

**THE BILL BLACKWOOD
LAW ENFORCEMENT MANAGEMENT INSTITUTE OF TEXAS**

The Uses and Abuses of Pepper-Spray:
Should We Carry It or Shouldn't We?

A Policy Research Project
Submitted in Partial Fulfillment
of the Requirements for the Professional Designation
Graduate, Management Institute

by
Betty D. Frey

Galveston County Sheriff's Department
Galveston, Texas
September, 1998

Abstract

Over the years' deputies of the Galveston County Sheriffs Department have often carried some form of chemical spray; most recently Oleoresin Capsicum (OC), better known as pepper spray. During this time, although a widely accepted practice, no written guidelines have been established governing its use.

The purpose of this research project is to determine if the carrying of pepper spray should be authorized by the administration. If after deliberation it is recommended the carrying of pepper spray is a feasible force option, consideration should be given to what mandates must be written to utilize it.

Through review of articles, opinions, and court cases both sides of the issue has hopefully been presented to make an informed determination. As there is always liability attached to any form of use of force, it is important to weigh all information in a rational and objective manner.

As a general rule there are several steps to be taken when attempting to place an individual into custody. The first is officer presence followed by verbal commands. Failing this, individuals who will not comply to an officer's request place themselves in a position that may require escalation of force. One option that continues to be closely scrutinized is the use of pepper spray. By most standards its use falls between verbal and physical force oftentimes preventing unneeded injury to officer and suspect alike.

The conclusion of this research indicates that OC spray is a safe and effective means of less-than-lethal force. However, it is stipulated that formal adoption of its use warrants clear and concise guidelines.

TABLE OF CONTENTS

Section	Page
Abstract	
Introduction	1
Historical, Legal or Theoretical Context	2
Review of Literature or Practice	5
Discussion of Relevant Issues	8
Conclusion/Recommendations	11
Bibliography	13

Introduction

For many years the law enforcement community has sought more effective tools to use as less-than-lethal force options. The decision to begin this search was based on several factors. Reducing the need to use deadly force whenever and wherever possible was a prime consideration. The courts, both criminal and civil, decided officers had a choice and a responsibility to control how far their use of force reached. Officer safety was another important factor. Dealing with belligerent, violent, mentally-challenged, or those under the influence of drugs or alcohol required a viable solution. A solution that would at once assist officers into taking an individual into custody, but minimize harm to the officer or suspect. The introduction of Oleoresin Capsicum (OC), or pepper-spray, several years ago promised to be such a panacea. Numerous forerunners including taser-guns, kubatons, and other chemical agents such as tear-gas had been tried with little success. Complaints of excessive force, inhumane treatment, and police brutality continued to rise. The most effective and least invasive non-lethal-weapon according to many, seemed to be what pepper-spray was offering. After officer presence and verbal commands the next step up in the use-of-force continuum could conceivably be pepper-spray.

Presently there is no prohibition against carrying pepper-spray within the Galveston County Sheriffs Department. There also is no written policy or guidelines limiting its' use, or the utilization thereof. The intended audience of this research project is the division commanders of the Galveston County Sheriff s Department whose staff is impacted. The purpose of this research is to assist in determining whether or not to implement a policy, and

if the use of pepper-spray is a viable alternative to other methods of control and restraint.

Through the sources of information used, i.e. journals, articles, legal opinions, and policies of other agencies, this research hopes to assist the administration in making an informed decision. The history of OC spray, what it is, and its effects will be discussed. Opinions of both proponents and dissenters will be offered. Training and liability issues pertaining to excessive use of force will be included.

The intended outcome of this policy research project will be whether or not the impact of liability lies with the agency by not adopting a policy. The standard to allow or prohibit its use will hopefully be considered by virtue of the research.

Historical, Legal or Theoretical Context

Any non-lethal use of force alternative may be used by deputies with the Galveston County Sheriffs Department. Only policy dealing with deadly force has been addressed to date. Although training is offered in the use of pepper spray it is not a prerequisite to carry. As required by law, deputies must qualify with their firearm once a year. They are not required to show proficiency with any other weapons, including impact weapons. This research project hopes to provide information that would culminate in adoption of a use of force policy and utilize the use of force continuum as a practical means of diminishing liability for the officer and department.

Confrontations between police and individuals resisting arrest which resulted in injury have frequently spawned complaints about the level of force used. Increased civil liability and court-imposed limitations on the use of deadly force have resulted in a search for safe and effective less-than-lethal alternatives (NIJ 1997). There seems to be little comfort in knowing that if the individual had not resisted, no force might have been necessary.

Conceivably, chemical agents when used properly, can be another tool in the police arsenal which helps diminish the need to resort to deadly force. Oleoresin Capsicum or pepper spray gives law enforcement officers a way to control subjects without resorting to physical confrontations (Hunter 24). At any given time it is the officer's decision as to how much force is needed and when to use it. Whether a subject is compliant or non-compliant will affect the decision. As the need to increase force escalates the officer must decide if open-hand techniques will suffice. If not, and there is no alternative method such is the case with OC spray, a harsher method may have to be adopted. Unlike impact weapons and defensive tactic techniques, OC spray requires no physical strength or great skill to be utilized. Although the baton often works as a threat and ends the confrontation before it is used, if the threat fails the officer has little choice but to strike the suspect increasing chance of injury (Schneider 3). OC is low on the use-of-force continuum because it does not show a propensity for serious medical injury. In many law enforcement agencies OC spray is placed between the passive or cooperative stage of verbal communication and the assaultive level stages involving impact weapons such as the baton or flashlight (Pilant 1993).

OC spray is a naturally occurring substance derived from the cayenne pepper plant. It has become widely used only within the past few years (IACP 1995). There are differing opinions as to when Oleoresin Capsicum was first developed. One source reveals that pepper spray was first developed as an animal deterrent (Lawing 3). Others maintain it was developed in the 1930's by the U.S. military (Galveston County Sheriffs Academy 1). There seems to be general consensus, however, that it was introduced into law enforcement in 1976 by

CapStun (Lanny 1991). According to Lanny, OC was developed to replace CS and CN, which are classified as irritants. For those with a high pain threshold, under the influence of drugs or alcohol, or those in a highly agitated state CN and CS weren't always effective. OC spray is classified as an inflammatory agent. Immediately upon contact with pepper spray the mucous membranes of the eyes, nose, and throat become inflamed and swollen (NIJ 1997). The first body function affected is vision as the eyelids rapidly shut after exposure to OC. It takes 10-20 seconds before the subject can open the eyelid (Lein 36). The extract of peppers causes the blood vessels to dilate and the blood to rush to the upper body. The skin becomes red and irritated. It is 300 times hotter than Jalapeno pepper and is referred to as a "naturally occurring inflammatory agent" (Wilson 85). In most cases the immediate effect causes an individual to "double-over" allowing an officer the opportunity to place the person in custody with no further resistance.

In 1989 the FBI completed a three-year study of OC aerosol agents. The study concluded that OC was a very viable ingredient to use for the temporary incapacitation of an opponent. Based on this study and the need for another intermediate use of force option, the FBI approved OC for use by it's personnel (Winner 1995). Since that time use among law enforcement agencies has increased dramatically. In the FBI study, over 800 subjects were either sprayed directly in the face with a 1 to 5% OC solution or exposed to 1 to 10% from aerosol grenades in an enclosed space. No long-term adverse medical effects were noted in either situation and no medical treatment required. In 1992 a newspaper article reported the results of the study made its use so popular that over 2,000 law enforcement agencies were using the spray (Lee, et al. 548).

Review of Literature or Practice

Since the FBI study concluded in 1989, other studies have been completed. The question of just how safe OC is to the human body, and how it affects its recipients, will be the focus of this section of research. In addition, practices and policies of agencies currently using pepper spray as a less-than-lethal alternative will be offered. A comparative providing both sides of the issue from the standpoint of proponents versus dissenters will be included.

Although seemingly hundreds of law enforcement agencies began utilizing OC spray after the FBI study, there was virtually no documentation of its effectiveness. In an effort to correct this the National Institute of Justice began a study to determine pepper spray usage and effectiveness. The assessment was based on a field test of the use of aerosol spray by a police department over a period of eight months during the mid-90's (NIJ 97). Research of these findings focused on whether OC spray could effectively incapacitate humans. It also examined its impact on assaults against police, injuries to both police and suspects, and complaints about police brutality. There was particular interest in whether or not those under the influence of drugs or alcohol, or those exhibiting signs of being mentally disturbed were effected differently. Results revealed that OC spray successfully incapacitated humans in 156 of 174 cases or approximately 90 percent of the time. It also revealed that encounters with those under the influence of drugs or those exhibiting bizarre behavior might be less vulnerable to OC. Assaults against police and complaints against police for police brutality decreased during this time. This study determined that pepper spray is a less-than-lethal weapon that effectively addresses the issues of police officer and citizen injury.

Let's now explore the other side of the issue. Just how safe the use of OC spray is to most people must be examined. The fact that OC has grown in popularity is understood. Part of this is based on the ability to temporarily incapacitate a subject to be able to effect an arrest with little or no injury to either party. A majority of manufacturers of OC spray and several law enforcement professional groups or associations have supported the wide spread use of the product in law enforcement. Other professional police training groups and the American Civil Liberties Union has challenged the effectiveness and are supporting a more conservative use of OC (Doubet 1996). The challenge is in direct correlation to a study of in-custody deaths or sudden-death syndrome.

The IACP, based on several data sources, identified 30 incidents in the U.S. between August 1990 and December 1993 in which death of a suspect followed a spraying with OC. The 30 cases shared some common ground. All of the suspects behaved in a bizarre or combative manner making it necessary to incorporate a higher degree of use of force than verbal communication would achieve. In most cases drugs or alcohol was involved, the subject was obese, or there was a presence of some type of prior respiratory ailment. In addition, the OC was often either ineffective or less than effective than in other instances. All but one of the deaths occurred immediately or soon after the confrontation (Granfield 1994). There seemed to be substantial evidence that in many cases when a form of restraint was used such as "hog-tying", coupled with placing the subject face down, positional asphyxia followed causing suffocation and death. Although OC was not determined to be the direct cause of death, it became incumbent on the law enforcement community to further evaluate any causal link that might reduce significantly the possibility of in-custody deaths.

In a report by the American Civil Liberties Union of Southern California a slightly different slant was taken. Published in June of 1995, the ACLU voiced mounting concerns over the health risks associated with pepper spray, particularly in regard to fatalities of suspects in custody who were repeatedly sprayed. This report summarized 26 deaths among people who were sprayed in California between January 1994 and June 1995. Although there was no identifiable proof pepper spray was the direct cause of death, their concern focused on the lack of scientific data to determine the residual effects of the spray and what to look for during an autopsy. Their findings supported the IACP as to the initial confrontations and subsequent similarities between the victims but recommended the development of emergency restrictions on pepper spray use to limit exposure for people who may be at increased risk. They also felt adoption of model policies should be initiated and stringent training standards implemented (ACLU 1995).

Law enforcement agencies that use or plan to use OC spray should learn what the sprays contain, how they work, and how and when to use them. It is ultimately the departments responsibility to ensure that officers know how and when to use the spray to minimize liability. Departments should establish written policy and procedures governing its use. Where pepper spray is placed on a department's use-of-force continuum determines at what point during a confrontation it should be utilized (Jett 1997). According to Jett, when OC began widespread use, many departments placed it between verbal commands and physical contact. However, some legal advisors maintain it is a pain compliance technique that should be positioned between physical contact and impact weapons. It is generally suggested and accepted that an agency should have a clear-cut written policy which includes the type of pepper spray

used, where it fits on the department's use of force scale, decontamination procedures, recognition of medical emergency, and documentation and reporting procedures anytime an encounter has escalated to the point pepper spray must be used (Survey-Departments Policy and Procedures).

Discussion of Relevant Issues

Although in use now for almost ten years in a large number of departments, the controversy surrounding OC spray rages on. There is little doubt officer injury and encounters requiring deadly force have diminished (Potter 1997). But new problems have cropped up in the wake of the continued success of this "non-lethal" alternative. There is still no real evidence that there are no health consequences directly related to its use. More recently, the liability issue has brought a dimension to the police brutality argument as lawsuits are being filed for wrongful death and misuse of power.

Although in at least one federal case, a city was held liable for not training its officers in alternatives to lethal force (Roy v. Inhabitants of City of Lewiston) such as pepper spray, the recent conviction of former FBI Special Agent Thomas Ward places a heavy burden on those who promote it according to some sources. Ward, was the chief chemical weapons expert at the FBI Academy in Virginia. In 1989 his report, entitled "Chemical Agent Research: Oleoresin Capsicum," was sent to virtually every police agency in the country. In 1990 he traveled the country promoting Cap-Stun as the FBI's chosen OC brand. No doubt his reputation was largely responsible for the upward surge of pepper spray use. His plea of guilty last spring, and subsequent sentencing to federal prison for taking nearly \$60,000 in payoffs from the manufacturer's of Cap-Stun

has placed every study he authored and every promotion he made questionable (Wilson 1997).

In citing numerous court cases, both civil and criminal, Wilson continues "with respect to failure to promulgate an adequate chemical restraint policy, numerous federal courts have held that where situations obviously call for the adoption of procedures, a city's deliberate indifferent failure to do so is actionable under Section 1983 (City of Canton v. Harris). Because courts have extended City of Canton to apply to a municipality's "deliberately indifferent" failure to adopt a policy where the need for doing so was obvious, a strong argument can be made that the need for an OC policy has been "obvious" since 1994 when the National Institute of Justice recommended it and that the likely "consequences of not adopting such a policy is the deprivation of constitutional rights" in the form of increased excessive force"." In brief, an agency that arms its officers with pepper spray, knowing to a moral certainty that the armed officers will encounter mentally ill, drug-intoxicated or extremely agitated people, but fails to train them properly in its use and fails to provide them with guidelines, is deliberately indifferent to its own citizens' constitutional rights."

One of the key issues of this research project is whether or not OC spray is a positive subject control tool. Since its introduction as a less-than-lethal force option, it has been used thousands of times successfully to de-escalate varying levels of resistance, and is directly responsible for decreasing the incidents of serious injuries to officers and subjects. With any subject control technique, there are inherent risks. There also is no substitute for common sense which cannot, unfortunately, be monitored to any great degree. Officer responsibility, department support with clear-cut guidelines

and continuous and up-to-date training, are the keys to effectively utilizing pepper spray with a minimum of liability. Liability being the other key issue, it is apparent that the use of pepper spray cannot be recommended as a use of force option without a concise policy and procedure guideline dealing with officer safety, the use of force ladder, potential in-custody deaths, and reporting procedures.

Issuance of the spray, at a cost of about \$15.00 per unit is relatively low in comparison to the cost of a baton or firearm. It is extremely low when compared to a potential lawsuit for failure to utilize only the force necessary to effect an arrest. Injury to a suspect which might have been avoided is something that must be taken into consideration. For those individuals who will not peaceably respond to requests for compliance and will resist efforts to arrest or control them it would seem the potential for injury is less than it is for such hands-on techniques as pain compliance or take-down measures.

As there are presently deputies within our agency carrying OC spray, a training program has already been put in place. Upgrading this program to meet any standards set by adoption of a policy and procedure guideline will be a relatively simple matter. A certified instructor is already on staff and very familiar with OC spray, it's effects, advantages, and disadvantages. Presently training consists of mostly lecture-based data in a four-hour block of instruction. Inert canisters of spray are incorporated as part of the program to give the student an opportunity to apply a mist for the purpose of keeping themselves from harm's way, i.e. knowing which is upwind. Although there are a number of supporters for having officer's sprayed with the "real thing" it is not the current policy of the Galveston County Sheriffs Department. Opinions

with regard to officer's being able to feel compassion for the suspect, officer's being able to testify in court that they know pepper spray is not lethal, and officer's being able to better respond if their pepper spray is taken away from them and used against them are considered to be beneficial to an officer's affirmative defense when under scrutiny. Dissenters argue they don't have to be shot with their handgun to know how it works (Nowicki 1994). There is agreement in one area, however, and that is it is vital that officer's receive use-of-force training before using pepper spray on the streets. The potential for criminal and civil liability is tremendous when officers use OC spray without documented training and proof of competency (Nowicki 1995).

Conclusion/Recommendation

The purpose of this research project is to determine if the use of pepper-spray is a viable alternative as a less-than-lethal weapon for our agency. Further it is the intent of this paper to provide rationale to ensure written policy and procedure will be implemented if pepper spray is included in our use of force continuum. Since the Rodney King incident in March of 1991 law enforcement agencies across the country have strived to find better ways to control hostile and aggressive arrestees without resorting to physical violence. State mandates, which have effectively dealt with cultural differences and racial sensitivity, have all but avoided the issue of use of force. Presently the Galveston County Sheriffs Department through practice, but not policy, condones the use of pepper spray. Research indicates it is imperative that stringent guidelines dealing with training, health risks, individuals posing a high propensity toward sudden-death, decontamination process, and reporting and documentation procedures be included in any use of force policy.

Based on present information gleaned from this research there seems to be no reason not to recommend the incorporation of pepper spray into the Galveston County Sheriffs Department use of force ladder. This recommendation is commiserate with policy adoption as stated earlier. It is also the recommendation of this research that failure to adopt a firm written policy regarding the use of pepper spray should result in immediate abolition of its use by employees presently carrying it. It is our fervent desire that consideration of the recommendations herein provided will help diminish any civil or criminal liability by addressing the problem of using a force alternative that includes applied standards.

BIBLIOGRAPHY

American Civil Liberties Union, et al. "Pepper Spray Update: More Fatalities More Questions," ACLU/SC (1995)

City of Canton v. Harris, 489 U.S. 378 (1989)

Doubet, Mike. "Research Study on the Medical Implications of OC Spray" PPCT Publications Millstatdt, IL, 1 (60) (1996)

Galveston County Sheriffs Academy. Instructor Lesson Plan: Oleoresin Capsicum (OC) Certification. Sgt. Bruce Balchunas, November 1997

Granfield, John., et al. "Pepper Spray and In-Custody Deaths" RCMP Gazette, 56(11) 1994: 12-17

Hunter, John C. "Pepper Spray" FBI Law Enforcement Bulletin, 63(5) 1994: 24-26

International Association of Chiefs of Police. Pepper Spray Evaluation Project: Results of the Introduction of Oleoresin Capsicum (OC) into the Baltimore County, MD. Police Department, (Final Report Prepared for: National Institute of Justice/U.S. Department of Justice) 1995

Jett, Monty B. "Pepper Spray-Training for Safety" FBI Law Enforcement Bulletin, 1997: 17-23

Lanny, Roger. "Cap-Stun is the Aerosol That Works", Women and Guns, 1991

Lawing, Jerry. The Use of Oleoresin Capsicum (OC) Aerosol Spray in Law Enforcement. Huntsville, Texas: The Bill Blackwood Law Enforcement Management Institute of Texas, 1995.

Lee, Robert J., et al. "Personal Defense Sprays: Effects and Management of Exposure" Journal of the American Optometric Association, 67(9) (1996) 548-59

Lein, L.E. "Rapid Response to an OC Exposure" Law Enforcement Technology, 23(1) (1996) 36-39

National Institute of Justice. "Evaluation of Pepper Spray" Research in Brief, 1997

Nowicki, Ed. "Facts About Oleoresin Capsicum Sprays" Law Enforcement Technology, 21(5) (1994) 32-5

Nowicki, Ed. "Spray Day" Police, 1995: 36-9

Pliant, Lois. "Selecting Non-Lethal Weapons" Police Chief, 60(5) (1993) 37-9, 74-5

Potter, Keith. "Verdict on CS Spray" Police Review , 105 (S102) (1997) 16-7

Roy v. Inhabitants of City of Lewiston, (ME), 42 F.3d 691 (1st Cir. 1994)

Schneider, Tom B. A Proposal to Include Oleoresin Capsicum Spray as a Force Option Available to Officers of the Colleyville Police Department. Huntsville, Texas: The Bill Blackwood Law Enforcement Management Institute of Texas, 1996

Wilson, Lynne. "The Use and Abuse of Pepper Spray" Police Misconduct and Civil Rights Law Report, 5(8) (1997) 85-96

Winner International Training Division. Phase IV Tactical OC Aerosol Training Manual. Winner International, 1995

SURVEY RESOURCES

Arlington Police Department, Non-Deadly Force (401.03)

Bexar County Sheriff's Department, Policy and Procedure: Less Than Lethal Force Options (8.26)

Brazoria County Sheriff's Department, Guide to Use of Oleoresin Capsicum (OC)

Dallas/Fort Worth Airport Dept. of Public Safety, Use of Force, General Directive: 50

Ft. Bend County Sheriff's Department, Policy and Procedure, Oleoresin Capsicum, Appendix B

Galveston Police Department, Rules, Use of Force (Non-Deadly), RR-OOI

Humble Police Department, Model Policy: Pepper Aerosol Restraint Spray 04.02

Orange County Sheriff's Department, Proposed Policy Guidelines, Use of Oleoresin Capsicum (OC) Spray

Pasadena Police Department, Policy and Procedure: Use of Oleoresin Capsicum (OC-5) Aerosol Spray 72.00-72.03

Texas Department of Public Safety, Policy and Procedure, Use of Chemical Agent Sprays 05.95.00

Tucson, Arizona Police Department, Command Directive No. 95-09, Oleoresin Capsicum (OC Spray)