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## LEGISLATIVE BRIEFER

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# Legislative Options to Restrict the Use of Less Lethal Weapons in Crowd Control

AUGUST 2020

The killing of George Floyd by police in Minneapolis, Minnesota, in May 2020 sparked nationwide protests against police violence targeting Black Americans. It also led to a confrontational response. Law enforcement have used tear gas or rubber bullets on protesters in over [100 U.S. cities](#).

The use of these and other “[less lethal weapons](#)” (LLWs) for crowd control has been heavily criticized.<sup>1</sup> These weapons were often used [indiscriminately](#) against peaceful assemblies and were blamed for escalating confrontations. Dozens of people were injured by “less lethal” projectiles, including [peaceful protesters](#), [journalists](#), and [legal observers](#). Numerous [lawsuits](#) have been filed against municipalities for violating the constitutional rights of demonstrators in the use of these LLWs.

In response to criticism over the use of LLWs at protests, municipalities, states, and the federal government have [introduced, and in many cases enacted](#), new legislation to limit the use of these weapons.

This briefier provides an overview and analysis of the most common types of reforms. It calls for a prohibition on the use of these weapons at First Amendment assemblies, and a ban on the use of the most dangerous forms of these weapons in crowd control more generally. If these weapons are used for crowd control, to protect public safety and ensure they are not used against peaceful protesters, legislators should impose a rigorous set of restrictions on their use. They should also mandate reporting and transparency requirements in their procurement and use.

The manufacture of these weapons is poorly regulated. As a result, weapons that create disproportionate safety concerns are both widely available to, and wielded by, law enforcement officers who may not fully understand the harm they can cause. There is

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<sup>1</sup> For a description of common less lethal weapons and their health impact, see PHYSICIANS FOR HUMAN RIGHTS, [CROWD-CONTROL WEAPONS AND SOCIAL PROTEST IN THE US](#) 6 (June 2020)

an urgent need for the federal government to mandate independent testing and transparency requirements for manufacturers.

## Banning Less Lethal Weapons at First Amendment Assemblies

Less lethal crowd control weapons, like tear gas, rubber bullets, or sonic weapons, are inherently indiscriminate when used in the context of a protest. As such, they should be prohibited to the police or to disperse First Amendment assemblies, including protests, rallies, and parades.<sup>2</sup>

Some recent legislation bans the use of crowd control weapons at First Amendment assemblies. For instance, under legislation recently enacted in Washington DC, chemical irritants and less lethal projectiles “shall not be used by [the police] to disperse a First Amendment assembly.”<sup>3</sup>

While this is an important prohibition, it still potentially allows for these weapons to be used on peaceful protesters. Law enforcement might declare peaceful protests that are not properly permitted unlawful, and thus not a protected “First Amendment assembly.” Similarly, if there is a confrontation or isolated disturbances at a protest, law enforcement has, at times, declared the entire assembly unlawful. In either of these scenarios, law enforcement could then potentially use LLWs against peaceful protesters.

## Banning Disproportionately Dangerous Less Lethal Weapons for Crowd Control

Some jurisdictions have proposed or enacted bans on categories of less lethal weapons, such as kinetic impact projectiles, chemical irritants, disorientation devices, and acoustic weapons.<sup>4</sup> For example, Seattle has enacted a complete ban on the use of such “crowd control weapons” by law enforcement.<sup>5</sup>

Bans have two primary benefits. First, restrictions short of a ban, as this briefer has described and will detail further, can allow for continued abuse of these weapons against peaceful protesters and others. Second, some of these weapons are disproportionately dangerous, and there is no reason to use them for crowd control given alternatives available to the police.

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<sup>2</sup> Law enforcement may disperse assemblies only in [exceptional cases](#), following [carefully delineated rules](#) that among other things require giving a clearly audible order to disperse and providing an adequate opportunity for the crowd to comply.

<sup>3</sup> Washington DC [B23-0825](#) (2020)

<sup>4</sup> ICNL has tracked recently introduced legislative initiatives to ban or restrict the use of Less Lethal Weapons. See, ICNL, [Reforms Introduced to Protect the Freedom of Assembly](#)

<sup>5</sup> Seattle Ordinance [126102](#) (2020) (The ban applies not only to Seattle police, but also law enforcement agencies with which they have mutual aid agreements operating in the city. The ban exempts oleoresin capsicum spray unless it was used at a First Amendment protected event or landed on another individual besides where it was targeted.)

### KINETIC IMPACT PROJECTILES

Kinetic projectiles have long been singled out [by experts](#) as raising inordinate safety concerns.<sup>6</sup> During the ongoing Black Lives Matter protests, [as many as 60 protesters](#) have been hit in the head with kinetic projectiles, causing traumatic brain injuries, blindness, and bone fractures. Kinetic projectiles with a metallic component – such as certain rubber bullets, bean bag rounds, and pellet rounds – are particularly dangerous.

Given these longstanding and well-documented safety concerns, many jurisdictions have introduced legislation to ban kinetic projectiles for use in crowd control.<sup>7</sup> Barring a complete ban, they should be prohibited until independent and rigorous testing can provide legislators with needed information to properly assess the safety of particular kinetic impact projectiles.<sup>8</sup>

Other countries have prohibited the use of less lethal kinetic impact projectiles in crowd control. For example, several countries in Europe, [including the United Kingdom](#), have banned, or discontinued, the use of rubber bullets and similar kinetic projectiles.

### DISORIENTATION DEVICES

Flash bangs, blast balls, and stun grenades also raise significant safety concerns for their use in crowd control. These weapons have severely injured protesters and can trigger [cardiac arrest](#).

Physicians for Human Rights found that while these weapons “stated objective is to cause disorientation and a sense of panic, the potential for injuries caused by the pressure of the blast or by shrapnel from the fragmentation of the grenade is disproportionately high, and could even lead to death.”<sup>9</sup>

### ACOUSTIC WEAPONS

Acoustic weapons emit painful levels of sound and can cause long-term injury to hearing. Few jurisdictions have used these weapons against the public. Given the lack of understanding about their effect, they should be banned as a tool of crowd control, or at least prohibited until their impact on health can be further studied.<sup>10</sup>

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<sup>6</sup> Rohini J. Haar et al., *Death, injury, and disability from kinetic impact projectiles in crowd-control settings: a systematic review*, 7(1) *BMJ* 2017) (surveying the academic literature to use injury data on 1984 people who had been shot with kinetic impact projectiles in crowd control settings from around the world. 53 people died of their injuries and 300 suffered permanent disabilities).

<sup>7</sup> See, for example, New York [S8516](#) (2020); Minnesota [HF 86](#) (2020); or Massachusetts [HD 5218](#) (2020).

<sup>8</sup> Amnesty International has called for such a prohibition, AMNESTY INTERNATIONAL, [USA: THE WORLD IS WATCHING, MASS VIOLATIONS BY U.S. POLICE OF BLACK LIVES MATTER PROTESTERS’ RIGHTS](#) 64 (2020) (also calling for independent and rigorous testing of kinetic impact projectiles before their use by law enforcement).

<sup>9</sup> PHYSICIANS FOR HUMAN RIGHTS, [CROWD-CONTROL WEAPONS AND SOCIAL PROTEST IN THE US](#) 6 (June 2020)

<sup>10</sup> *Id.* at 8 (making a similar recommendation that sonic weapons be banned at least until their health effects can be further studied).

## TEAR GAS AND CHEMICAL IRRITANTS

Tear gas and other chemical irritants can also cause substantial health consequences.<sup>11</sup> The [American Thoracic Society](#) has warned that “[t]hey cause significant short- and long-term respiratory health injury and likely propagate the spread of viral illness, including COVID-19.” Protesters have repeatedly been hit with tear gas canisters fired by law enforcement, sometimes causing [severe injury](#).

Several states have introduced legislation that would ban the use of chemical irritants like tear gas for crowd control. For example, California has introduced legislation that bans the use of all CN tear gas or CS gas for crowd control.<sup>12</sup> Many of these bills make an exception for the use of oleoresin capsicum spray (i.e., pepper spray) when used in a targeted and proportionate manner.

## Restrictions on Use

Where Less Lethal Weapons are used for crowd control, legislators have considered other options to restrict the use of these weapons and enhance transparency and accountability. Although such restrictions provide some protection, they each have deficiencies. As such, legislators should adopt these restrictions as a package to better protect First Amendment activity and public safety.

## TRIGGER FOR USE

Besides banning these weapons entirely at First Amendment assemblies, legislators have prohibited the use of less lethal weapons for crowd control more generally unless there is precipitating violent conduct or the threat of imminent violence. These measures provide some protection but need to be carefully crafted not to provide law enforcement too much discretion, which can lead to abuse.

## RIOT

Under legislation enacted in Oregon:

*“A law enforcement agency may not use tear gas for the purposes of crowd control except in circumstances constituting a riot.”<sup>13</sup>*

This trigger of requiring a riot adds additional protection against the abuse of LLWs for crowd control, but in many states, the standard for a riot is not a high threshold. In fact, [commentators](#) have long noted that riot statutes in many states are so broad and vague that they are likely unconstitutional. For example, in Oregon, a person is guilty of [rioting](#) if they engage with at least five other persons “in tumultuous and violent conduct and thereby intentionally or recklessly creates a grave risk of causing public alarm.” This is a relatively subjective standard that can potentially be triggered in situations where there is only isolated property destruction or “tumultuous” conduct

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<sup>11</sup> See, for example, Massachusetts [HD 5218](#) (2020); New York [S 8512](#) (2020); Minnesota [HF 86](#) (2020); and Ohio [HB 707](#) (2020).

<sup>12</sup> California [AB 66](#) (2020). CN and CS gas are both commonly used in tear gas.

<sup>13</sup> Oregon [HB 4208](#) (2020)

that law enforcement judges are causing “public alarm.” As such, even with this provision, law enforcement retains relatively wide discretion in declaring a largely peaceful protest a riot and then using crowd control weapons.

Where this standard is introduced, legislators should also closely examine the definition of a riot in their jurisdiction to ensure that it is not vague or overly broad.

#### NECESSARY AND PROPORTIONATE TO PREVENT IMMINENT HARM

In Massachusetts, legislators have proposed that law enforcement can only use LLWs if *“measures used are necessary to prevent imminent harm and the foreseeable harm inflicted by the [LLW] is proportionate to the threat of imminent harm.”*<sup>14</sup>

This language around proportionately provides limited protection but ultimately is subjective and malleable. For example, it is not clear if harm also includes property damage or what response is proportionate. Under this standard, a law enforcement officer might decide it is proportionate to fire tear gas towards a crowd in response to relatively minor property damage.

#### PREVENTING PHYSICAL INJURY OR THREATS TO LIFE

In California, legislators have drafted a bill that would require that to use a less lethal weapon for crowd control that “the use is objectively reasonable to defend against injury to an individual, including any peace officer.”<sup>15</sup>

This standard usefully distinguishes between violence to persons and damage to property, but still provides relatively wide latitude to officers. It also does not have an imminence requirement, providing more latitude for the officer’s subjective interpretation of the situation.

In Portland, Oregon, the mayor of the city prohibited the Portland police from firing tear gas except for in cases of “violence that threatens life safety” situations. This standard heightens the standard for harm to persons, but again can be interpreted subjectively by an officer.

#### PROCEDURE FOR USE

Jurisdictions have introduced several procedural measures to restrict the use of less lethal weapons in the context of crowd control. These restrictions can be usefully constraining but still allow for the possibility of abuse.

#### WARNING AND OPPORTUNITY TO DISPERSE

A number of states and municipalities require that officers provide a warning and opportunity to disperse before using LLWs against a crowd.

In Oregon, in the restricted situations in which tear gas can be used, an officer must first:

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<sup>14</sup> Massachusetts S 2820 (2020)

<sup>15</sup> California AB 66 (2020)

*“(a) Announce the agency’s intent to use tear gas; (b) Allow sufficient time for individuals to evacuate the area; and (c) Announce for a second time, immediately before using the tear gas...”<sup>16</sup>*

A similar provision was recently enacted in Colorado.<sup>17</sup>

#### TRAINED OFFICERS ONLY

LLWs should only be used by those who are trained to use them. California’s proposed legislation states that kinetic impact projectiles or chemical agents shall only be deployed and used by officers to disperse an assembly “who have received training on their proper use that is approved by the Commission on Peace Officer Standards and Training.”<sup>18</sup>

This requirement is important but depends significantly on the quality of the training and certification process. Further, law enforcement agencies need to have robust systems in place to discipline officers who deviate from rules around the use of these weapons.<sup>19</sup>

#### COMMAND AUTHORIZATION

Some jurisdictions have required that tear gas can only be used if approved by the commanding officer on the scene.<sup>20</sup>

#### DE-ESCALATION FIRST

In legislation introduced in Massachusetts, one of the requirements before using a crowd control weapon is that “de-escalation tactics have been attempted and failed or are not feasible based on the totality of the circumstances.”<sup>21</sup>

This provision is a helpful legislative reminder, and de-escalation tactics should be part of any training in the use of these weapons. Still, by itself, this requirement may not be a significant barrier to law enforcement using these weapons given the subjective language.

#### NO INDISCRIMINATE USE

In Colorado, new legislation states that law enforcement shall not “discharge kinetic impact projectiles indiscriminately into a crowd.”<sup>22</sup> This is a helpful reminder to law

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<sup>16</sup> Oregon [HB 4208](#) (2020)

<sup>17</sup> Colorado [SB 20-217](#) (2020) (requiring that before firing tear gas law enforcement must issue “an order to disperse in a sufficient manner to ensure the order is heard and repeated if necessary, followed by sufficient time and space to allow compliance with the order.”)

<sup>18</sup> California [AB 66](#) (2020)

<sup>19</sup> BOSTON POLICE, COMMISSION INVESTIGATING THE DEATH OF VICTORIA SNELGROVE ([Stern Report](#)) 40 (May 25, 2005) (recommending that only certified officers should be able to use less lethal weapons).

<sup>20</sup> Washington DC, [First Amendment Rights and Police Standards Act of 2004](#), Sec. 116 (“Large scale canisters of chemical irritant shall not be used at First Amendment assemblies absent the approval of a commanding officer at the scene, and the chemical irritant is reasonable and necessary to protect officers or others from physical harm or to arrest actively resisting subjects.”) (note: this provision has since been repealed as Washington DC has now banned the use of tear gas to disperse First Amendment assemblies.)

<sup>21</sup> Massachusetts [S 2820](#) (2020)

<sup>22</sup> Colorado [SB 20-217](#) (2020)

enforcement officers, who should never fire anything “indiscriminately” at the public, but is only a starting point in the required restrictions of the use of these weapons.

## Damages

To ensure compliance with rules on LLWs, jurisdictions can create additional damages that can be awarded to protesters injured by law enforcement for failing to abide by them. For example, a person injured by an officer in violation of Seattle’s new prohibition on LLWs is entitled to at least \$10,000 in damages, plus attorney and court fees.<sup>23</sup>

## Reporting and Public Participation Requirements

Reporting and public participation requirements help create transparency and accountability around the procurement and use of these weapons.

### REPORTING AFTER USE

Law enforcement should be required to make a public report any time less lethal weapons are discharged in the context of crowd control, detailing how the weapons were used, what precipitated their use, and why de-escalation tactics failed. This report should be reviewed by an independent body that can make further factual findings and recommendations.

Under a proposed bill in Massachusetts, if law enforcement uses tear gas or rubber bullets “against a crowd,” the officer’s appointing agency “shall file a report with the police office standards and accreditation committee detailing all measures that were taken in advance of the event to reduce the probability of disorder and all measures that were taken at the time of the event to de-escalate tensions . . .” The committee “shall review the report and may make any additional investigation” to determine whether the use of the weapon was justified.<sup>24</sup>

### REPORTING BEFORE USE

Transparency and public participation should be required when procuring and setting rules for the use of LLWs in the context of crowds. Law enforcement should have to disclose to the public what less lethal weapons they have procured and the rules for their use.<sup>25</sup> When procuring such weapons, they should submit a report detailing their relative safety compared to alternatives, as well as their potential impact on First Amendment rights. Such a report should be submitted to either a legislative or citizen-controlled body for independent oversight.

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<sup>23</sup> Seattle Ordinance [126102](#) (2020)

<sup>24</sup> Massachusetts S [2820](#) (2020)

<sup>25</sup> Such provisions can potentially be modeled on Community Control Over Police Surveillance legislation. See, [ACLU Community Control Over Police Surveillance](#).

## Transparency and Testing Requirements for Manufacturers

Experts, the public, and law enforcement itself still know too little about the actual harm LLWs can cause because of a lack of transparency and testing by manufacturers. Before a law enforcement agency ever uses them, these weapons should go through rigorous and independent testing to assess their safety and ability to perform as recommended by manufacturers. Manufacturers should be required to disclose to the public the components of these weapons, such as the chemicals in a chemical irritant, and their recommended use.

The federal government is particularly well-positioned to legislate these transparency and testing requirements. However, state and local governments can at least require local law enforcement agencies to disclose the recommendations they receive from manufacturers about how these weapons should be used. They can also prohibit law enforcement from purchasing these weapons unless they have gone through independent testing, or at the very least, require law enforcement to report on how they assessed the relative safety of the weapons they procure.

## Conclusion

Governments should prohibit the use of these LLWs in the context of First Amendment assemblies, and ban the use of the most dangerous of these weapons for any type of crowd control. When these weapons are deployed for crowd control, in order to protect First Amendment rights and public health, the government should impose a strict set of restrictions on their use as well as reporting and transparency requirements in their use and procurement.

The manufacture and sale of these weapons are poorly regulated. Law enforcement agencies frequently do not understand the risk posed by LLWs. The federal government should require manufacturers to submit these weapons to rigorous and independent testing and be transparent about both their components and recommended use.

## Contact Information

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If you have questions, would like to learn more about this issue, or ICNL's U.S. Program, please contact us:

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