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## Don't Let the Label Fool You: A Closer Look at Less-Lethal Weapons in Policing

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## Don't Let the Label Fool You: A Closer Look at Less-Lethal Weapons in Policing

Annie Mann

In the Summer of 2020, as protests erupted across the country in the wake of the police murders of George Floyd and Breonna Taylor, Black community leaders in Delaware demanded action and then-presidential candidate Joe Biden opined: “[I]nstead of standing there and teaching a cop when there’s an unarmed person coming at them with a knife or something, shoot them in the leg instead of in the heart.”<sup>1</sup> Biden’s opinion reflects support for the use of less-lethal force. The concept of law enforcement using less-lethal force tactics and weapons is not novel. Police use of less-lethal weapons such as bean bags, rubber bullets, tasers, and pepper spray has long been promoted as a crowd-control solution that would help lead to fewer fatalities.<sup>2</sup> Unfortunately, many scenarios, including last summers’ uprisings and the Standing Rock protests of 2016, tell a much different story.<sup>3</sup>

Melinda Power of the West Town Law Office and Janine Hoft of the People’s Law Office are both involved in the National Lawyers Guild Mass Defense Committee.<sup>4</sup> Melinda and Janine are involved in the ongoing litigation stemming from the Standing Rock protests.<sup>5</sup> There, protesters were trying to prevent the installment of the Dakota Access Pipeline (DAPL) for fear of a decrease in water quality to their communities.<sup>6</sup> The case comes as a result of law enforcement action on November 20, 2016. The local North Dakota government placed barricades on a main road to slow down the route to the protest campsite.<sup>7</sup> Protesters tried moving the barricades<sup>8</sup> and in response, of-

<sup>1</sup> Emily Jacobs, *Biden: Officers should train to shoot attackers ‘in the leg instead of the heart,’* NEW YORK POST (June 2, 2020, 8:58 AM), <https://nypost.com/2020/06/02/biden-suggests-officers-shoot-in-the-leg-rather-than-to-kill/>.

<sup>2</sup> Katie Schoolov, *Police try new high-tech devices to cut down on deadly force as clashes with protesters continue*, CNBC, <https://www.cnbc.com/2020/07/26/police-try-new-less-lethal-tools-as-protests-continue.html> (last updated July 28, 2020, 2:27 PM).

<sup>3</sup> Schoolov, *supra* note 2, at 1.

<sup>4</sup> Telephone Interview with Melinda Power, Attorney, West Town Law Office (Sept. 29, 2020).

<sup>5</sup> Power, *supra* note 4, at 1.

<sup>6</sup> Power, *supra* note 4, at 1.

<sup>7</sup> Power, *supra* note 4, at 1.

<sup>8</sup> Power, *supra* note 4, at 1.

ficers shot them with water jets.<sup>9</sup> Officers also shot protestors with rubber bullets.<sup>10</sup> Attorney Melinda Power spoke of Sophia Walansky, a protestor who was hit with a flash grenade and lost her arm.<sup>11</sup>

Today, the most widely used weapons include pepper spray, bean bag rounds, and tear gas.<sup>12</sup> There are many types of less-lethal weapons and “the market for less-lethal weapons is expected to reach \$11.85 billion by 2023.”<sup>13</sup> Less-lethal weapons are dangerous. For example, bean bag rounds, a “small fabric sack filled with” a lead shot and fired by a shotgun, are specifically “designed to expand in flight and cause trauma to the body, including muscle spasms, without penetrating the skin.”<sup>14</sup> These rounds can cause serious injuries “if fired at close range or at the head or neck.”<sup>15</sup> Moreover, there is tear gas which causes not only include “pain and tear production,” but also “exaggerated muscle cramping in the eyes and sensitivity to light.”<sup>16</sup> While less-lethal weapons are less dangerous when properly used, a 2017 study found that “3% of [victims] hit by projectiles worldwide died,” and an additional 15% “were permanently injured.”<sup>17</sup> Anecdotal evidence shows that many injuries from less-lethal weapons is long lasting, but debilitating.<sup>18</sup> For example, in Portland, a protestor was hit between the eyes with an unknown projectile and was left with chronic photosensitivity, impaired executive function, and incessant migraines.<sup>19</sup> In California, a protestor was leaving a protest when law enforcement officers shot her in the eye with a rubber bullet, permanently blinding her in that eye.<sup>20</sup> As a result of her disability, she lost her job and her health benefits.<sup>21</sup> Additionally, another study found that hundreds of people shot by

<sup>9</sup> Power, *supra* note 4, at 1.

<sup>10</sup> Power, *supra* note 4, at 1.

<sup>11</sup> Power, *supra* note 4, at 1.

<sup>12</sup> Janet Loehrke, Ramon Padilla, Jasper Colt & Shawn J. Sullivan, ‘*Less lethal*’ can still maim and kill: A visual guide to weapons police use on protesters, USA TODAY, <https://www.usatoday.com/in-depth/news/2020/06/20/less-lethal-rubber-bullet-protester-pepper-ball-tear-gas-injured-blinded/5343717002/> (last updated June 20, 2020, 9:15 PM).

<sup>13</sup> Power, *supra* note 4, at 1.

<sup>14</sup> Loehrke, *supra* note 13, at 2.

<sup>15</sup> Loehrke, *supra* note 13, at 2.

<sup>16</sup> Loehrke, *supra* note 13, at 2.

<sup>17</sup> Loehrke, *supra* note 13, at 2.

<sup>18</sup> Melissa Chan, ‘*My Faith in This World Is Gone.*’ For Protesters Injured by Police, There’s No Real Recovery, TIME (Oct. 9, 2020, 10:17 AM), <https://time.com/5894356/protesters-injured-police/>.

<sup>19</sup> Chan, *supra* note 20, at 2.

<sup>20</sup> Chan, *supra* note 20, at 2.

<sup>21</sup> Chan, *supra* note 20, at 2.

law enforcement with less-lethal projectiles between 1990 and 2017 suffered permanent disabilities.<sup>22</sup>

However, there is little to no cohesive national information regarding the use of less-lethal weapons in law enforcement agencies as “the nation’s more than 18,000 law enforcement agencies established their own rules for when they should be used, who’s allowed to fire them and how to hold their officers accountable.”<sup>23</sup>

An investigation into law enforcement actions at protests around the country over the course of Summer 2020 “found that some officers appear to have violated their department’s own rules when they fired “less-lethal” projectiles at protesters who, for the most part, were peacefully assembled.”<sup>24</sup> Looking locally, Attorney Janine Hoft stated that the Chicago Police Department (CPD) has a history of using batons, bikes, horses, and fists when using force against civilians.<sup>25</sup> However, during the 2020 uprisings, CPD dispersed tear gas more prevalently.<sup>26</sup>

Courts across the country are being confronted with the issue of less-lethal weapon use by law enforcement. Black Lives Matter-Los Angeles sued the Los Angeles Police Department (LAPD) claiming the LAPD violated protestors’ First Amendment rights by using “force to terminate the protests, including the indiscriminate use of so-called ‘less-lethal’ weapons that caused injury.”<sup>27</sup> The complaint further alleged that protestors were struck by rubber bullets “administered without lawful justification.”<sup>28</sup> In Denver, the American Civil Liberties Union filed a lawsuit against the City of Denver and the Denver

<sup>22</sup> Chan, *supra* note 20, at 2.

<sup>23</sup> Liz Szabo, Jay Hancock, Kevin McCoy, Donovan Slack & Dennis Wagner, *Fractured skulls, lost eyes: Police break their own rule when shooting protesters with ‘rubber bullets,’* USA TODAY AND KAISER HEALTH NEWS, <https://www.usatoday.com/in-depth/news/nation/2020/06/19/police-break-rules-shooting-protesters-rubber-bullets-less-lethal-projectiles/3211421001/> (last updated Sept. 11, 2020, 8:00 PM).

<sup>24</sup> Szabo, Hancock, McCoy, Slack & Wagner, *supra* note 25, at 2*d*.

<sup>25</sup> Telephone Interview with Janine Hoft, Attorney, People’s Law Office (Sept. 29, 2020) [hereinafter Hoft Interview].

<sup>26</sup> Associated Press, *Can tear gas and pepper spray increase virus spread?*, CHICAGO SUN TIMES (June 8, 2020, 1:29 PM), <https://chicago.suntimes.com/news/2020/6/8/21284297/tear-gas-and-pepper-spray-increase-virus-spread-protestors-george-floyd>.

<sup>27</sup> City News Service, *LAPD sued by Black Lives Matter-LA in federal court over mass detention*, Los Angeles Daily News (<https://www.dailynews.com/2020/06/05/lapd-sued-by-black-lives-matter-la-in-federal-court-over-mass-detention/> last updated June 6, 2020, 9:14 AM).

<sup>28</sup> City News Service, *supra* note 30, at 3.

Police Department on behalf of Black Lives Matter (BLM) 5280.<sup>29</sup> The complaint listed several examples of “officers misusing flashbangs and less-lethal bullets” during protests in late May and early June of 2020.<sup>30</sup> A Washington District Court held that Black Lives Matter Seattle “made a clear showing” that Seattle Police Department’s “use of [less-lethal], crowd control weapons, violate[d] their First Amendment right to protest and their Fourth Amendment right to be free from excessive force.”<sup>31</sup> The Seattle Police Department was “enjoined from employing chemical irritants or projectiles of any kind against persons peacefully engaging in protests or demonstrations.”<sup>32</sup> A separate group of plaintiffs in Seattle attempted to request an “outright prohibition on certain less lethal weapons” such as tear gas, flash-bang grenades, pepper balls, and rubber bullets.<sup>33</sup> The court held that a preliminary injunction would “protestors [with too many] safeguards.”<sup>34</sup>

Aside from attempts to use legal channels to prohibit use of less-lethal weapons, the remaining legal remedy is to file a civil lawsuit.<sup>35</sup> Federal agents deployed by President Trump to Portland demonstrated a disturbing use of force in some instances.<sup>36</sup> The resulting injuries include the aforementioned protestor, left blind in one eye and another woman who was shot in the foot with what was speculated to be a rubber bullet.<sup>37</sup> The protestors, and two others, filed a class-action lawsuit claiming the agents used “unconstitutional and unnecessary force.”<sup>38</sup>

Less-lethal weapons, like lethal weapons, remain a danger to the First Amendment right to peacefully assemble. As protests continue nationwide, this area of caselaw will surely develop further.

<sup>29</sup> Janet Oravetz, *Agreement reached over lawsuit to limit less-lethal force during protests*, 9NEWS, <https://www.9news.com/article/news/local/agreement-first-denver-less-lethal-force-lawsuit/73-b1b3883e-0e5b-4253-b2de-5af7e1c0f3d6> (updated June 26, 2020, 4:44 PM).

<sup>30</sup> Oravetz, *supra* note 33, at 3.

<sup>31</sup> *Black Lives Matter Seattle-King County v. City of Seattle*, Seattle Police Dept., No. 2:20-cv-00887-RAJ, 2020 WL 3128299, at \*1 (W.D. Wash. June 12, 2020).

<sup>32</sup> *Benton v. City of Seattle*, No. 2:20-cv-01174-RAJ, 2020 WL 4584214, at \*2 (W.D. Wash. Aug. 10, 2020).

<sup>33</sup> *Id.*

<sup>34</sup> *Id. d.*

<sup>35</sup> Chan, *supra* note 20, at 2.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*