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**Civil Liability for the Use
of Pepper Spray (OC), Tear Gas,
and Chemical Agents**

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This is Part 2 of a two-part article. To read Part 1, click [here](#).

❖ **Correctional Settings**

When force is used in a correctional context, the Fourth Amendment's reasonable standard does not apply. Instead, under [Whitley v. Albers](#), #84-1077, 475 U.S. 312 (1986) and [Hudson v. McMillian](#), #90-6531, 503 U.S. 1 (1992), force is lawful so long as it is applied in a "good faith effort to maintain or restore discipline," rather than "maliciously and sadistically to cause harm." This test applies whether the force was used in the context of a major prison disturbance, such as a riot, or a "lesser disruption."

It is true, the Court acknowledged, that the extent of the injury a prisoner suffers because of the use of force is one factor to be considered in deciding whether the force used was

wanton and unnecessary, but there is no requirement to show a significant injury in order to assert a valid Eighth Amendment claim.

Contemporary standards of decency, the Court reasoned, are always violated in the excessive force context when prison officials or employees maliciously and sadistically use force to cause harm, regardless of whether significant injury occurs. The Court further acknowledged that the Eighth Amendment does not cover “de minimis” (minimal or trivial) uses of physical force in most instances.

Both *Whitley v. Albers* and *Hudson v. McMillian* involved the use of force by prison staff members against convicted prisoners. What about the use of OC against pre-trial detainees in detention facilities, jails, or prisons? Detainees are not protected by the Eighth Amendment prohibition on cruel and unusual punishment. Since they have not been convicted of any offense, they may not be subjected to any punishment at all without receiving due process of law. They are protected in the custodial context against the excessive use of force by the due process clause of the Fourteenth Amendment.

In a footnote in *Graham v. Connor*, #87-6571, 490 U.S. 386 (1989), the U.S. Supreme Court stated that the “due process clause protects a pre-trial detainee from the use of excessive force that amounts to punishment. After conviction, the Eighth Amendment serves as the primary source of substantive protection ... in cases ... where the deliberate use of force is challenged as excessive and unjustified. Any protection that substantive due process affords convicted prisoners against excessive force is, we have held, at least redundant, of that provided by the Eighth Amendment.” Any real distinction between the protection provided to pre-trial detainees and convicted prisoners has been largely “blurred” over the years by the courts, and the legal standard, technical pleading aside, is essentially the same.

❖ OC Justified

The application of this legal standard in the correctional context is illustrated by *Horne v. Rutledge*, #09-17378, 2010 U.S. App. Lexis 20564 (Unpub. 9th Cir.), in which a federal appeals court ruled that a prisoner asserting a claim for excessive use of force failed to show that prison guards acted “maliciously and sadistically for the very purpose of causing him harm” when using pepper spray on him after he repeatedly refused to comply with orders to cease holding his blanket up to his cell door.

Similarly, in *Easley v. Dept. of Rehabilitation and Correction*, #2009-05277, 2010 Ohio Misc. Lexis 110 (Ct. of Claims), a correctional officer used no more force than necessary against an inmate who kicked his cell door, yelled profanity, refused orders to stop, and

threw some object from his bed at the officer. The use of a short burst of pepper spray against the prisoner was not excessive under the circumstances.

In [*Scroggins v. Davis*](#), #07-15514, 2009 U.S. App. Lexis 21383 (Unpub. 11th Cir.), cert. denied, #09-8488, 130 S.Ct. 1711 (2010), a guard used a burst of oleoresin capsicum (O.C.) spray against a prisoner who made an aggressive move toward an officer while being escorted from his cell to be searched for contraband. The action took place after the prisoner had also disobeyed a direct order. After the incident, the prisoner was kept in four-point restraints for three and a quarter hours. Rejecting claims of excessive force, a federal appeals court found that jail personnel properly regarded him as a dangerous, high-risk prisoner in light of a past history of escape, and found that the use of the O.C. spray was proper under the circumstances.

The court also found no evidence that the cell where the plaintiff was restrained was poorly ventilated or small, or that the defendant guards, who did not try to wash the spray off of him, knew that he claimed to be experiencing continued discomfort from the spray.

In [*Poe v. Texas Dept. of Criminal Justice*](#), #08-20148, 2009 U.S. App. Lexis 706 (Unpub. 5th Cir.), the court ruled that a prisoner failed to show that the force used against him in his cell was excessive, or that engaging in further discovery would establish that. The evidence showed that the prisoner refused to obey commands to allow guards to secure his cell door properly by releasing control of a food slot in the door, and that he was warned that his failure to obey would result in the use of chemical agents and the sending of a “move team” into his cell. When he failed to comply, guards administered chemical agents into his cell and the move team forcibly restrained him.

❖ Passive Exposure

In [*Flournoy v. Schomig*](#), #09-3610, 2011 U.S. App. Lexis 8303 (Unpub. 7th Cir.), an inmate in an Illinois maximum security facility claimed to have been exposed to fumes at least eight times when guards used pepper spray against other prisoners. He also claimed that this aggravated his [glaucoma](#), although he never sought medical treatment for it. He asserted that officers ignored requests, after pepper spraying incidents, to air out cells.

The prisoner failed to establish that the warden knew that he had been exposed to pepper spray fumes or that he suffered from glaucoma, which was thereby aggravated. Claims against the warden for deliberate indifference were therefore properly rejected.

❖ Decontamination

Whether the use of a chemical agent against a prisoner is justified, however, is not the end of the legal issues arising from its use. Lawsuits have frequently revolved around contentions that prisoners or detainees were not provided with proper medical attention for the consequences of such use, or were not permitted to properly clean off the substance used, a major issue at times in the close quarters of prison and jail cells. At times, prisoners who were not involved in a disturbance or disobeying orders may also be subjected to exposure to chemical agents being used against prisoners who are.

In an inmate's lawsuit claiming that corrections officers violated the Eighth Amendment in failing to adequately decontaminate him after subjecting him to pepper spray, and in holding him in restraints for eighteen hours, a federal court ruled that a reasonable officer could have believed that allowing the prisoner to briefly shower before he was placed into restraints, as well as rinse his eyes with saline, was adequate to avoid a rights violation. Normally, the effects of pepper spray are gone after 45 minutes. Claims related to the decontamination were therefore rejected. [*Montgomery v. Johnson*](#), #7:05CV00131, 2008 U.S. Dist. Lexis 74256 (W.D. Va.).

In [*Danley v. Allen*](#), #07-12328, 540 F.3d 1298 (11th Cir. 2008), when a prisoner refused to obey a jailer's orders during a disagreement, creating a disturbance, there was a need to use force and a short burst of pepper spray was not excessive. The prisoner's assertion, however, that he was confined in a small cell following the incident and was not allowed to wash off the spray was sufficient to state a claim for excessive use of force.

In [*Walker v. Bowersox*](#), #06-3118, 526 F.3d 1186 (8th Cir. 2008), a federal appeals court ruled that summary judgment should not have been entered against a prisoner on his excessive force claims since there were genuine factual disputes as to whether officers used force against him, including pepper spray, after he had begun to comply with their orders to him. Additionally, he allegedly was not warned before the use of the pepper spray, was not permitted to clean up after its use, and was then handcuffed to a bench and denied bathroom breaks, food, and water during that restraint.

In another case, an arrestee seated in the booking room of a jail was subjected to a short burst of pepper spray, and subsequently placed in the back of a patrol car for approximately an hour. He claimed that he was never allowed to decontaminate, and that his repeated complaints of breathing problems and repeated requests for medical attention after he was removed from the car were ignored. In an excessive force lawsuit, he claimed that he developed [*Reactive Airway Dysfunction Syndrome*](#) (RADS) from the lengthy pepper spray exposure. A federal appeals court held that the plaintiff had adequately established that an officer was aware of his serious need for medical attention, but ignored it, which

stated a claim for violation of his Fourteenth Amendment rights. [*Nasseri v. City of Athens*](#), #09-11473, 2010 U.S. App. Lexis 7297 (Unpub. 11th Cir.).

Earlier caselaw on this subject is discussed in a prior article in this publication: [Staff Use of Force Against Prisoners--Part III: Use of Chemical Weapons](#), 2008 (11) AELE Mo. L.J. 301.

❖ Policy Suggestions for Police and Corrections

Policies and procedures for the use of pepper spray (OC), tear gas, and other chemical agents should be written and take into account both legal and practical considerations. They should also be regularly reviewed on a periodic basis, based on both developments in the law and the experience of carrying them out by the department or agency's personnel. Training on both when to use such force and how to do so is also essential. Here are some suggestions to consider:

1. Unless it is impractical, unreasonable or dangerous to do so, a verbal warning should be given before a chemical agent is used, to see if the threat alone can gain compliance without the use of force.
2. Officers should avoid the use of OC in areas where it could cause a panic (spraying OC in a darkened movie theater) or affect the breathing of small children or very elderly adults.
3. Officers should use only the amount of OC that is necessary to achieve the desired effects, which may take several seconds. Once the desired effects are achieved, officers must discontinue the use of OC.
4. Police and correctional personnel should be trained to avoid positional or compressional asphyxia. In a 2004 [DoJ Report \(NCJ 204029\)](#), a prominent medical examiner attributed seven post-OC application deaths to positional or compressional asphyxia.
5. A Taser should not be deployed in either the dart or stun mode after an application of OC spray that contains a flammable propellant (e.g., butane) or carrier (e.g., alcohol).
6. Handcuffs or other restraints should immediately be applied after the subject shows that he or she was affected by the OC.
7. Policies and procedures should specify in detail decontamination procedures to be used after the use of a chemical agent, including, when necessary, the supplying of medical attention, in order to minimize discomfort or injuries.

8. Officers or other designated personnel should maintain constant surveillance of sprayed subjects and closely monitor their breathing during transportation.
 9. Each use of a chemical agent should be documented, even if the applications were ineffective.
 10. OC is not always effective. Wind and rain can deflect the spray. A person who is sprayed can complete a violent or fatal attack.
 11. A few people will die following the application of OC. Often, the cause of death is attributed to the ingestion of drugs or heart disease.
- These suggestions were reviewed and revised by [Capt. Greg Meyer](#) (Ret.), who commanded the LAPD Academy in Elysian Park.

❖ Resources

The following are some useful resources related to the subject of this article.

- [Chemical Agents](#). AELE Case Summaries.
- Myrtle Beach, S.C. Police Department: [Chemical Sprays](#). (Nov. 30, 2005).
- Orland Park, IL [Oleoresin Capsicum Restraint Spray Program](#).
- [Pepper Spray \(OC\), Tear Gas and Chemical Agents, and Assault and Battery: Chemical](#). AELE Case Summaries.
- [Pepper Spray](#). Wikipedia article.
- Tampa Police Department Standard Operating Procedures: [521 Oleoresin Capsicum](#). (June 2010).
- [Task Force Report](#), University of California Police (Davis campus) pepper spray incident in Nov. 2011. (190 pp. PDF 2012).
- [UC Davis pepper-spray incident](#). Wikipedia article.

❖ Prior Relevant Monthly Law Journal Articles

- [Restraint and Asphyxia: Part One – Restraint Ties](#), 2008 (12) AELE Mo. L. J.101.
- [Restraint and Asphyxia: Part Two – Compressional Asphyxia](#), 2009 (1) AELE Mo. L. J.101.
- [Staff Use of Force Against Prisoners--Part III: Use of Chemical Weapons](#), 2008 (11) AELE Mo. L.J. 301.

- [Civil Liability for the Use of Pepper Spray, Tear Gas, and Chemical Agents - Part 1](#), 2014 (4) AELE Mo. L. J. 101. .

❖ **References:** (*Chronological*)

1. [Why Do Police Officers Use Pepper Spray?](#) by Brandon Keim, Wired (Nov. 22, 2011).
2. [Bibliography of Selected Resources on OC Spray and Other Chemical Irritants](#), Canadian Police Research Centre (2007).
3. [Pepper Spray](#), PATC/L&LRMI (Oct. 2006).
4. [Pepper Spray Policy Redux](#), IACP, 72 (9) The Police Chief (Sep. 2005).
5. [Deaths in Police Confrontations When Oleoresin Capsicum is Used](#), by Charles S. Petty, M.D. (February 2004), NCJ 204029.
6. [Oleoresin Capsicum: An Analysis of the Implementation of Pepper Spray into the Law Enforcement Use of Force Continuum in a Selected Police Department](#), by Lydia Denise Adkins (Aug. 2003). Electronic Theses and Dissertations. East Tennessee State University, Paper 779.
7. [The Effectiveness and Safety of Pepper Spray](#) (April 2003). National Institute of Justice (NIJ), NCJ 195739.
8. [Health Hazards of Pepper Spray](#), by C. Gregory Smith and Woodhall Stopford, North Carolina Medical Journal , Volume 60 Number 5 (Sept./Oct. 1999).
9. [Evaluation of Pepper Spray](#), National Institute of Justice (NIJ), NCJ 162358 (Feb. 1997).
10. [Oleoresin Capsicum: Pepper Spray as a Force Alternative](#), National Institute of Justice (NIJ) (Mar. 1994).
11. [Pepper Spray and In-Custody Deaths](#), International Association of Chiefs of Police, Inc. (Mar. 1994).

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