

CHANGING USE OF FORCE PRACTICES

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Hand held chemical spray weapons (typically referred to as aerosol weapons, aerosol subject restraints, or ASRs) have been used by police in the United States since the late 1960's. Initially, more traditional chemical mixtures, usually generically referred to as tear gas¹, were marketed in small aerosol cans for use by individual officers.

Early hand-held units were often ineffective, as the active ingredients – or agents – were really intended to be dispersed over a large area in an airborne cloud rather than sprayed onto an individual in a direct pattern. Sold under the brand name Mace™, these products rapidly gained a reputation amongst police officers of failing to control aggressive, resistive individuals. Instead, officers that used Mace™ were often so adversely affected by the spray that they would refuse to use it thereafter. Use of handheld sprays generally fell out of favor.

During the late 1970s, a hand-held spray weapon containing oleoresin capsicum (OC), sometimes referred to as “pepper spray”, was developed for civilian policing, making inroads into the police arsenal during the 1980s. This product contains the active ingredient capsaicin, extracted from pepper plants. Because OC is chemically classified as an inflammatory agent, thereby differing from the earlier tear gas products which are chemical irritants, it produces a more severe effect in the targeted individual. The primary effects of exposure to OC include sharp burning sensations in the eyes and on the skin, as well as coughing and profuse mucous production. Generally, reflexive closing of the eyes, choking and shallow breathing, lead to reduced mobility following exposure (National Institute of Justice, 1994).

Today, American law enforcement generally employs two types of aerosol weapons. Simple OC products, in varying strengths and concentrations of up to ten percent, make up the bulk of the aerosol market. Additionally, combination products, or blends, are also used. Typically, OC and more traditional CS tear gas (orthochloro-benzalmalononitrile) are “blended” to produce a pepper-fortified tear gas. These blend products have seen particularly widespread use in the Midwest and southern states.

¹ “Tear gas” is technically incorrect. All of the chemical agents discussed in this paper are actually microparticulate solids. The term “tear gas” is of unknown origin.

LAW ENFORCEMENT'S LESS THAN LETHAL PRACTICES

Because police officers are charged with enforcing the law and maintaining public order, they are frequently placed in situations where they must attempt to manage or control an otherwise free citizen. Whether an encounter leads to an actual arrest or merely a temporary detention for questioning, these intrusions are often unwelcome. It is not uncommon for such police intervention to be resisted by the citizen or citizens involved. When this happens, officers frequently need to use forcible means to control and perhaps arrest the persons in question. Traditionally, officers have had limited technology at their disposal. Beyond empty-hand defensive tactics or boxing, officers could utilize striking instruments (such as nightsticks, billy clubs or blackjacks) or they could use a firearm.

Clearly, striking someone with a club or stick represents a high level of force, with significant potential for injury. Of course, shooting them represents an even higher level of force. While such high levels of force are sometimes justified by a citizen's aggressive, resistive behavior, the opposite is far more common.

In those situations where high levels of force cannot be justified, officers were, and are, often at a disadvantage, facing a significant possibility of being injured themselves. The need to control certain violent individuals, while at the same time being discouraged from using potentially injurious deadly weapons (often the only weapons they possess), has resulted in many officer injuries while making arrests for relatively minor violations of the law.

As society's expectations matured regarding reasonable levels of force, police needed a control method that possessed less potential for injury than a "club" or a gun. For roughly the last decade, that method has increasingly been aerosol subject restraints.

During the late 1980s many law enforcement agencies began to adopt OC technology for routine patrol use. There was commensurate development of non-brand specific training programs, although much of the available training still emanated from the manufacturers and vendors of aerosol weapons.

Concurrent with the movement toward aerosol weapons, law enforcement began to adopt other less-than-lethal technologies. Expandable police batons, which could be worn on the officer's belt (as an alternative to the traditional nightstick, which was often left behind in the patrol car when needed), became the "impact weapon" of choice. Different versions of the standard police flashlight, engineered so as to substitute as an impact weapon when necessary, were also available, although concerns were raised as to increased legal liability in such circumstances. Alternative restraint methods were developed, supplementing and sometimes supplanting standard issue, chain-link handcuffs.

Each of these new developments required specialized training, as well as additional procedural guidelines in order to reduce the risks inherent in technological change. Such procedures and training were not always

implemented, with the results that new control methods and tools often led to increased liability costs, and a parallel increase in the number of officer injuries.

As municipal managers and insurers increasingly take notice of this undesirable and contradictory trend, law enforcement executives have sought to reduce risk through adoption of procedures and training programs. Today, many of the negative results arising from these initial problems have been overcome, although some departments still lag behind the rest of the law enforcement profession in their risk reduction efforts.

JUSTIFYING THE USE OF AEROSOL WEAPONS

It has been estimated that the majority of law enforcement officers in the United States carry an aerosol weapon. While most officers have a basic understanding of how to use their aerosols, the question of when to use them is less well understood. In fact, there are differing opinions among police administrators and theoreticians as to when aerosol use is operationally appropriate. Concerns regarding this question are embodied in several basic philosophies for the timing of aerosol use.

The first of these philosophies is to use aerosols when faced with minimal levels of resistance, such as verbal non-compliance or aggressive posturing. Justification for use at such a low level hinges upon the potential for officer injury – and the commensurate increased likelihood of injury to the involved citizen – if an officer moves in to control the resistance physically, and begins fighting with the individual. Essentially, it's thought to be better to spray early rather than face this increased risk of injury to both parties.

Another operational philosophy is to not spray unless faced with a fairly high level of resistance, such as would otherwise justify the use of a striking weapon. The reasoning for delaying the use of sprays until greater justification is present involves concern that use of the aerosol could result in a severe physical reaction that might, in fact, be life threatening. This philosophy tends to place heightened emphasis on avoidance of legal liability in such circumstances.

A third, and perhaps the most defensible philosophy, is to use aerosols – and for that matter any weapon – when such use can meet the test of “objective reasonableness”. This standard is required by the Fourth Amendment to the United States Constitution, and is cited by the Supreme Court of the United States in *Tennessee v. Garner*, 105 S.Ct. 1694 (1985). One way of stating this is that use of any weapon is justified when an officer reasonably believes that such force is necessary to stop an individual's aggressive or resistant behavior, and that lesser levels of control would be unsafe or ineffective.

The Supreme Court has further indicated that reasonableness should be determined based upon a reasonable officer's assessment of four factors; the nature of the crime at issue, whether the suspect is an immediate threat to the

safety of the officer or others, whether the suspect is attempting to evade arrest through resistance or flight, and the degree to which the situation is tense, uncertain and rapidly evolving. This last point acknowledges that officers must act with little time to analyze and consider circumstances, rather than with the luxury of 20-20 hindsight (*Graham v. Connor*, 109 S.Ct. 1865 (1989)).

Officers using weapons or control techniques of any type must be prepared to articulate their need for the use of such force. The use of force to maintain order, to protect citizens and to enforce the law must be balanced against the cost to society in reduced freedom of movement and in increased intrusion into the lives of society's members. The outcome of this balancing test will determine the legal acceptability of each individual use of force.

CITIZEN PERCEPTION OF AEROSOL WEAPONS AND POLICE USE OF FORCE

There was a time when mainstream America gave little thought to the routine use of force by police officers. Unless a citizen had been arrested, or lived in a high crime area, such things were generally out of sight, and out of mind. When it did come to the attention of the public, use of force was often deemed to be necessary for the greater good. Only in the case of inappropriate use of deadly force did one see very noticeable public reaction, and generally even those cases did not result in an overall damning of the law enforcement profession. This is no longer the case.

The proliferation of information, coupled with society's ability to capture and rapidly distribute images and ideas, has dramatically changed the law enforcement landscape in America. There is an increased belief in the pervasiveness of brutality and excessive force on the part of law enforcement officers by the American public. Widespread and repeated broadcast of sensational footage of excessive force incidents, coupled with endless analysis and discussion of events by commentators, has resulted in a virtual expectation that the police will use more force than is necessary.

Despite this trend, in many jurisdictions where aerosol weapons are properly used and managed, complaints against officers for excessive force have declined by as much as 50 to 60 percent. It is generally believed that this is due to the short-term nature of the effects of aerosol exposure.

Physically fighting with a suspect, and perhaps using a striking implement such as a nightstick or baton, carries with it a significant potential for harm. Injuries ranging from scrapes and sprains to deep bruises and broken bones are often the result. These injuries leave marks on the human body which often remain for days, if not weeks or months. Occasionally medical treatment may be required, sometimes resulting in time off from work for the involved citizen. These situations frequently give rise to complaints that the force used was excessive, and often are accompanied by threats of legal action.

When viewed in this context, the relatively short-lived effects of an aerosol exposure, albeit extremely painful and debilitating, seem preferable. Usually, the most extreme effects wear off in approximately 20 to 30 minutes, and the exposed person can then be said to be “functionally recovered”. Residual effects, such as reddening of the skin, bloodshot eyes, heightened respiratory sensitivity, and a mild burning sensation, can last anywhere from several hours to several days. In a very few cases, there may be some peeling of the outer layer of the skin (as if recovering from a mild case of sunburn).

Unfortunately, high profile cases such as the demonstration in Humboldt County, California, wherein officers applied OC directly to the eyes of apparently peaceful anti-logging demonstrators, are widely broadcast by the national media. In such cases, debate ensues as to the appropriateness and necessity of aerosol use, giving rise to statements equating use of aerosol weapons to “torture”. Following such incidents, some jurisdictions rethink their use of aerosols, and sometimes ban further use by local police.

On balance, it appears that routine use of aerosol weapons by police leads to reductions in complaints of excessive force, while high profile, individual cases often give rise to general discontent with use of force practices in the affected jurisdictions.

CONCLUSION

Societal pressure to find less injurious methods of controlling behavior led to the development and increasing adoption of aerosol spray weapons during the 1970s and 1980s. Once products began to appear, law enforcement agencies began to seek the most effective aerosol weapons from both liability reduction and officer safety standpoints.

As of this writing, the majority of law enforcement agencies in the United States are routinely using aerosol spray weapons. In most states, a high percentage of those departments are equipped with oleoresin capsicum (OC) products. In some areas, blends (most notably of OC and CS tear gas) are used.

Increasing pressure from citizen’s groups and the media has encouraged law enforcement administrators to develop appropriate procedural guidelines for use of aerosol weapons, and to develop and implement training programs in aerosol weapon usage. Increasing levels of documentation and supervision of incidents have resulted from ongoing public scrutiny of use of force situations.

In jurisdictions where appropriate policies and procedures are in place, supported by thorough training and adequate supervision and management, reductions in officer and suspect injuries, as well as fewer complaints of excessive force, continue to be reported. Occasional aberrant incidents receive widespread publicity, fueling public perception that police in general use excessive force.

THE NEED FOR FURTHER RESEARCH

While a large amount of information exists on capsaicin, much more research is needed into the long-term effects of OC aerosol weapon exposure. Specifically, more research is needed into the long-term effects on vision and respiratory health. More definitive study is needed into any possible connection between use of aerosol weapons and in-custody deaths.

There is an almost total lack of research into the effects of blend (CS/OC) based aerosol weapons. The completion of future research into use of blends is particularly important for those regions of the country where blends are the dominant weapon used.

While compliance to the loss prevention techniques suggested herein may reduce the likelihood of an incident, it will not eliminate all possibility of an incident.

Further, as always, the reader is encouraged to consult with an attorney for specific legal advice.