepper spray, impact projectiles, electroshock weapons, and other devices (Section II). It then examines national legislative and legal landscape regarding less lethal weapons, including a review of recent lawsuits against police departments arising from the use of less lethal force (Section III and IV). A survey of current less lethal force policies of major metropolitan police departments is set forth in Section V, covering Boston, New York, Seattle, and Los Angeles.

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<sup>1</sup> Thomas Farragher & David Abel, *Postgame police projectile kills an Emerson Student*, BOSTON GLOBE, October 22, 2004.

## II. Less Lethal Weapons

### A. Types of Less Lethal Weapons

Incidents involving hostage rescue, attempted suicide, crowd control, unruly and potentially violent individuals, and domestic disturbances are among the common and routine challenges confronting police officers, and these situations are often tense and uncertain. Furthermore, a police officer must act quickly but reasonably to resolve them, which may require the use of some level of force. For most of these situations, however, the use of firearms is neither required nor justified.

In recent years, a number of less lethal weapons have been developed for law enforcement use in situations requiring some use of force. Four of the most common less lethal weapons are described below. These are synthetic chemical sprays, pepper spray, impact projectiles, and electroshock weapons. In addition, a description of the next generation of less lethal weapons is provided.<sup>2</sup>

The weapons in these categories cannot be used interchangeably. Instead, each category of less lethal weapon has characteristics that make it appropriate for dealing with certain threats, but not others. Thus, no police department can rely on a single type of less lethal weapon in all encounters that do not require the use of lethal force. Understanding how and when each type of less lethal weapon should be used, and the advantages and disadvantages of each kind of weapon, are essential to revising the less lethal force policy of the Boston Police Department.

#### 1. Chemical Sprays

Two types of chemical agents are commonly used by police officers as less lethal weapons: chloroacetophenone (“CN”) and orthochlorobenzalmalononitrile (“CS”), which are collectively known as “tear gas.” The effects of exposure to these chemicals can include tearing and involuntary closure of the eyes and severe burning sensations on the nerve endings of the skin. Other typical results include coughing, inflammation, mucous secretion, headache, nausea, dizziness, a tight feeling in the chest, and excessive salivation. However, neither of these agents can produce instant incapacitation, particularly when used against individuals who are under the influence of drugs or alcohol.

CN is still used in many parts of the world. Dissatisfaction with its potency and chemical instability, however, led to the development of CS in the 1950s. Although it is slower acting than CN, CS is more powerful and longer-lasting.

There are multiple ways to deliver CN and CS, including various grenade-delivery

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<sup>2</sup> Further information, including photographs and information regarding additional types of less lethal weapons, can be found in an October 2004 report authored by the National Institute of Justice, entitled “Department of Defense Nonlethal Weapons and Equipment Review: A Research Guide for Civil Law Enforcement and Corrections.” This report is attached hereto as Exhibit 1.

mechanisms, firearm-delivered cartridges, and liquid or aerosol spray delivery mechanisms. The use of CN and CS is common in crowd control situations (using the grenade delivery mechanisms) and against violent subjects (using aerosol or liquid spray delivery mechanisms). CN and CS may also be fired into homes or buildings to incapacitate or force the surrender of targets inside.

## 2. **Pepper Spray**

Oleoresin capsicum (“OC”) is a less lethal weapon derived from the oily extract of the cayenne pepper plant, which gives rise to its common name of “pepper spray.” Exposure to pepper spray causes irritation to the skin, eyes, and respiratory tract. In 1973, pepper spray became available as an aerosol spray and had gained widespread use by law enforcement by the 1980s.

Today, pepper spray is commonly delivered via handheld canisters that emit an aerosol spray, liquid stream, or foam containing OC concentrations ranging from 1% to 10%. Contact with pepper spray particles incapacitates subjects by inducing an almost immediate burning sensation of the skin and burning and uncontrollable swelling of the eyes. When it is inhaled, pepper spray causes inflammation of the respiratory tract, resulting in a swelling of the mucous membranes lining the breathing passages that temporarily restricts breathing to short, shallow breaths (or even gasping and bronchial spasms). However, pepper spray does not cause permanent injury when properly employed and requires little decontamination, especially in comparison to chemical products like CN and CS.

Pepper spray produces the same debilitating physiological reaction on most people exposed to it: an involuntary swelling-shut of the eyes. This effect distinguishes pepper spray from CN or CS, which do not produce comparable physiological effects and can thus fail to incapacitate certain persons (*e.g.*, persons who are extremely agitated, determined, under the influence of drugs, or accustomed to exposure of chemical agents). Proponents of pepper spray cite its ability to cause temporary blindness and shortness of breath as an advantage for law enforcement in restraining violent individuals.

Many pepper spray weapons have a limited range. Belt-carried canisters typically have an effective range of three to six feet. Larger “crowd control” projectile versions, discussed below, can be effective when launched from a greater distance to disperse a crowd.

The risks of pepper spray as a less lethal weapon may be exacerbated by other factors. One study has found that exposure to pepper spray, when combined with pre-existing respiratory difficulties and asthma, can lead to fatalities.<sup>3</sup> It is also possible that exposure to pepper spray, combined with positional restraints such as the “hogtie,” could pose additional risk of asphyxia.

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<sup>3</sup> United States Department of Justice, Office of Justice Programs, National Institute of Justice, *The Effectiveness and Safety of Pepper Spray*, April 2003, NCJ 195739.

### 3. **Impact Projectiles**

Impact projectiles incapacitate their target through the application of blunt trauma force. They are designed to deliver a debilitating (albeit superficial) blow to a subject that renders the subject incapable of pursuing a violent or threatening objective. Impact projectiles are typically fired from shotguns or specialized launchers. Although impact projectiles are discharged like a firearm, their purpose is to incapacitate by inflicting pain and bruising, without penetrating the body. Many variations of these impact projectiles exist, including “bean bag” rounds, rubber bullets, pepper spray balls, and wooden projectiles. Notably, many police departments use weapons launchers (*e.g.*, the ARWEN 37 mm Weapon System and the SAGE SL-6) that are able to fire a wide range of less lethal projectiles.

Impact projectile weapons permit the use of less lethal force from a greater distance than other less lethal weapons. The projectiles are fired from weapons capable of propelling the projectiles over substantial distances while still delivering a sufficient blow to knock down or otherwise incapacitate their target. Law enforcement personnel can thus avoid the zone of danger presented by the threat.

However, these weapons are capable of inflicting severe trauma, or even causing death, when fired at close range. The most likely injury to result from close-range use of impact projectiles is broken bones, but more serious injuries may occur if the projectile strikes the head, throat, or heart area. In a recent incident, a man in Columbus, Ohio, was killed after being hit in the area of his spleen by two beanbag rounds.<sup>4</sup> According to press accounts of the man’s confrontation with police, he was shot at a range of approximately 25 feet – the recommended minimum distance from a target.

#### (a) **Bean Bag Rounds**

“Bean bag” rounds are small square or round pouches filled with metal pellets. These pouches are folded to fit in 12 gauge shotgun cartridges or 37/40 millimeter cartridges, and are fired from firearms that are already a part of a police department’s arsenal. When fired, the pouches unfold to full size before striking their intended target, thus allowing the force of their impact to be distributed evenly over their surface area.

#### (b) **Rubber Bullets**

Rubber bullets are similar to standard ammunition but are made of rubber instead of lead, and are fired at slower velocities compared to lead projectiles. Rubber bullet rounds have commonly been used in riot-control situations.

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<sup>4</sup> Associated Press, *Man dies after police shoot him with bean bags*, <http://www.cnn.com/2005/US/04/08/beanbag.death.ap/index.html>, April 8, 2005 (last visited May 6, 2005).

(c) **Pepper Spray Projectiles**

Pepper spray projectiles are fired by air pressure launchers and break upon impact to release the pepper spray contained within them. This pepper spray has the same effect of the hand-held pepper spray canisters described *supra*, without the risk posed to a police officer by a limited stand-off distance.

However, due to the nature of impact projectile weapons, pepper spray projectiles can pose a lethal threat, as evidenced by the death of Ms. Snelgrove last October. Following her death, pepper spray projectiles were removed from the Boston Police Department's arsenal.

In the past, the American Civil Liberties Union has protested the use of pepper spray as a crowd control device. Following a 1997 incident in which police used pepper spray to disperse protesters in Eugene, Oregon, the ACLU worked with the city's police department to develop a policy that prevents its use to disperse crowds.

(d) **Wooden Bullet Projectiles**

Wooden bullet projectiles were first used in the 1960s by British troops, who fired "baton rounds" to control rioters in Hong Kong. These rounds consisted of 25 mm cylinders made of teak and were also widely used by British troops in Northern Ireland.

The wooden bullets used in the United States are wooden dowels that are approximately 1.5 inches thick and 1 inch long. Like rubber bullets, wooden bullets are often used to disperse protesters and in riot control situations. For example, in April 2003, police in Oakland, California fired wooden bullets into a crowd protesting the Iraq war, leaving large raised welts on those hit by the projectiles.<sup>5</sup> The extensive litigation resulting from this incident will be discussed *infra*.

4. **Electroshock Weapons**

Electroshock weapons function by delivering a high voltage electric current into a target, resulting in a loss of neuromuscular control and the ability to perform coordinated action for the duration of the electric shock. Typically, the target collapses to the ground due to a loss of total muscle control and remains dazed for a short period of time. Two kinds of handheld electroshock weapons exist: the stun gun and the dart-firing electrical shock device, more commonly known as the Taser.

A stun gun is relatively simple to operate. A police officer needs only to touch a suspect with the charged portion of the stun gun and press a switch, which completes an electrical circuit

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<sup>5</sup> Graphic evidence of the injuries suffered by these protestors can be found at [http://athens.indymedia.org/local/webcast/uploads/metafiles/oakland\\_docks2.jpg](http://athens.indymedia.org/local/webcast/uploads/metafiles/oakland_docks2.jpg) and <http://www.commondreams.org/headlines03/0407-06.htm>.

and delivers an incapacitating shock to the target. The design of a stun gun limits the possible distance between an officer and his target, thereby creating a close-range confrontation.

The Taser is the most popular electroshock weapon used by law enforcement.<sup>6</sup> A Taser works like an ordinary handgun and can be operated from up to 25 feet away from the target, depending upon the length of the electric wire connecting the darts to the device. The device uses compressed nitrogen gas to fire two wires tipped with electrical barbs at an intended target. When the barbs penetrate the target's skin or clothing, an electrical signal is transmitted through the wires, resulting in a paralyzing and incapacitating electrical shock. The initial electrical jolt lasts five seconds, but it may be extended indefinitely by continuously pressing the device's trigger. The duration of the shock will be recorded by the Taser's internal microchip.

Electroshock weapons are capable of producing an immediate incapacitating effect that can last for several seconds. The devices are also relatively light and portable when compared with the firearms used to deploy impact projectiles, allowing police officers to easily carry a Taser or stun gun as standard equipment on their belt. Furthermore, both devices can be operated using only one hand. The portability of these devices also makes them accessible in sudden emergencies.

Since 2001, over 100 people have died in the U.S. after being stunned with a Taser. This has led to increasing controversy surrounding their use. Despite the steadily increasing number of Taser-related deaths, its manufacturer continues to maintain that Tasers are a safe and essential less lethal weapon. Many law enforcement agencies and departments also believe in the safety and effectiveness of Tasers and feel that the device is essential for routine police emergencies. However, other police departments nationwide – most notably in Chicago and the State of New Jersey – have suspended the use of Tasers or have put on hold plans to expand their deployment, citing concerns about their safety following fatal incidents.

## 5. Other Devices

Various additional weapons utilizing bright light, acoustic energy, and malodors are under development. While these weapons may not be relevant to a particular police department's current less lethal force policy, an awareness of the current development status of these weapons may lead to their incorporation in such policies in the future.

In general, these weapons incapacitate a subject by overwhelming his senses. For example, Law Enforcement Technologies, Inc., is developing a less lethal weapon called a "flash-bang" round that combines light and sound in one weapon. The flash-bang round is fired from a 37 mm or 40 mm firearm and bursts in midair before reaching its target. Upon bursting, the weapon ejects and ignites flake aluminum, thereby creating a brilliant flash that causes no

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<sup>6</sup> Associated Press, *Amnesty Report slams Taser, cites 103 related deaths*, [www.usatoday.com/news/nation/2005-04-01-taser-report\\_x.htm](http://www.usatoday.com/news/nation/2005-04-01-taser-report_x.htm), April 1, 2005.

permanent damage to a person's vision.<sup>7</sup> The round also creates a 170 decibel bang, which is louder than a jet engine at take-off. The manufacturer claims that the round can be fired accurately from 20 to 100 yards away and does not result in permanent harm.

By using both light and acoustics, the flash-bang round simultaneously attacks and overwhelms the two senses used to process the surrounding environment. A person subjected to a flash-bang round would become disoriented, making it difficult for him to resist arrest. The effects of a round's burst can last from 45 seconds to 15 minutes, depending on several factors (*e.g.*, time of day and proximity of the burst to the individual).

Additional less lethal weapons are also being developed. Acoustic weapons, which use both audible and inaudible frequencies, have been examined primarily for halting or dispersing rioting crowds. Malodorous chemicals have also been considered for use as less lethal weapons for various crowd control scenarios.

#### **B. Studies Regarding Physiological Effects of Less Lethal Weapons**

Controversy regarding the use of less lethal weapons has led to a number of studies directed to assessing their safety. For example, the National Institute of Justice is funding a study to record the number and severity of injuries produced by law enforcement officers using electroshock and impact projectile weapons. The lead study site is Wake Forest University Baptist Medical Center, and an additional twelve law enforcement agencies across the nation will participate as study sites. A physician at each site will review and record each less lethal weapon use, the type of weapon used, and record the severity of the injuries in each case based on the use of force report and medical records generated for each use. This independent, two year study is the first of its kind to rate the safety of less lethal weapons used by law enforcement.

Other ongoing studies are focusing on electroshock weapons, primarily the popular Taser. These studies are testing the hypothesis that Taser use causes cardiac fibrillation that may lead to death, since the official cause of death in many fatal Taser incidents is recorded as heart failure. However, the deceased was often under the influence of drugs or had underlying health problems, making it difficult to determine if drugs, Taser use, or both were the primary cause of death.

One of these studies is being conducted at the University of Wisconsin. In that study, scientists will attempt to model the flow of a Taser's electrical current through the human body using anesthetized pigs, animals which have comparable heart and circulatory systems. The study will attempt to determine whether Taser-related deaths were the result of heart failure fueled by drug use or other medical factors, rather than electrocution. Researchers hope that the study will produce information that will help police determine when Tasers should be used, provide standards for how powerful electroshock weapons can be, and instruct emergency room

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<sup>7</sup> The flash is comparable to looking directly at the sun for 60 milliseconds.

personnel on how to treat patients who have been shocked.

In another study, researchers will use existing Los Angeles Sheriff's Department data on electroshock weapons to derive statistics regarding the effectiveness of the devices. Factors defining "effectiveness" will include the reduction in the number of deaths and injuries sustained by officers, suspects, and bystanders, that can be attributed to the use of electroshock weapons instead of firearms. The research will also focus on developing information regarding the scenarios in which use of electroshock weapons is appropriate.

Unfortunately, a more thorough analysis of the risks that may be posed by these weapons tends to occur only after the weapons have been in general use by law enforcement officials. When such weapons are initially marketed, the information available to police departments considering their use consists, for the most part, of materials produced and distributed by the manufacturer. A copy of product information currently provided by the manufacturer of Taser is attached hereto as Exhibit 2.

### III. Legislation Regarding Less Lethal Weapons

As controversy surrounding Taser use has grown in recent months, legislative activity at the federal, state, and municipal levels has also increased.

Tasers have been under scrutiny at the federal level, but legislation regarding their use has been somewhat limited. The Department of Homeland Security's two largest law enforcement divisions have rejected the use of stun guns, largely because of concerns regarding the weapons' safety. The bans were adopted by the Immigration and Customs Enforcement and Customs and Border Protection bureaus, and effect 20,000 agents and officers.

In recent months, state legislatures have also been active in considering legislation regarding less lethal weapons. In July 2004, Massachusetts became the forty-ninth state to allow law enforcement officials to use electronic shock weapons, leaving New Jersey as the only state that bans Tasers for any use whatsoever. Upon enactment of the new law, Massachusetts Governor Mitt Romney stated that "stun guns have proven time and time again when used by law enforcement officers in other states that they are an effective tool in stopping suspects," and that is was "high time for our men and women in blue to utilize this modern crime fighting technology."<sup>8</sup>

However, despite their widespread use by police departments, the use of electronic shock weapons remains controversial. After several recent deaths following Taser use, some police departments have suspended their use in order to re-examine guidelines on their handling. Many of these departments have cited concerns about Tasers' safety, and have decided to await better

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<sup>8</sup> Press Release, Governor Mitt Romney, Romney Approves Electronic Weapons for Law Enforcement; Gives Police Departments Authority to Purchase and Use Effective Tool, [www.mass.gov/portal/govPR.jsp?gov\\_pr=gov\\_pr\\_040715\\_taser\\_gun\\_bill.xml](http://www.mass.gov/portal/govPR.jsp?gov_pr=gov_pr_040715_taser_gun_bill.xml), July 15, 2004 (last viewed April 20, 2005).

data on their health risks.

In addition, legislative proposals in many states and cities have sought to impose moratoria on the use of electronic shock weapons, if not ban them outright. Although some of the proposals will only restrict the availability of the weapons to the general public, some proposals also seek to prohibit use of the weapons by police officers.<sup>9</sup>

In Georgia, a legislative proposal introduced by state representative Tyrone Brooks sought to ban the use of any electroshock device, including Tasers. In support of his proposal, Brooks stated, “I think it’s atrocious that in our society that you can be electrocuted before you’re prosecuted.”<sup>10</sup> His proposal followed incidents in which two people died after being stunned by electroshock weapons. Despite widespread controversy surrounding the two incidents, the legislative proposal failed when the Public Safety Committee of Georgia’s House of Representatives gave a “Do Not Pass” recommendation to the legislation in early February. The Committee is referring the topic to a study committee to gather further information, and it is anticipated that no further action will occur on this legislation for the remainder of this year.

In Florida, four measures seeking to limit or ban the use of Tasers have been introduced in the State Senate. One measure (SB 2448) would make it illegal for any person “to manufacture, display, sell, repair, own, possess, or use a stun gun,” with exceptions that would allow law enforcement use of Tasers. Three other proposals would prohibit the use of stun guns against minors on school grounds (SB 488), require all officers to “complete one hundred hours of training in the use of Tasers as a means of restraining and arresting individuals suspected of criminal activity” (SB 2238), and establish standards for instructing law enforcement officers in the use of Tasers (SB 2240).

In Nevada, the Nevada Sheriff’s and Chief’s Association wants to prevent stun guns from being used by criminals against either their victims or the police. A current proposal, backed by the law enforcement group, would outlaw the use of stun guns except in self defense, while felons, fugitives, and the mentally ill would be barred from possessing stun guns at all. The law would also prohibit minors from using stun guns for self-defense, except inside their own homes. In addition, for minors under the age of 14, parental permission would be required for the possession or ownership of a stun gun. Not surprisingly, the bill would allow law enforcement personnel to continue to use stun guns to apprehend combative subjects.

In California, Assemblyman Mark Leno introduced legislation that would add Tasers to a

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<sup>9</sup> However, one state is seeking to make Tasers more available to the public. In Arizona, a proposal would allow police and civilians to use lethal force against an aggressor threatening to use a Taser. The measure would require any civilian owner of a stun gun to register the weapon with its manufacturer. As of March 28th, the measure had passed in the House and in the Senate Judiciary Committee.

<sup>10</sup> Elaine Reyes, *SCLC Wants Feds to Research Tasers*, [http://www.11alive.com/news/news\\_article.aspx?storyid=58955](http://www.11alive.com/news/news_article.aspx?storyid=58955), February 14, 2005 (last viewed March 15, 2005).

list of generally prohibited weapons, but creates an exception for law enforcement use. The legislation would also require police officers to file reports with the state on every case in which a Taser is used. Each report would include a description of the circumstances under which the Taser was used, the number of shocks administered, the duration of each shock, the age, gender and race of the subject, and whether the subject or officer was injured in the incident.

In March 2005, the Arkansas legislature approved a measure that prohibits the sale of stun guns to any person under 18 years of age, despite the concerns of some members that there could be “good reason” to allow teens to carry stun guns for self-protection. The new law also requires that law officers carrying stun guns receive proper training in their use.

In Massachusetts, the use of “electronic weapons” (*i.e.*, Tasers) is subject to the provisions of 501 CMR 8.00 *et seq.*, which establishes rules and regulations related to training and sales of electronic weapons in the Commonwealth. These provisions, *inter alia*, limit the sale of electronic weapons to enumerated groups of law enforcement personnel (*see* 501 CMR 8.07) and are attached hereto as Exhibit 3.

Although no police departments in Massachusetts were deploying Tasers as of February 2005, the Boston Globe reported that at least four departments (Peabody, Methuen, Amesbury, and Lawrence) have already purchased the weapons, and Raynham’s Town Meeting has voted to buy a dozen Taser stun guns. In addition, a number of Massachusetts chiefs have publicly expressed interest in purchasing electro-shock weapons for their departments, and representatives from more than 30 police departments across the state have been trained to use the weapon by the Taser company, including Brookline and Boston.<sup>11</sup> Tasers are reportedly being tested by the Berkshire County Sheriff’s Department, the Boston Police Department, the Milton Police Department, and the Souza-Baranowski Correctional Center in Shirley.<sup>12</sup>

The state Municipal Police Training Committee and the Executive Office of Public Safety are working to write regulations for police Taser training, according to Dennis W. Pinkham, the committee’s executive director. But he said it would be up to individual departments to set their own policies on when they can be used.<sup>13</sup> To date, only the Greenfield Police Department has submitted its training protocol for state approval, a requirement before the weapons can be deployed. As of March, 2005, the state was still reviewing Greenfield’s

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<sup>11</sup> Ric Kahn, *Tased and confused: Lifesaver, lethal weapon, aid for crowd control, tool of torture?*, BOSTON GLOBE (February 20, 2005). Christine Wallgren, *Officer Takes a Jolt to Help Stun-Gun Plan Win OK*, BOSTON GLOBE, page 3, Section Globe South (February 24, 2005).

<sup>12</sup> Franco Ordonez, *Local Police Considering Stun Gun Option*, BOSTON GLOBE, Page 1, Globe West (Feb. 6, 2005).

<sup>13</sup> *Id.*

plans.<sup>14</sup>

As controversy surrounding the use of Tasers has increased, a number of municipalities have also considered bans on their use.<sup>15</sup> Following two recent fatal incidents involving the use of Tasers in Chicago, the City Council is considering a proposal by Finance Committee Chairman Edward M. Burke, who has expressed concern that Taser's civilian models will "fall into the hands" of criminals who will use them to commit crime. Police in Chicago have already suspended their use of stun guns following the death of a suspect who had been shocked nine times. The Miami-Dade City Council has revised its policy regarding the use of Tasers by its police, requiring consideration of a subject's age and size before using a Taser, but not expressly banning the use of Tasers on children. The city council of Bellingham, Washington, voted in December to ban ownership or possession of "electronic weapons." The Indianapolis city council is also considering a proposal to ban the use of stun guns and impose a \$250 fine for buying one. The measure is based on one already passed by the South Bend (Indiana) City Council in March 2004.

#### IV. Legal Issues Regarding Less Lethal Weapons

##### A. Overview

The Fourth Amendment of the Constitution protects against unreasonable search and seizure, including seizure of a person (which has been held to include the use of excessive force). Under the Civil Rights Act of 1871, 43 U.S.C. § 1983, an individual police officer may be sued violating an individuals' right under the Fourth amendment not to be subjected to the use of excessive force.

In a § 1983 action for the use of excessive force, a court must first evaluate whether the force used was indeed excessive. The framework for evaluating whether a person's Fourth Amendment rights have been violated by the use of excessive force was set forth by the Supreme Court in *Graham v. Connor*, 490 U.S. 386 (1989). Under the *Graham* test, the "nature and quality of the intrusion" on a person's liberty is balanced against "the countervailing governmental interests at stake" to determine whether the use of force was objectively reasonable under the circumstances. This inquiry is very fact specific, and will depend on a number of factors, including the weapon used, the circumstances surrounding its use, and the person against whom it was used.

Like individuals, municipalities can also be held liable under § 1983 if their failure to promulgate an adequate less lethal force policy constitutes "deliberate indifference." See *City of Canton v. Harris*, 489 U.S. 378 (1989) ("where the need . . . is so obvious, and the inadequacy so

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<sup>14</sup> "Local Group Opposes Stun Guns," by Ric Kahn, Boston Globe, page 9 City Weekly (March 13, 2005).

<sup>15</sup> However, in Cincinnati, a proposal to ban police from using Tasers on children younger than 11 recently failed for the third time.

likely to result in the violation of constitutional rights that the policymakers . . . can reasonably be said to be deliberately indifferent to the need”). Therefore, cities should promulgate detailed less lethal force policies to reduce their potential liability, especially when their present policies are plainly inadequate.

## B. Cases Involving Less Lethal Force

Recent cases regarding the use of less lethal force, including Tasers, chemical sprays, and projectiles, demonstrates how common the use of less lethal force is, and the potential for overuse of such weapons. These cases also illustrate the great financial exposure for municipalities whose police officers have used excessive force. This underscores the importance of developing an effective less lethal force policy.

### 1. Pepper Spray

The abuse of chemical spray agents (*e.g.*, pepper spray) has led to a number of lawsuits against police departments and municipalities.

In Portland, Oregon, the family of Dickie Dow sued the Portland School Police, the Portland City Council, and Armor Holdings (a pepper spray manufacturer) following Mr. Dow’s death.<sup>16</sup> Mr. Dow died in 1998 after police sprayed him with pepper spray, beat him, and piled on top of him. According to reports, this case settled, with the family receiving \$380,000 from the Portland City Council, \$10,000 from Armor Holdings, and \$10,000 from the Portland School Police.

The potential to abuse pepper spray was also made readily apparent in the case of *Headwaters Forest Defense v. County of Humboldt*, a case that has received a great deal of media attention. In this case, Headwaters Forest activists were swabbed and sprayed directly in their eyes with pepper spray by Humboldt county sheriff’s deputies, in an attempt to end their non-violent protest.<sup>17</sup> The activists subsequently sued the Eureka Police and the Humboldt County Sheriff’s Department for violation of their Fourth Amendment rights, charging the use of excessive force. Following two mistrials, a jury in the Northern District of California recently found that deputies and police officers had used excessive force against the protestors.<sup>18</sup>

### 2. Projectiles

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<sup>16</sup> *People’s Police Report Updates, April 2002*, [www.portandcopwatch.org/PPR26/updates26.html](http://www.portandcopwatch.org/PPR26/updates26.html) (last viewed March 21, 2005).

<sup>17</sup> Nicholas Wilson, *Pepper spray activists win major court victory*, [www.monitor.net/monitor/0005a/pepperappeal.html](http://www.monitor.net/monitor/0005a/pepperappeal.html), May 10, 2000 (last viewed March 21, 2005).

<sup>18</sup> John Driscoll, *Excessive force: Jury issues verdict in favor of pepper spray plaintiffs*, EUREKA TIMES STANDARD, April 29, 2005.

The employment of various types of projectiles have also led to lawsuits against police officers and municipalities. As discussed *supra*, Victoria Snelgrove died after she was hit in the eye with a pepper spray projectile fired by a member of the Boston Police Department. The Boston Police Department ultimately settled the case for five million dollars.<sup>19</sup> Other types of “less lethal” projectiles have proved to be just as deadly.

In Oakland, California, the Oakland City Counsel paid twenty-four anti-war demonstrators \$145,000 to settle claims that Oakland police officers had used excessive force by firing wooden projectiles at them.<sup>20</sup> An additional thirty-four other protestors and longshoremen (who were not participating in the protest, but were on their way work) choose to proceed to trial, maintaining that the police department violated their civil rights by using excessive force to control a protest held on the eve of the U.S. invasion of Iraq.

In *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001), the Court of Appeals for the Ninth Circuit ruled that it was excessive force to use a “beanbag” against an emotionally disturbed man who was walking in a steady gait in the officer’s direction but was unarmed, and had neither attacked nor touched anyone, nor was even suspected of having committed a serious criminal offense. The force of the beanbag knocked the man’s left eye from his skull, and left lead shot implanted in his head. The Court described the term “beanbag” as “a euphemism that grossly underrates the dangerousness of the projectile, that is not some sort of hackey-sack; it is a projectile capable of inflicting serious injury or death,” and found that that “the force used was obviously enough to cause grave physical injury.” The Court emphasized that “[a] desire to resolve quickly a potentially dangerous situation is not the type of governmental interest that, standing alone, justifies the use of force that may cause serious injury.”

In Long Beach, California, the family of Glenda Rymer sued the City of Long Beach and Armor Holdings, Inc., after Ms. Rymer died due to injuries she sustained when hit in the chest with a bean bag projectile.<sup>21</sup> Ms. Rymer was a mentally ill woman who weighed only 90 pounds. The lawsuit eventually settled, and her family received \$100,000 from the City of Long Beach and an undisclosed amount from Armor Holdings, Inc., the manufacturer of the bean bag gun.<sup>22</sup>

Another suit regarding beanbag projectiles is currently pending in Miami, Florida. In that suit, film producer Carl Kesser claims that the Miami police department used excessive

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<sup>19</sup> Donovan Slack, *Snelgroves Weigh Suit Against Gunmaker: \$5m settlement with Boston says city would aid case*, BOSTON GLOBE (May 3, 2005).

<sup>20</sup> Heather MacDonald, *Oakland City Council settles claim alleging police assaults*, THE ARGUS (Fremont-Newark, CA), February 3, 2005.

<sup>21</sup> *L.B., L.B.P.D. sued in death*, LONG BEACH PRESS TELEGRAM, June 25, 2002.

<sup>22</sup> Wendy Thomas Russell, *Victim’s Family Wins Settlement*, LONG BEACH PRESS TELEGRAM (CA), August 13, 2004.

force by shooting him in the head with a bean bag projectile while he was filming protests related to the Free Trade of the Americas Agreement.<sup>23</sup> After falling to the ground, Mr. Kesser was further struck with repeated rounds of rubber bullets. Mr. Kesser claims he suffered permanent nerve damage as a result of the shooting. Other peaceful demonstrators were also injured by the police, and more lawsuits are expected.

### 3. Tasers

As previously discussed, Tasers are used to subdue a person through the use of a five second, 50,000 volt shock. However, the ease of using a Taser sometimes overshadows the fatal impact this jolt may have. As a Texas Assistant District Attorney cautioned, “[t]here is a philosophy to use a Taser any time you would have to put your hands on a suspect. I am not sure the public is ready to give the police that kind of authority.”<sup>24</sup> Alarming, pregnant women, children,<sup>25</sup> the elderly, and people with mental disabilities<sup>26</sup> have all been the victims of ill-advised Taser use. Often, it is the city or municipality that employs the police officer who is forced to compensate these victims due to the use of excessive force against them.

In one case, Cindy Grippi sued the City of Chula Vista, California, after suffering a miscarriage following being shocked by police officers with a Taser.<sup>27</sup> The police had been called to Ms. Grippi’s home in response to a domestic dispute involving her husband. Ms. Grippi was six months pregnant and walking away from a police officer when she was shocked. According to her lawyer, she had not engaged in criminal or disruptive behavior of any kind. The City of Chula Vista ultimately settled with Cindy for \$675,000.

In Chicago, the family of Romona Madison filed a lawsuit against the Evergreen Park Police Department after she and her father were shocked with Tasers at her backyard wedding reception.<sup>28</sup> Police had come to the reception in response to a noise complaint. The police claimed that Romona had struck and shoved several officers before running into her house, while

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<sup>23</sup> Steve Ellman, *Filmmaker Shot at Protest Sues Miami, Police Officers*, BROWARD DAILY BUSINESS REVIEW, Sept. 24, 2004; Steve Ellman & Harris Meyer, *Accuracy takes a hit*, MIAMI DAILY BUSINESS REVIEW, November 8, 2004.

<sup>24</sup> Roma Khanna, *Police being called too quick on Taser’s trigger*, HOUSTON CHRONICLE, Jan. 2, 2005.

<sup>25</sup> In November 2004, Miami-Dade police used a Taser to subdue a 6-year-old boy and a 12-year-old girl. Aimee Juaraz, *Training officers feel Taser’s sting*, MIAMI HERALD, Dec. 31, 2004.

<sup>26</sup> Charles Ornstein, *Use of Tasers Spurs Change*, LOS ANGELES TIMES, Dec. 24, 2004.

<sup>27</sup> Amnesty International, *Excessive and lethal force? Amnesty International’s concerns about deaths and ill-treatment involving police use of tasers*, (Amnesty International Report), November 2004.

<sup>28</sup> Alan Krashesky, *Less Lethal – More Questions*, [http://abclocal.go.com/wls/news/specialsegments/020805\\_ss\\_weapons.html](http://abclocal.go.com/wls/news/specialsegments/020805_ss_weapons.html), February 9, 2005 (last viewed March 21, 2005).

the family's lawyers claim that Ms. Madison had not fought with officers.<sup>29</sup> Police shocked Ms. Madison twice in the abdomen when she refused to come out from hiding in a clothes cupboard, in spite of the fact that the officers allegedly had been told she was two months pregnant. This case is currently pending.

In New York, the family of David Glowczenski sued both Taser International, Inc., and Southampton Village after David died after being shocked nine times with a Taser and sprayed with mace. David's family had called police after David, who had suffered from schizophrenia for more than 15 years, had begun to scream and act extremely agitated. The family is seeking a total of \$550 million from Taser International and \$570 million from Southampton Village.

In Portland, Oregon, 71-year-old Eunice Crowder sued the City of Portland for use of excessive force. Portland police officers had entered Ms. Crowder's yard with a permit to remove debris. Ms. Crowder, who was blind, asked the officers to read the permit to her. When the officers refused, she followed them into her yard. Subsequently, an officer struck her in the face, which caused her glass eye to fall out. After she fell to the ground, police pushed her face into the dirt and shocked her twice in the back with a Taser. Ms. Crowder's claims against the city were later settled for \$145,000.<sup>30</sup>

In Chicago, the Department of Children and Family Services sued the City of Chicago and an officer on its police force who used a Taser to subdue a 14-year-old boy who lived in a state-run group home.<sup>31</sup> The child went into cardiac arrest after being shocked by the Taser. The police had been called to the home after the boy attacked three group home workers. This case is currently pending.

A police officer has also filed a private liability action against Taser International.<sup>32</sup> Former sheriff's deputy Samuel Powers claims in his lawsuit that a one-second shock from a Taser has force strong enough to fracture his back. Deputy Powers received this shock as part of a mandatory Taser certification training exercise, but its unintended effect was to force him into medical retirement. His case is scheduled to be tried in June 2005.

## V. A Survey Of The Current Less Lethal Force Policies Of Select Metropolitan Police

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<sup>29</sup> Amnesty International, *Excessive and lethal force? Amnesty International's concerns about deaths and ill-treatment involving police use of tasers*, (Amnesty International Report), November 2004.

<sup>30</sup> *Tasers zapped by bad publicity*, [www.portlandcopwatch.org/ppr33/tasers33.html](http://www.portlandcopwatch.org/ppr33/tasers33.html) (last viewed March 21, 2005); Associated Press, *Portland Oregon to Pay \$145 in Arrest Lawsuit*, <http://www.officer.com/article/article.jsp?id=12103&siteSection=1> (last viewed March 21, 2005).

<sup>31</sup> Michael Tarm, *Hoosier dies after Chicago Taser hit*, CHICAGO JOURNAL-GAZETTE, February 12, 2005.

<sup>32</sup> Robert Anglen, *Officer's injury tied to Taser*, THE ARIZONA REPUBLIC, Dec. 26, 2004; Ric Kahn, *Tased and confused: Lifesaver, lethal weapon, aid for crowd control, tool for torture?* BOSTON GLOBE, Feb. 20, 2005.

## **Departments**

There is a substantial body of material which may be used for guidance in the formulation of appropriate policies governing the use of less lethal weapons. In this section, we will review departmental policies from select metropolitan police departments across the country, including Boston, New York, Los Angeles, Metropolitan (Washington, D.C.), Seattle and Detroit. We will also examine materials arising out of the investigation by the United States Department of Justice (“the DOJ”) of the use of excessive force by several municipal police departments including consent decrees which call for the revision of police department policies on the use of force and the use of less lethal weapons and standards published by the DOJ.

### **A. General Police Department Use of Force Policies**

In general, most police department use of force policies are based on the concept that police officers should use the minimum amount of force reasonably necessary to apprehend or control a suspect. While this principle is nearly a universal guide, it is also vague and leaves much room for subjective and varied interpretation in the absence of more detailed policies, training, and reporting procedures. Furthermore, although laws and policies based upon this principle with respect to the use of *lethal* force are often clear (*e.g.*, deadly force is authorized only to protect an officer or another against threats of serious bodily injury or death), the application of the principle to situations warranting the use of less lethal force is far less straightforward.

Individual police department policy manuals expand to varying degrees on the philosophy of less lethal force in the section of the policy manual devoted generally to the department’s use of force policy. A number of these policies are reviewed below.

#### **1. Boston Police Department**

The Boston Police Department’s (“BPD”) policies regarding the use of less lethal weapons are contained in the Boston Police Department Rules and Procedures Manual (“BPD Manual”), including Rule 303, Rule 303A, and Rule 304. The relevant provisions of each of these rules are evaluated below and attached hereto as Exhibit 4.

Rule 303A of the BPD Manual is entitled “Use of Less-Lethal Force” and explains that the Boston Police Department’s “less-lethal force philosophy is a concept of planning and force application that meets operational objectives, with less potential for causing death or serious physical injury than the use of deadly force.” The BPD Manual further explains that the Boston Police Department’s philosophy is that less lethal force should be used “to assist in the de-escalation of potentially violent situations” (Rule 303A, Sec. 2, 6/22/00), and that the use of less lethal force is not intended to be a substitute for or to preclude the use of deadly force. The only less lethal weapon specifically mentioned in this section of the BPD Manual is the Super Sock Round, a flexible projectile that is fired through a 12 gauge shotgun.

Rule 303A contains little specific detail regarding the appropriate use of the less lethal 12 gauge shotgun. It specifies that only supervisors who complete the requisite training and qualification program are authorized to use the weapon. It further states that when the use of less lethal force is determined to be a possibility, the officer should summon the Patrol Supervisor to the scene. If the Patrol Supervisor confirms that less lethal force is a reasonable option, he should notify the Boston Emergency Medical Services to respond, designate an officer to provide lethal force coverage, and (where appropriate) designate two more officers for suspect “take down.”

Once the less lethal shotgun has been used, the BPD Manual provides that the District Commander and Duty Supervisor should be notified and suspects should be transported to a medical facility. The Manual further specifies that the discharge of a less lethal shotgun should be investigated pursuant to Rule 303 (“Use of Deadly Force”), which provides detailed rules for investigating firearms discharge, but which seems to apply largely to discharge of firearms that results in the death of the suspect. The investigation under Rule 303 is performed by the Internal Affairs Division and the Homicide Unit Investigating Team with assistance from a Superior Officer from the District where the incident occurred.

Rule 304 of the BPD Manual addresses “Use of Non-Lethal Force,” which is defined as “that amount of force that will generally not result in serious bodily injury or death.” This rule states the general proposition that only the amount of force reasonably necessary to overcome resistance in making an arrest should be used and that the use of “non-lethal force” is provided as an alternative in those situations where the potential for serious injury to an officer or civilian exists, but where the application of lethal force would be extreme.

In the introduction to Rule 304, the BPD Manual states:

Because there are an unlimited number of possibilities, allowing for a wide variety of circumstances, no rule can offer definitive answers to every situation in which the use of non-lethal force might be appropriate. Rather, this rule will set certain specific guidelines and provide officers with a concrete basis on which to utilize sound judgment in making reasonable and prudent decisions, attending to the spirit over the letter of the rule.

The “non-lethal” weapons specifically discussed in Rule 304 are incapacitating agents, the service baton and “sap stick.”

In providing guidance as to the circumstances under which the “non-lethal” weapons should be used, Rule 304 first cautions that “since such force will not likely result in serious injury and . . . close public scrutiny . . . , th[e] availability [of non-lethal weapons] may also increase the possibility for overzealous and inappropriate use of force.” As a result, Rule 304 provides that use of “non-lethal” force should generally be limited to situations where either an officer or other person is attacked or an officer is met with physical resistance while making an arrest. Rule 304 also authorizes the use of “non-lethal” force in the event of passive resistance

(e.g., where the suspect refuses to get out of a car or where a protestor is illegally occupying a particular place).

With respect to “Incapacitating Agents,” Rule 304 provides more specific guidelines. The rule limits the use of incapacitating agents (1) to situations of self defense or defense of another person against physical assault, and (2) to situations where an officer is making an arrest and is met with vigorous physical resistance and is in danger of being injured or losing custody of the suspect. Furthermore, the Rule indicates that “[o]fficers should be aware of” the potential for serious injury from use of incapacitating agents when used (1) when the suspect is less than two feet away, (2) when the subject is enclosed in an unventilated area, and (3) when the subject lacks normal reflexes (like blinking) or is otherwise incapacitated. The rule does not, however, prohibit the use of incapacitating agents under the above circumstances.

Rule 304 also addresses some specific policy guidelines for use of the “Service Baton and Sapstick.” The rule states that the primary purpose of these weapons is to provide officers with an advantage when fending off and subduing unarmed assailants. The rule advises the officer that these weapons are essentially defensive weapons and that “pressure point control tactics,” (*i.e.*, a tactic that involves striking motor function controlling nerve points in the body) should be used. The BPD Manual also states that body blows should be confined to the arms and to the thighs and below, further warning that blows to the groin could cause permanent disability and officers “should limit such blows to extreme situations.” The manual, however, fails to specify what constitutes an “extreme situation.”

One notable distinction between the Boston Police Department’s less lethal force policy and some other police departments’ policies is their treatment of passive resistance. The BPD Manual authorizes the use of some less lethal force on suspects who passively resist, whereas many other police departments restrict the use of less lethal weapons to instances of active or aggressive resistance. In fact, after conducting a six month review of police policies and practices on the use of force in 2000-01, the Eugene (Oregon) Police Commission concluded that the Eugene Police Department’s policy should be amended to include a restriction on the use of impact weapons against people engaged in passive resistance.<sup>33</sup> In general, there appears to be a growing trend to limit or prohibit the use of less lethal weapons in situations in which an officer is presented only with passive resistance.

For purposes of comparison, we have reviewed the policies of other police departments with respect to use of less lethal force. A summary of the most relevant provisions of those policies, as well as a brief analysis of the differences between those policies and Boston’s policy, is provided below.

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<sup>33</sup> *Eugene Police Commission Findings and Recommendations on Police Use of Force Adopted May 2001: Executive Summary*, [http://www.ci.eugene.or.us/PoliceComm/FF\\_Summary.htm](http://www.ci.eugene.or.us/PoliceComm/FF_Summary.htm) (last visited April 7, 2005).

## 2. New York Police Department

The New York Police Department (“NYPD”) Patrol Guide sets forth the NYPD’s policies with respect to the use of less lethal weapons, and the relevant provisions are attached hereto as Exhibit 5. The NYPD Patrol Guide has a section generally on the “Use of Force” (PG 203-11), but this section makes only brief mention of less lethal weapons. It advises that at the scene of a police incident, officers should (1) immediately establish firearms control, (2) use minimum necessary force, and (3) employ non-lethal alternatives, as appropriate. This section of the Patrol Guide provides no further detail on the “appropriate” circumstances for the use of less lethal weapons.

However, unlike the Boston Police Department’s Manual, the NYPD Patrol Guide contains a number of separate sections that focus on individual types of less lethal weapons and provides somewhat more detailed guidance as to their appropriate use. For example, PG 212-92 (entitled “Use of Tear Gas”) provides some guidance in the use of CS and CN by the NYPD’s Emergency Service Unit. However, this section only provides detailed procedures regarding the way to use tear gas (*e.g.*, who must be notified and how to evacuate civilians) and procedures for decontamination of those affected. Notably, it does not provide any policy guidance on the circumstances under which the use of tear gas is appropriate or recommended.

The NYPD Patrol Guide also contains detailed policy statements on the use of pepper spray devices. Under PG 212-95, pepper spray may be used when “a member reasonably believes it is necessary to effect an arrest of a resisting suspect, for self-defense or defense of another from unlawful force, or to take a resisting emotionally disturbed person into custody.” This section urges officers to regard pepper spray as an alternative to the use of substantial physical force, where practical. Further, the section emphasizes that pepper spray should not be used in situations that do not require the use of physical force.

The NYPD Patrol Guide also provides a detailed description of how and when pepper spray may be used. Pepper spray should be discharged into subject’s eyes using two one-second bursts from at least three feet away. Moreover, the use of pepper spray should be limited to situations where the officer reasonably believes it is necessary to (1) protect himself or another from assault, (2) effect an arrest or establish control of a subject resisting arrest, (3) establish physical control of an emotionally disturbed person, or (4) control a dangerous animal. In contrast to the Boston Police Department’s policy, the NYPD Patrol Guide emphasizes that pepper spray should not be used on subjects who passively resist (*i.e.*, offer no physical resistance). In addition, the Patrol Guide states that, if possible, officers should avoid using pepper spray on people in frail health, young children, women believed to be pregnant, and people with respiratory conditions.

## 3. Seattle Police Department

The Seattle Police Department’s policy on less lethal weapons is largely embodied in Section 1.145 (entitled “Use of Force”) of the Seattle Police Department’s Policy and Procedure Manual (“SPD Manual”), attached hereto as Exhibit 6. This section enumerates the less lethal

weapons currently in use by the Seattle Police Department: the Taser, OC spray, impact weapons (including the expandable baton), and beanbag rounds.

Like the NYPD Patrol Guide, but in contrast to the BPD Manual, Section 1.145 indicates that less lethal force, specifically pepper spray or other riot control agents, should not ordinarily be used to overcome passive resistance by nonviolent or peaceful protestors. Instead, pepper spray should be restricted to use in overcoming “a subject’s combative or active resistance.” However, the SPD Manual appears to distinguish between (1) the use of less lethal weapons in effecting the arrest of isolated suspects and, (2) their use in “unusual occurrences” (*see* SPD Manual, Section 2.031).

“Unusual occurrences” include incidents that involve riot or crowd control and involve a different set of policies with respect to the use of less lethal force. With respect to unusual occurrences, the SPD Manual authorizes the use of chemical agents to prevent violence, to suppress and disperse unlawful assemblies, to aid in overcoming *passive* or aggressive resistance to effect arrest, and to remove a crowd from a building to prevent further destruction of property.

The Seattle Police Department policy distinguishes the use of less lethal weapons during “unusual occurrences” in several other ways. For example, use of individually-issued less lethal weapons (*e.g.*, a baton) is discouraged (but not prohibited) during an unusual occurrence. Furthermore, the deployment of less lethal weapons needs to be authorized by an on-site Field Incident Commander, who must justify the authorization for this use of force in a subsequently filed report.

#### 4. Los Angeles Police Department

The general use of force philosophy of the Los Angeles Police Department (“LAPD”) is set forth in the LAPD Manual, Vol. 1, Section 240.10 (entitled “Use of Force”):<sup>34</sup>

While the use of reasonable physical force may be necessary in situations which cannot be otherwise controlled, force may not be resorted to unless other reasonable alternatives have been exhausted or would clearly be ineffective under the particular circumstances. Officers are permitted to use whatever force that is reasonable and necessary to protect others or themselves from bodily harm.

In the section of the LAPD Manual devoted to less lethal weapons (referred to as “non-lethal control devices”), the manual mentions only chemical irritant spray and the Taser (*see* Vol. 1, Section 573). The manual authorizes the use of these devices “to control a violent or potentially violent suspect when lethal force does not appear to be justifiable and/or necessary, and attempts to subdue the suspect by other conventional tactics have been or will likely be ineffective in the situation at hand; or there is a reasonable expectation that it will be unsafe for officers to approach to within contact range of the suspect.” The remaining provisions in this

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<sup>34</sup> The relevant provisions of the LAPD Manual are attached hereto as Exhibit 7.

section state that the weapons may be used only by those officers who have received appropriate training and that officers should ensure that suspects upon whom these devices are used receive appropriate medical treatment.

The LAPD Manual has a separate section on “Use of Chemical Agents” (Vol. 1, Section 572), which provides minimal guidance as to their appropriate use. It provides only that a chemical agent may be used to “minimize injury to suspects, officers, and others or to avoid property damage . . . where a serious danger to life and property exists and other methods of control or apprehension would be ineffective or more dangerous.” It further provides that use of a chemical agent must be authorized by an officer at the rank of Sergeant, Detective, or above; and for crowd or riot control by an officer at the rank of Commander or above.

## **B. Training Requirements**

A review of the police department policy and procedure manuals from a number of different cities reveals little about the training procedures currently in place within those departments. While most manuals specify that officers must be trained in the use of less lethal weapons before being allowed to carry and deploy them, the details of the frequency, content, and structure of training are noticeably absent from most of the manuals we reviewed.

### **1. Boston Police Department**

According to Rule 304 of the BPD Manual, officers must successfully complete an in-service training course on the use of “non-lethal” force, including a written test component and a practical application segment. For each new “non-lethal” force weapon the Department adopts, the officers must qualify in its use before being allowed to carry it. An officer who cannot complete this certification will be provided with a remedial training program at the Academy. If the officer still fails to qualify, the officer will be subject to reevaluation as to his or her fitness to continue to perform as a police officer.

Rule 303A contains a similar provision with respect to the training for the 12 gauge shotgun. Supervisors train and qualify four times per year. No information on the frequency of training, if any, for non-supervisors is provided. Moreover, beyond these provisions, the BPD Manual provides little information about the training offered to officers or required by the Department.

### **2. Other Police Departments**

The policy and procedure manuals for other cities’ police departments are likewise not very detailed in their descriptions of their training courses and the substance of those programs. Most police department policies simply mention that officers must be trained and qualify in the use of a particular weapon before they are allowed to use it. In most cases, the training is specific to a particular less lethal weapon, and officers undergo a separate training for each new weapon added to the department’s arsenal. For example, the Seattle Police Department Manual provides that only officers “who have successfully completed a training course designated by the

Commander of the Training Section in the use and deployment of less lethal weapons will be permitted to deploy such weapons.”

Furthermore, the manuals often do not specify how frequently the officers are trained or retrained in the use of less lethal weapons. However, the Seattle Police Department’s Manual does specify that the department provides annual retraining in, *inter alia*, “firearms and use of force” (Section 1.294), but does not provide further detail.

The consent decrees that the Metropolitan (Washington, D.C.) Police Department and the Detroit Police Department signed with the Department of Justice provide a somewhat more detailed description of the training requirements for use of less lethal weapons. For example, under the consent decree signed by the Metropolitan Police Department<sup>35</sup>, the department will provide annual training that includes components regarding the department’s use of force continuum, its use of force reporting requirements, the Fourth Amendment and other relevant constitutional and legal provisions, and examples of use of force ethical dilemmas and interactive exercises for resolving those dilemmas.

The Detroit Police Department’s (“DPD”) consent decree with the Department of Justice provides even more detail on the content of the annual training, and the relevant portions are attached hereto as Exhibit 8<sup>36</sup>. The training is to include topics similar to those covered by the Metropolitan Police Department’s training. In addition, the training will include examples of scenarios faced by Detroit Police Department officers; interactive exercises that illustrate proper use of force decision making; proper use of all intermediate force weapons; threat assessment; alternative and de-escalation techniques; training on interacting with people with mental illnesses (with emphasis on de-escalation strategies); and proper duration of burst of chemical spray, distance from which it should be applied, and where it should be aimed.

Notably, the provisions of the consent decrees appear to require a comprehensive and *integrated* training program. The training addresses the use of force generally and deals with the spectrum of available force alternatives, rather than compartmentalizing each less lethal weapon by training officers on one less lethal weapon at a time (as each becomes available in the department’s arsenal). In a related fashion, the training programs mandated by the consent decrees assume that the departments will adopt a force continuum. This continuum provides the force options available to an officer, ranging from mere police presence or verbal commands through the use of deadly force, and guidelines for decision making about which level of force on the continuum is appropriate under which circumstances.

An example of a force continuum in practice is the Kansas City Police Department’s

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<sup>35</sup> Memorandum of Agreement on the use of force between the US Department of Justice and the DC Metropolitan Police Department, June 13, 2001 at <http://www.dwatch.com/police/010613.htm> (last visited March 28, 2005).

<sup>36</sup> Consent Judgment, Use of Force and Arrest and Witness Detention, *United States v. City of Detroit*, No. 03-72258 (E.D. Mich. 2003).

Procedural Instruction on Use of Force, attached hereto as Exhibit 9. These instructions contain a section entitled “Situational Force Model,” which lists various levels on a force continuum with detailed descriptions of the appropriate officer response. For example, Level 1 on the Kansas City PD force continuum is “Compliant,” which is defined as “[t]he subject is cooperative but must be given verbal instructions/directions for compliance.” For Level 1, the officer’s response options are (1) officer’s presence, and (2) verbal instructions/directions. Level 2 on the continuum is “Passive Resistance,” defined as situations where the subject “is not controlled by verbal direction, but is not preventing the officer from taking control.” The response options listed for Level 2 are the same as those for Level 1, with the addition of the following available responses: (1) empty hand restraint tactics, (2) nerve receptor manipulation, (3) PR-24 baton draws, (4) PR-24 baton arm lock restraint tactics, and (5) OC spray or pepper foam. Level 3 (referred to as “Active Resistance – Non-Assaultive”) is defined as a situation where the subject “actively resists arrest in a defensive manner but is not assaultive toward the officer (flight, pushing and pulling away).” For Level 3, the response options available to the officer are the same as for Level 2, plus lateral vascular neck restraint. The use of force continuum further defines two additional levels of force and lists the response options available to the officer for each.

### C. Reporting Requirements

Most police department policies we reviewed required a written report to be completed after the deployment of a less lethal weapon, but the degree of detail regarding the contents of the reports varied by jurisdiction. In addition, most police department manuals specified that the written reports are forwarded up through the chain of command and that files of the use of force reports are maintained.

However, the policies differ as to how far up the chain of command the reports go and consequently who investigates the use of force incidents. At least one commentator has observed that there are advantages to centralized investigations (at a higher level of command) but also some benefits – in terms of timing, accessibility, and accountability – to the involvement of officers at the precinct level in investigations of the use of force.<sup>37</sup> Very few (if any) policies focus on the tracking or monitoring of the reports, or whether any sort of periodic review of the files should be undertaken to identify deviations from the department’s use of force policies. Furthermore, the polices do not address the proper response to deviations that are found (*e.g.*, whether to take disciplinary action or revise its use of force policies).

#### 1. Boston

Rule 304 of the Boston Police Department Manual sets forth the process for investigation of the use of force after an incapacitating agent or other “non-lethal” weapon has been used. The process involves the following steps:

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<sup>37</sup> Samuel Walker, *THE NEW WORLD OF POLICE ACCOUNTABILITY*, 62-63 (Sage Publications, Inc. 2005).

- (a) The officer involved must report the incident verbally to the patrol supervisor.
- (b) Before the end of the tour of duty, the officer must make a written report describing the incident, names of those involved, the circumstances under which the force was used, the nature of any injury and the care given to the injured party.
- (c) Before the end of the tour of duty, the patrol supervisor conducts a thorough investigation and submits a report to the Commanding Officer that includes, *inter alia*, a copy of the incident report, reports on interviews of civilian witnesses, and findings and recommendations as to the justification for the use of force.
- (d) The Commanding Officer submits a report of the incident through channels to the Police Commissioner within seven days.
- (e) The report is forwarded to the Office of Internal Investigations and the Training & Education Division, which maintains a comprehensive file of all use of force reports.

The rule also provides that the Office of Internal Investigations may conduct a separate investigation on its own authority or at the request of the Police Commissioner. The results of such an investigation are forwarded to the Police Commissioner. Under the rule, the Police Commissioner has final responsibility and authority for determining the Department's disposition of any "Use of Non-Lethal Force Incident."

Under Rule 303A, the reporting requirements for any discharge of the less lethal 12 gauge shotgun are the same as those for use of deadly force under Rule 303.

## 2. Seattle

The Seattle Police Department's reporting requirements are similar in many ways to the Boston Police Department's reporting requirements, but they differ in some significant ways. For example, in the SPD Manual, no distinction is made between the reporting required for the use of different types of less lethal weapons. In contrast, the Boston Police Department Manual distinguishes between the reporting requirements for the use of the less lethal 12 gauge shotgun (which is reported in the same manner as the use of deadly force) and the use of other less lethal weapons (which have the reporting requirements described above).

In addition, the Seattle Police Department's reporting procedures for less lethal weapons appear to be more detailed and rigorous than those of the Boston Police Department. For example, the Seattle PD Manual specifies in great detail the required contents of the written report, including a description of the types and number of photographs of the suspect's injuries that must accompany the report.

## 3. Los Angeles Police Department

The LAPD manual provides very little detail regarding the reporting requirements for

less lethal weapons use. A section entitled “Non-lethal Control Devices” provides that both use of the Taser and use of chemical irritant spray requires the completion of a “Non-Categorical Use of Force Report” by a non-involved supervisor, who ensures that the Use of Force Box on all related reports is marked with the word “TASER” or “chemical spray control device” as appropriate (Vol. 4, Section 246). Under the procedures specified in the LAPD Manual (Vol. 3, Section 793), the report makes its way up through the chain of command, where a decision is made as to whether the use of force complied with LAPD policy.

The LAPD Manual also provides for the maintenance of records and files of all use of force reports. Under Vol. 5, Section 1.67.3, the manual provides that all division commanding officers must report all use of force incidents that occur during “a deployment period” on a summary report, which is then forwarded to the Commanding Officer, Human Resources Bureau.

#### **D. Additional Miscellaneous Policies**

Apart from the policies discussed above, various police department manuals have other provisions regarding the storage or maintenance of less lethal weapons. Other policies address the proper care of suspects upon whom the weapons have been used.

##### **1. Boston**

The BPD Manual has specific provisions about the storage and maintenance of less lethal weapons that ensure that the less lethal shotgun can be readily distinguished from the lethal shotgun, thereby avoiding accidental use of the wrong weapon. Under Rule 303A, the less lethal shotgun should have an orange colored stock with the words “less lethal” on the stock. Once a week, a visual inspection is performed to ensure that the weapons are properly labeled and maintained.

The BPD Manual also has a provision for the care of suspects after use of an incapacitating agent. Rule 304 provides that after using of an incapacitating agent and subsequently securing the suspect, the exposed area should be doused with water to minimize the seriousness of the burn.

##### **2. Other Police Departments**

In 2004, as part of a settlement of a lawsuit brought by anti-war demonstrators who had been injured with wooden bullets, sting ball grenades and shot-filled bean bags, the Oakland, California Police Department, adopted regulations prohibiting the use of less lethal weapons for purposes of crowd control.<sup>38</sup>

The Metropolitan Police Department (Washington, D.C.) also has policies that address

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<sup>38</sup> OPD Crowd Management/Crowd Control Policy, [http://www.aclunc.org/police/041109-opd\\_policy.pdf](http://www.aclunc.org/police/041109-opd_policy.pdf)

the care of a suspect following the use of pepper spray. Under the MPD's consent decree, after use of pepper spray, the officer should decontaminate the subject with water within 20 minutes. Further, the officer must transfer the subject to the hospital if the symptoms do not subside after decontamination or if the subject has a preexisting condition (*e.g.*, asthma or emphysema) that could be exacerbated by the use of pepper spray.

#### E. Department of Justice Actions and Guidelines

Over the past five to seven years, the United States Department of Justice ("DOJ") has launched investigations of and filed charges against several police departments across the country in response to allegations of police misconduct, including excessive use of force incidents. The outcome of many of these investigations and lawsuits has been a negotiated settlement in which the police department works cooperatively with the DOJ to improve the department's policies with respect to the use of force. According to the DOJ website,<sup>39</sup> as of January 2003, the DOJ had reached negotiated settlements with ten different police departments: Pittsburgh Bureau of Police, PA (consent decree, 1997); Steubenville Police Department, OH (consent decree, 1997); New Jersey State Police (consent decree, 1999); Los Angeles Police Department, CA (consent decree, 2001); District of Columbia Metropolitan Police Department (settlement agreement, 2001); Highland Park Police Department, IL (settlement agreement, 2001); Cincinnati Police Department, OH (settlement agreement, 2002); Columbus Police Department, OH (conditional dismissal, 2002); Buffalo Police Department, NY (settlement agreement 2002); and Mount Prospect Police Department, IL (settlement agreement 2003).

More recently, a consent decree was signed between the DOJ and the Detroit Police Department in connection with the DOJ's charges that the Detroit Police Department was subjecting individuals to, *inter alia*, excessive force, false arrests, and illegal detentions. The consent decree identified problems, mandated proper training of officers (as described above), and required policy changes in the department's use of force, including rules that require the department to offer less lethal weapons (*e.g.*, the Taser or baton) as force options.

In addition, in January 2001, the DOJ published "Principles For Promoting Police Integrity: Examples of Promising Police Practices and Policies."<sup>40</sup> This publication states that its purpose is to "assist law enforcement agencies [to] achieve the highest levels of professionalism in police services."

There are several notable provisions in this publication that address the use of less lethal force. For example, with respect to policy on the use of less lethal weapons, the publication provides that "[w]here nondeadly force is authorized, officers should assess the incident to determine which nondeadly technique or weapon will best de-escalate the incident and bring it

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<sup>39</sup> U.S. Department of Justice, Civil Rights Division, *Special Litigation Section: Frequently asked questions*, <http://www.usdoj.gov/crt/split/faq.htm#howmanyporIP> (last visited at May 6, 2005).

<sup>40</sup> These polices are available on the DOJ website at <http://www.ojp.usdoj.gov/lawenforcement/policeintegrity/welcome.html> (last visited April 7, 2005).

under control in a safe manner” (*see* Section I, “Use of Force”).

The section also discusses the continuum of force that officers should employ in determining which level of force to use. According to the DOJ, officers should consult “an escalating scale of options” and use the lowest level of force that would be adequate. The levels of force include the following: verbal commands, use of hands, chemical agents, baton or other impact weapons, canine, less-than-lethal projectiles, and deadly force. Some commentators have criticized the concept of the force continuum because it requires officers to try each option before escalating the level of force to the next option, and have instead proposed a “force wheel.” The DOJ makes clear, however, that its policy does *not* “require officers to try each of the options before moving to the next, as long as the level of force used is reasonable under the circumstances.”

In addition, the DOJ “Principles” provide some guidance on appropriate less lethal weapons training. Section IV (“Training”) provides that the instructors of the recruit training courses, field training courses, and in-service training courses should be carefully selected using heightened eligibility criteria that are specific to each job. This section also discusses the subjects that should be covered during recruit training and during retraining on an in-service basis, which include communication skills, verbal disengagement techniques, and alternatives to use of force. The DOJ also encourages scenario-based training as an effective way to teach subjects and indicates that officers should receive specialized training in interacting with people with disabilities (especially mental illness) to minimize misunderstanding of certain behavior as suspicious or uncooperative.

Finally, with respect to reporting uses of less lethal weapons, the DOJ offers some guidelines. Not surprisingly, the DOJ suggests that uses of “non-deadly force” should be reported thoroughly and in writing. The DOJ also suggests that police departments define “force” broadly for reporting purposes to ensure comprehensive reporting. Specifically, reporting should be mandated for any use of a weapon, electronic restraint device, chemical agent, and “any use of punches, hits, kicks, or other physical efforts to seize, control, or repel a civilian (with or without a weapon or other implement).” The only contact the DOJ excludes from the reporting requirement is the routine use of handcuffs. Interestingly, the DOJ does not distinguish between the type of reporting required for use of different types of less lethal weapons, nor does it distinguish between the reporting required for use of force involving a weapon from use of force without a weapon.

In addition to the reporting requirements, the DOJ “Principles” also address administrative review of the use of force reports. The DOJ recommends that the use of non-deadly force report should be reviewed promptly by a supervisor to determine whether the use of force complied with department policy. The supervisor should then determine what action (if any) needs to be taken, such as launching an internal affairs investigation, requiring additional training or counseling, or other measures for the involved officer. Moreover, the DOJ also suggests that the supervisor’s review of the use of force report may be the basis for suggesting revisions to general department policy, strategy, tactics, or training. Therefore, the reports should include enough detail regarding the police tactics and surrounding events such

that department evaluation of its training and policies is feasible.

Interestingly, the DOJ “Principles” also includes a separate chapter (Section III) entitled “Promoting Accountability and Effective Management.” This section discusses the implementation of “early warning systems” to identify problem behavior and problem officers.

The DOJ reports that studies of law enforcement agencies have revealed that a large number of misconduct incidents are often traceable to a relatively small number of police officers. As a result, it is often helpful to implement database-centered management systems for identifying problematic behavior early and intervening often in non-punitive ways (*e.g.*, with counseling and supplemental training).

The DOJ required implementation of this early warning system in the consent decree it signed with the Los Angeles Police Department.<sup>41</sup> Under that consent decree, the LAPD developed a database containing information about its officers, supervisors, and managers to identify and modify at-risk behavior. The system, known as the Training Evaluation and Managements System (“TEAMS”), includes detailed information on all uses of less lethal force, the officers involved, the circumstances surrounding the incident, and the disposition of the immediate investigation into the incident (*e.g.*, whether any punitive action was taken). Importantly, the consent decree requires the LAPD to implement a protocol for using TEAMS to evaluate specific officers, supervisors and the LAPD as a whole.

#### **F. Summary of Issues Raised by Review of Police Department Policies**

A review and evaluation of police department policies from cities across the country raises several issues to be considered by the Boston Police Department in revising and formulating policies and procedures with respect to the use of less lethal force.

These issues include the following:

- (1) The need for objective evaluation of the benefits and risks of individual less than lethal weapons before adoption by police departments.
- (2) Whether and how to distinguish between the use of less lethal weapons for crowd/riot control versus their use in apprehending a suspect;
- (3) The use of a force continuum to define department policy with respect to less lethal weapons and the appropriate position on the continuum of each type of less lethal weapon;
- (4) The circumstances under which the use of various less lethal weapons are appropriate, including whether their use is appropriate in overcoming passive

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<sup>41</sup> This portion of the consent decree is available at <http://www.usdoj.gov/crt/split/documents/laconsentpart3.htm> (last visited May 6, 2005).

resistance as opposed to active or aggressive resistance;

- (5) The content of the training programs to be mandated by police department policy, including:
  - (a) The notion of integrated training that encompasses the use of force continuum and integrates training for all available less lethal weapons and appropriate decision-making, and
  - (b) Training with interactive real-life scenarios that force officers to confront ethical dilemmas in deciding on a level of force and provides guidance and answers to those ethical dilemmas;
- (6) The frequency and setting for training courses and the circumstances under which re-training will be mandated;
- (7) Detailed reporting procedures for use of less lethal force and whether different reporting requirements should apply to different types of less lethal weapons;
- (8) Policies on storage and maintenance of less lethal weapons to prevent accidental use of lethal weapons through confusion; and
- (9) Policies on care of subjects after the deployment of less lethal weapons to lessen the severity of any permanent injuries that may be incurred.

#### **VI. Proposed Changes in the Boston Police Department's Less Lethal Force Policy**

In light of the ongoing review of the Boston Police Department's policies and procedures governing the use of force by its officers which is being conducted by the Stern Commission and by Commissioner O'Toole, the ACLU of Massachusetts offers the following recommendations that are specific to Boston. The principles underlying these recommendations, however, are not limited to a single department or, for that matter, to a single weapon.

The Boston Police Department's use of less lethal force policy should integrate a number of components to provide its officers with the knowledge and flexibility necessary to respond to a wide range of circumstances. The most effective way to accomplish this goal is implement a policy that addressed what takes place. The foundation of the policy should be based on a force continuum that provides a clear roadmap for a police officer to use in deciding whether to escalate force in a given circumstance, while at the same time allowing an officer to incorporate his own training and experience into the decision. In addition, the policy should include well-defined training goals, clear reporting requirements, and general behavior guidelines that are consistent with the expectations of the people of Boston.

A. **Before Less Lethal Force is Used**

1. **Preliminary Review**

There are presently no government standards for the design and manufacture of less lethal weapons,<sup>42</sup> in spite of their widespread use and their proven power to seriously injure or kill their intended target. As a result, the standards and policies that guide police in the selection and use of these weapons must be promulgated at the state, local, and departmental level. This is a major to the development of effective policy.

Not infrequently, a police department considering the adoption of a new less lethal weapon has little to inform its choice other than the promotional materials provided by the manufacturer. While such materials are sometimes useful, they cannot be relied upon to provide an objective assessment of the dangers or the effectiveness of the weapon.

For this reason, the Department should, *before approving any new weapon* for use by its officers, require an independent evaluation of the weapon. This would include an evaluation of the physiological effects of the use of the weapon on its intended target and the officers who use it, the risks of death or serious injury that it poses, consideration of its appropriate uses and limitations, the specific training which it will require, and whatever regulations may be need to govern its use.

2. **Training**

Training may be the most significant component of the Boston Police Department's less lethal weapons program. The city police department should have well-defined training programs that include both a comprehensive initial program to be taught in the Boston Police Academy and yearly follow-up training to be held in the precincts of the Boston Police Department.

The quantity and quality of training regarding less lethal force in the Boston Police Academy should be evaluated and increased, if necessary, to address the numerous issues relevant to the use of less lethal weapons. First and foremost, the training should include a component regarding how to avoid confrontations or prevent them from escalating. Other issues to be addressed include, but are not limited to, the underlying technology and operation of the weapons themselves, the physiological effects upon an individual against whom such a weapon has been used, the proper use of the weapon (*i.e.*, minimum distance between subject target, length of time that officer should activate weapon, the appropriate place of impact on the target's body), a review of the Fourth Amendment and its relationship to the use of force, and the circumstances under which the weapon should or should not be used.

The training should also address the use of less lethal force with respect to certain populations, including children, the elderly, and the mentally ill. This portion of the training

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<sup>42</sup> Brian Macquarrie, *United States Lacks Regulations, Data on Less-lethal Weapons*, BOSTON GLOBE, January 11, 2005.

should have a strong emphasis on de-escalation of the use of force.

In addition, the training should include instruction directed to a use of force continuum. However, the use of force continuum should not be treated as a rigid decree that pigeon-holes each less lethal weapon for use only in specific circumstances – in part due to the unpredictability of the challenges an officer may face on a day to day basis. Instead, the program should emphasize that the use of force continuum should be treated as a guide that will provide an officer with a suggestion about the appropriate level of force that would be used in a somewhat analogous situation.

A well-developed practical component of the training program is also essential for preparing officers to use less lethal force in the field. The training should thus include interactive exercises that address and resolve ethical dilemmas regarding the use of force. Furthermore, the training should include a significant amount of hands-on training and practice in deploying the weapon, which may include use of the weapon against an officer volunteer. Following the initial training program, officers should be required to pass a written and a practical skills test before being given the right to deploy less lethal force.

The Boston Police Department should also hold yearly “refresher” courses regarding the use of less lethal force. This course should begin with a diagnostic test to identify any weaknesses in the knowledge of the officers as a group. Any weaknesses should be thoroughly addressed by the course’s instructor, and the course also should especially emphasize the importance of understanding a force continuum. The course should also contain a practical component in which officers are recertified in the use of less lethal weapons, in particular Tasers and projectiles.

The training courses should be administered by the police department itself, related state or local agencies, or neutral third parties. As discussed *infra*, manufacturers and distributors of less lethal weapons should not administer the training, as these parties may tend to emphasize the advantages and downplay the disadvantages of less lethal force as part of their sales pitch.

## **B. Use of Less Lethal Force**

The foundation of the Boston Police Department’s less lethal force policy should be a use of force continuum. The Comments to Article 3 of the United Nations Code of Conduct for Law Enforcement Officials, which was adopted by the General Assembly in December 1979, provides valuable guidance regarding the construction of a use of force continuum. Article 3 states, “Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.”

The comments to Article 3 are as follows:

- (a) This provision emphasizes that the use of force by law enforcement officials should be exceptional; while it implies that law enforcement officials may be authorized to use force as is reasonably necessary under the circumstances for the

prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders, no force going beyond that may be used.

- (b) National law ordinarily restricts the use of force by law enforcement officials in accordance with the principle of proportionality. It is to be understood that such national principles of proportionality are to be respected in the interpretation of this provision. In no case should this provision be interpreted to authorize the use of force which is disproportionate to the legitimate objective to be achieved.
- (c) The use of firearms is considered an extreme measure. Every effort should be made to exclude the use of firearms, especially against children. In general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender. In every instance in which a firearm is discharged, a report should be made promptly to the proper authorities.

In accordance with these guidelines, the amount of force used by a police officer should be proportionate with the threat posed to the police officer or to the public.

The principles set forth in these guidelines should be incorporated into the Boston Police Department's use of less lethal force policy, particularly in the form of a force continuum. The adoption of an official use of force continuum as part of a police policy would provide the Boston Police Department with a framework to help it choose the proper level of force to use in any given circumstances.

Officers should begin at the lowest levels of force necessary to effect an arrest or to control and contain a threat, and escalation of force to the next level should occur only when the officer has determined that such an escalation is reasonably necessary. Contrary to the present Boston Police Department policy, however, officers should not (in any circumstances) use a level of less lethal force that exceeds soft-handling/passive restraints when arresting a subject that is passively resisting.

The application of a use of force continuum should apply in a slightly different manner in situations involving crowd control. Situations in which crowd control will be needed can often be predicted in advance, since certain events will tend to give rise to large crowds (*e.g.*, protests for which permits are required, parades, celebrations following sporting events). Therefore, before the event occurs, the Boston Police Department should review the types of less lethal weapons that an officer may use for crowd control purposes and authorize the officers assigned to the event to use only those weapons that it deems appropriate.

Furthermore, specific rules that are enacted in conjunction with the use of force continuum should guide the officer's decision regarding an escalation of the use of force. For example, force cannot be escalated unless an officer clearly instructs an individual that force will be escalated unless the officer's commands are obeyed.

In view of the proposed use of a force continuum, BPD Manual Rule 304 should be revised. Presently, and as discussed above, Rule 304 does not prohibit the use of “incapacitating agents” when used against a subject who is less than two feet away, who is enclosed in an unventilated area, or who lacks normal reflexes or is otherwise incapacitated. Instead, the rule only indicates that “officers should be aware of” the potential for serious injury when an incapacitating agent is used in these circumstances. We propose that Rule 304 should be amended to prohibit the use of incapacitating agents with respect to each of the circumstances enumerated in the rule.

Moreover, a lower level of force should always be used with respect to certain populations. Members of these populations often have physiological or mental impairments that render them especially susceptible to permanent injury or death following the use of non-lethal weapons. These populations include pregnant women; children (*i.e.*, persons below the age of sixteen years); the elderly (*i.e.*, persons over the age of fifty years); individuals with mental disabilities or impairments; individuals with altered mental states due to use of narcotics, hallucinogenics, or other drugs; and individuals who appear to be suffering from cardiac or respiratory problems.

As per the present Boston Police Department policy, the less lethal weapons carried by an officer should be plainly distinguishable from each other to reduce the risk of confusing the two weapons in a stressful situation. For example, the stock of a firearm that contains lethal bullets should be a different color than the stock of a firearm that fires pepper spray bullets. In addition, a visual inspection should occur once a week to ensure that the weapons are properly labeled and maintained.

### C. After Use of Less Lethal Force

A police department should also have clear policies regarding the procedures that shall be followed after less lethal force is used.

First, the policy should contain clear instructions about the medical treatment that an officer should provide to a person upon whom he has used less lethal force. For example, an officer should use water to rinse the skin or other affected areas of a person whom he has sprayed with pepper spray immediately after the officer has gained control of the person (as per Rule 304 of the Boston Police Department’s manual). In addition, all persons against whom higher levels of less lethal force has been used (*i.e.*, chemical sprays, projectiles, impact weapons, and electroshock guns) should be evaluated by a physician or other qualified medical personnel before or upon arrival at the police station or other detainment facility.

Second, the officer who has used less lethal force should be required to complete and submit individual reports before the end of his tour of duty. The individual reports should include at least the following information:

- The type of force used

- The circumstances that gave rise to the use
- The duration of the use of force
- The distance between the officer and the victim
- The name, age, sex, weight, and height of the victim
- Whether the victim was intoxicated or under the influence of drugs
- Whether the victim was pregnant
- Whether the officer informed the victim that less lethal force would be used if the victim did not obey the officer's orders
- Observations regarding the general physical condition of the victim following the use of force
- Whether the victim received medical attention following the use of force
- Photographs of any injuries to the victim following the use of less lethal force

**D. Monitoring the Use of Less Lethal Force**

Monitoring the use of less lethal force should be an essential part of the Boston Police Department's policy related to these weapons. The foundation of monitoring is strict reporting requirements. Records that indicate the frequency of use of less than weapons by police precinct and by the individuals within that precinct will provide valuable data indicating whether more restrictive policies should be considered or if a particular individual is abusing the privilege of using less lethal force. Furthermore, the term "force" should be defined broadly to ensure comprehensive reporting.

Individual and cumulative records of the use of less lethal force should be maintained by the Boston Police Department. As per the department's present policy, described *supra*, an officer who has used less lethal force should be required to complete and submit a report (including pictures) before the end of his tour of duty. The Patrolling Officer should review this report before the end of his tour of duty and submit a report to the Commanding Officer. In turn, the Commanding Officer should submit (via the proper channels) a report of the incident to the Police Commissioner within seven days. Finally, the report should be forwarded to the Office of Internal Investigations and the Training and Education Division, which maintains a comprehensive file of all the use of force reports. These reports should be maintained in paper form and added to a centralized database, similar to the "TEAMS" database (discussed *supra*) used by the Los Angeles Police Department.

Each month, a member of the Office of Internal Investigations should compile statistics

regarding the use of less lethal force. These statistics should include (1) the number of times each type of less lethal weapon was used in one month, (2) the number of times each officer used less lethal force, and (3) the number of times a precinct used less lethal force. Any notable trends in less lethal weapons, including repeated instances of use by the same officer or precinct, should be reported to a supervisor for further evaluation and possible corrective action.

## VII. **Conclusion**

Good police practices do not get in the way of good law enforcement. The recommendations of this report are not intended to hamstring police officers. Its proposals incorporate strategies that have been effectively employed by major metropolitan police departments. The ACLU believes that implementation of the policy recommendations for controlling the use of less lethal force by police officers will benefit both the police and the general public. The public will receive some measure of protection against the excessive use of less lethal force. The police will be given much-needed guidance regarding the use of less lethal force. Finally, municipalities may limit the risk of having to compensate those against whom less lethal force was improperly used.

## Appendix Contents

- Exhibit 1 “Department of Defense Nonlethal Weapons and Equipment Review: A Research Guide for Civil Law Enforcement and Corrections.”
- Exhibit 2 Product information supplied by Taser International, Inc.
- Exhibit 3 501 CMR 800 *et seq.*
- Exhibit 4 Relevant excerpts from the Boston Police Department Rules and Procedures Manual
- Exhibit 5 Relevant excerpts from the New York Police Department Patrol Guide
- Exhibit 6 Relevant excerpts from the Seattle Police Department’s Policy and Procedures Manual
- Exhibit 7 Relevant excerpts from the Los Angeles Police Department Manual
- Exhibit 8 Relevant excerpts from the Detroit Police Department’s consent decree with the Department of Justice
- Exhibit 9 Relevant excerpts from the Kansas City Police Department’s Procedural Instruction on Use of Force