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### Cover Page Footnote

The author gratefully acknowledges the support of the Filbmen D'Agostino Research Fund. He also wishes to express appreciation for Phil Cook's, Graham Hughes' and David Wasserman's comments and criticisms. This article would not have been possible without the diligent research assistance of Theresa S. Fedder.

# THE REGULATION OF PERSONAL CHEMICAL WEAPONS: SOME ANOMALIES IN AMERICAN WEAPONS LAW

James B. Jacobs\*

## I. INTRODUCTION

Socio-legal scholarship on weapons has been dominated by research and analysis devoted to firearms, especially handguns.<sup>1</sup> This is hardly surprising given the popularity and prevalence of firearms in America and their significance in American crime patterns. But weapons law is a complex jurisprudence that extends far beyond the regulation of firearms,<sup>2</sup> explicitly or implicitly defining, for example, what a weapon is and determining what regulations, if any, should apply to which weapons.

This article focuses on personal tear gas devices and shows that, because our weapons laws and policies are so dominated by firearms, there has been little attention to the unique qualities, capacities and dangers of other weapons.<sup>3</sup> Personal chemical weapons, like tear gas aerosols and tear gas pens, deserve attention in their own right. Whether they are "weapons" and, if so, how they should be regulated ought to be based on their own unique potentials and dangers rather than on a monolithic weapons policy.

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1. See, e.g., J. WRIGHT, P. ROSSI & K. DALY, *UNDER THE GUN: WEAPONS, CRIME AND VIOLENCE IN AMERICA* (1983).

2. Legal studies of firearms have predominantly focused on the origin and meaning of the second amendment (and the state constitutional equivalents), and the constitutionality of proposed handgun prohibition, however, rarely paying attention to the web of regulations prescribing legal and illegal firearms, conditions of purchase and sale, conditions of transport and public display, and the legal consequences of using firearms in the commission of criminal offenses. See SUBCOMMITTEE ON THE CONSTITUTION OF THE SENATE COMM. ON THE JUDICIARY, 97TH CONG., 2D SESS., *THE RIGHT TO KEEP AND BEAR ARMS* (Comm. Print 1982); D. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983). But see W. TURLEY & J. ROOKS, JR., *FIREARMS LITIGATION: LAW SCIENCE AND PRACTICE* (1988).

3. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1335 (1983) (defines "weapon" as "an instrument of offensive or defensive combat: something to fight with").

## II. PERSONAL CHEMICAL WEAPONS

The term "personal chemical weapon" refers to non-military chemical weapons, primarily tear gas weapons, manufactured for private citizens, businesses and law enforcement personnel.<sup>4</sup> The most common commercially available tear gas agents are chloroacetophenone ("CN") and orthochlorobenzalmalonitrile ("CS"). Capsicum, an abstract of African red peppers, is another agent used in some tear gas products. Of these three chemical agents, CS is the most widely available and highly recommended. A wide range of personal tear gas products are commonly referred to as "mace," although mace is actually a DEF-TEC Corporation brand name for tear gas.

Personal chemical weapons are not a new weapons technology. Tear gas pen guns were in use as early as the 1930s.<sup>5</sup> Over time, chemical weapons have become more specialized with different products marketed for private citizens, businesses and law enforcement agencies.<sup>6</sup> Today, the most common products for private citizens are (1) tear gas aerosols (from ½-4 ounces) with a range of 6 to 16 feet, depending upon the container's size, and (2) tear gas pens or guns which propel a cartridge up to twenty feet either by air pressure or by a small explosion caused by a firing pin making contact with a chemical primer. Some tear gas products contain an indelible ultraviolet dye which stains clothing and skin for up to 72 hours, thereby assisting police in apprehending criminals who have been sprayed with the gas.

There are only a few manufacturers of personal chemical weap-

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4. The types and potency of weapons manufactured are a consequence of state and federal legislation and regulation. While powerful tear gas weapons are available to the military and the police for riot control, they are not available for retail sale to private citizens which is a peculiar restriction in a nation that permits retail sale of automatic military-type assault rifles. In theory, manufacturers like Smith & Wesson could produce gas weapons of various levels of strength and effectiveness. UNITED STATES DEPARTMENT OF JUSTICE, NATIONAL INSTITUTION OF JUSTICE STANDARDS FOR HAND-HELD AEROSOL TEAR GAS WEAPONS § 0110.00 (1985).

5. *Village of Barbourville ex rel. Bates v. Taylor*, 115 W. Va. 4, 174 S.E. 485 (1934), *overruled* *State v. Choat*, 363 S.E.2d 493 (1987) (*Bates* was overruled to the extent that it was inconsistent with the court's holding that it is for the jury to determine whether a weapon is dangerous/deadly.).

6. There are some special tear gas weapons manufactured for businesses. Automatic dispensers attached to a safe, the chemical equivalent of a spring gun, release tear gas when the safe is broken into. Banks make available to their tellers and officers automatic exploding tear gas disks which can be placed in bags with stolen money. A time delay causes them to explode while the bank robbers are making their escape. The gas is meant to incapacitate the robbers while a colored dye sprays the money and the thieves. The fleeing robbers' vision becomes clouded by both the tear gas and dye. In addition, colored smoke billowing out of the money bags acts like a signal flare calling attention to the escaping criminals.

Law enforcement personnel also possess some special tear gas weapons. Police and corrections officials, on occasion, use tear gas grenades and shotguns with exploding tear gas cartridges to flush people out of enclosed areas or buildings or to subdue rioters.

ons.<sup>7</sup> DEF-TEC Corporation, the producer of “mace,” is by far the largest. Often tear gas products are sold by groups promoting citizens self defense and neighborhood security.<sup>8</sup> Marketing is frequently aimed at women, as the following advertisement suggests:

#### FREEZE

C.S. Tear Gas is . . . Your key to Protection Against Violent Crime. “Freeze” is a non-lethal weapon that could save your life. “Freeze” comes in ½ oz., ¾ oz., 2 oz., and 4 oz. containers. The ½ oz. size is for your purse or pocket. The other sizes are usually for law enforcement. The attractive purse size “Freeze” Key Case unit contains a canister of the strongest chemical self defense agent ever offered to civilians. It is legal to carry in most areas of the country (except on passenger aircraft) because it causes no permanent damage or lingering side effects after usage.<sup>9</sup>

Personal chemical weapons are non-lethal. They produce irritation of the eyes, clouded vision, burning skin and sometimes choking; effects may last up to thirty minutes. Of course, this does not mean that there are not freak misuses that can cause serious or permanent injury.<sup>10</sup> At first blush personal chemical weapons seem almost an ideal defensive weapon to ward off muggings, robberies and assaults. They are easy to use and, unlike handguns, do not pose a danger of serious injury to the user and her family or to intended and unintended targets.

Nevertheless, because they are implicitly or explicitly compared with firearms, sophisticated weapons owners and users are reluctant to accept personal tear gas devices as “real weapons.” Gun advocates are likely to scoff at the idea that tear gas could ever be a substitute for handguns and view personal chemical weapons as weak, ineffective and lacking in range, power and deterrent capacity. Handgun opponents may also oppose liberal citizen access to personal chemical weapons for opposite reasons: tear gas is too powerful a weapon for general dissemination. They may believe that widespread ownership of such weapons would escalate the internal arms race. Thus, personal chemical weapons must find a third constituency, perhaps those individuals and groups advocating active non-lethal self defensive strategies to cope

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7. Manufacturers of tear gas weapons include Aerko International Corporation, Accuracy Systems, Inc., Mountain West Alarm Supply Co., Technipol International Corp., Ziphron, Inc., The Sirchie Group, Smith & Wesson Chemical Co., Inc., and Federal Laboratories.

8. The sale of personal chemical weapons increased rapidly in the 1970s. Interview with Michael Dallett, Aerko International Corporation (February, 1986).

9. Advertisement for Freeze, C.S. Tear Gas, Aerko International Corp. (Advertising pamphlet for personal tear gas weapon).

10. See, e.g., *Wall v. Zeeb*, 153 N.W.2d 779, 782 (N.D. Sup. Ct. 1967) (tear gas pen fired within three feet of plaintiffs face caused loss of eyesight).

with violent crime.

A personal chemical weapon can be criticized as being ineffective in defending against a gun or knife attack because 1) it might fail to stop an attacker;<sup>11</sup> 2) it might enflame an attacker; and 3) it might be turned against the user. However, while these criticisms may be persuasive to committed firearms owners, they may not be persuasive to many individuals who do not wish to carry a handgun because (1) it is illegal to do so without a license, and they cannot obtain one; (2) they do not wish to or believe they would not be able to use deadly force; (3) they fear accidental injuries associated with handguns; or (4) they fear that a handgun could be lethally turned against them. Such individuals might also prefer a personal chemical device to a knife or other weapon. Knives in particular are quite difficult to employ against an attacker; they require strength, close contact, accuracy and a psychological capacity to inflict a stabbing wound. Thus, such individuals might prefer to accept the lesser deterrent and "stopping power" of a personal chemical weapon. The point is not that personal chemical weapons are one hundred percent effective or that they are without risks, but that they may be rationally preferred to the available alternatives.

### III. REGULATING CITIZEN ACCESS TO PERSONAL CHEMICAL WEAPONS

Federal and state law treat possession and use of personal chemical weapons similarly to the possession and use of firearms.<sup>12</sup> Tear gas pens and guns which utilize a firing pin and (a miniscule amount of) chemical primer to fire a small projectile of gas a short distance qualify as "firearms" under federal law,<sup>13</sup> and their dealers must be licensed. However, no license is needed to sell tear gas aerosols.

Since most weapons law is state law, a state by state survey is required to determine what regulations cover tear gas. The most surprising conclusion revealed by such a review is that, if anything, the

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11. One weapons evaluation carried out by the D.C. Capitol Police found that "Smith & Wesson state[d], in their current 'Chemical Agent Instructional Flip Chart,' that a twenty second delay will transpire before their CS Aerosol will incapacitate a subject. A delay of that length is completely unacceptable for an officer involved in a physical confrontation." Letter from Lieutenant James P. Rohan to Captain Charles T. Kindsvatter (Dec. 26, 1985) [hereinafter Rohan Letter] (discussing results of the Alternative Nonlethal Weapon Project P85-0040) (on file with University of Dayton School of Law, Law Review Office).

12. Indeed, some statutes, judicial interpretations and other interpretations equate (or define) tear gas weapons as firearms. For example, a Massachusetts Attorney General Opinion states that a tear gas pen gun is a firearm under Massachusetts General Law. 1965 Op. Att'y Gen. 263 (Mass. 1965).

13. 18 U.S.C. § 921(a)(4)(A) (1988).

regulation of personal tear gas weapons is more stringent than the regulation of firearms. Perhaps this is because there is no strong pressure group, like the National Rifle Association, lobbying on behalf of tear gas weapons. It may also be because tear gas weapons do not figure prominently in American history, culture and constitutional law.<sup>14</sup>

#### A. Tear Gas Prohibitions

While no state prohibits possession of all firearms, a few states have adopted a prohibitionist or practically prohibitionist position on personal chemical weapons. For example, New York State flatly prohibits possession of all "noxious materials," defined as "any container which contains any drug or other substance capable of generating offensive, noxious or suffocating fumes, gases or vapors, or capable of immobilizing a person."<sup>15</sup> Title 10, section 131 of the New York City Administrative Code<sup>16</sup> prohibits possession of "any lachrymating, asphyxiating, incapacitating or deleterious gas."<sup>17</sup> The New York City Police Department issues no permits for tear gas devices, although it has regular procedures for granting firearms permits.

In Wisconsin it is illegal to sell, possess, use or transport a tear gas container of any kind.<sup>18</sup> Kansas prohibits carrying on one's person or in any air, water, or land vehicle any tear gas container with the intent to use it unlawfully.<sup>19</sup> Somewhat awkwardly, Massachusetts prohibits personal tear gas weapons via its definition of tear gas cartridges and mace as prohibited "ammunition."<sup>20</sup> Virginia simply prohibits any "tear gas."<sup>21</sup> In those states without specific statutes covering tear gas weapons, a judge's or attorney general's construction of the word "weapon" or "deadly weapon" has sometimes led to a ban on personal chemical weapons. For example, a Connecticut Attorney General's Opinion determined that a tear gas pencil gun was a deadly weapon *per se*, thus covered by the state's general weapons statutes.<sup>22</sup> The opinion states

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14. Interestingly, it may well be that the second amendment protects the right to possess a firearm but not a personal chemical weapon. The amendment could be said to protect the kind of light military "arms" that a militia would use for community defense, but not tear gas guns or canisters which would have no military value.

15. N.Y. PENAL LAW § 270.05 (McKinney 1988); *see also* *People v. Duskin*, 85 Misc. 2d 839, 380 N.Y.S.2d 895 (Sup. Ct. 1976). For several years bills have been introduced into the New York State legislature to legalize the possession and use of personal chemical weapons, but to date none have been successful.

16. NEW YORK CITY, N.Y., ADMIN. CODE tit. 10, § 131 (1989).

17. *Id.* § 131(e)(1).

18. WIS. STAT. § 941.26(1) (1988).

19. KAN. CRIM. CODE ANN. § 21-4201(c) (Vernon 1989).

20. MASS. GEN. LAWS ANN. ch. 140, § 121 (West 1989).

21. VA. CODE ANN. § 18.2-312 (1950).

22. *Tear Gas Pencil Gun-Dangerous Weapon*, 26 Op. Att'y Gen. 207 (Conn. 1950).

that since the pencil gun is designed to injure and disable a person temporarily or permanently, it is not a proper instrument for private individuals to possess.<sup>23</sup>

### B. Regulation of Personal Tear Gas Weapons

While the majority of states do permit private citizens to possess and carry some personal tear gas weapons, the qualifications and criteria for tear gas weapons are generally more restrictive than their requirements for the possession of firearms. Many statutes specify that personal chemical weapons must conform to certain size, weight, or shape criteria; limitations like these have not typically been applied to firearms. Some examples illustrate the stringency of regulations of personal chemical weapons.

Michigan and Nevada permit only one type of tear gas agent (CS).<sup>24</sup> Michigan limits the size of permissible tear gas weapons to a miniscule 35 grams,<sup>25</sup> while Nevada sets the legal size level at 2 fluid ounces.<sup>26</sup> Minnesota law permits only tear gas aerosol containers, and adds the following superfluous clause: "in the exercise of reasonable force in defense of the person or the person's property;"<sup>27</sup> no such caveat qualifies the right to own a firearm. Tennessee appears to allow only aerosols and air pressure fired cartridges, since it explicitly prohibits tear gas weapons with a firing pin capable of shooting cartridges.<sup>28</sup>

Florida permits sale, possession and transportation of personal chemical weapons weighing no more than one-half ounce and "designed to be carried in a woman's handbag or a man's pants or coat pocket or designed as a pocket pencil or pen and containing not more than one-half ounce of chemical."<sup>29</sup> Arkansas permits canisters possessed and carried for self protection, if they do not exceed 50 cubic centimeters.<sup>30</sup> New Jersey exempts any "chemical substance not ordinarily capable of lethal use or of inflicting serious bodily injury, but rather, [which] is intended to produce temporary physical discomfort or disability through being vaporized or otherwise dispensed in the

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23. The opinion explained that some instruments have both normal and peaceable functions, but can become dangerous or deadly. These instruments, like razors and sawed off billiard cues, are not, like personal tear gas weapons, dangerous *per se*.

24. MICH. COMP. LAWS § 750.224(2) (1989) (MICH. COMP. LAWS ANN. § 28.421 (West 1981)); NEV. REV. STAT. ANN. § 202.375(1)(a) (Michie 1988).

25. MICH. COMP. LAWS § 750.224d(1) (MICH. COMP. LAWS ANN. § 428.421(4)(1)).

26. NEV. REV. STAT. ANN. § 202.375(1)(a).

27. MINN. STAT. § 624.731(2)(o) (1990).

28. TENN. CODE ANN. § 39-6-1701 (1982).

29. FLA. STAT. ANN. § 790.001(3)(b) (West 1976).

30. ARK. STAT. ANN. § 5-73-124 (1987).



air.”<sup>31</sup> Moreover, such a weapon cannot contain and release more than three-fourths of an ounce of the chemical.<sup>32</sup> None of these states prescribes similar size restrictions for handguns.<sup>33</sup>

A few state statutes permit possession of personal chemical weapons without offering any definitions or imposing any limitations. However, they are careful to emphasize that this permission is only for non-lethal chemical weapons, obviously a limitation that is not applied to firearms. For example, chapter 38, paragraph 24-1(a)(3) of the Illinois Revised Statutes<sup>34</sup> speaks generally of “non-lethal [chemical weapons] . . . designed solely for personal defense.”<sup>35</sup> Similarly, Missouri exempts only devices that eject repellents or temporarily incapacitating substances from the prohibited class of “gas guns.”<sup>36</sup> Maine prohibits all “disabling chemicals,” including “chemical mace or any similar substance composed of a mixture of gas and chemicals which has or is designed to have a disabling effect upon human beings.”<sup>37</sup> However, the blanket prohibition is swallowed up by an exception which permits the use of disabling chemicals for the purposes of defending person or premises, preventing the retaking of property, or preventing criminal mischief.<sup>38</sup>

California, which only requires the police to be notified prior to purchase and sale of a firearm,<sup>39</sup> has the most complex regulatory scheme for personal chemical weapons, covering manufacturers, vendors and consumers.<sup>40</sup> Manufacturers must submit an application to the California Department of Justice to have a tear gas product deemed acceptable.<sup>41</sup> Section 12451 of the California Penal Code<sup>42</sup> defines as “acceptable” those chemical weapons reasonably free from any undue hazard when used by, or upon a human being taking into consideration such factors as:

(a) The reasonable safety, availability, and effectiveness of other devices, including other tear gas or tear gas weapons, capable of being used under the same circumstances and for the same purposes, including such

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31. N.J. STAT. ANN. § 2C:39-6i (West Supp. 1989).

32. *Id.*

33. *See, e.g.,* Cook, *The Saturday Night Special: An Assessment of the Alternative Definitions from a Policy Perspective*, 72 J. CRIM. L. & CRIMINOLOGY 1735 (1981).

34. ILL. ANN. STAT. ch. 38, para. 24-1(a)(3) (Smith-Hurd 1989).

35. *Id.*

36. MO. ANN. STAT. § 571.010(7) (Vernon Supp. 1990).

37. ME. REV. STAT. ANN. tit. 17-A, § 1002(1) (1983).

38. *Id.* § 1002(3).

39. CAL. PENAL CODE § 12076 (West Supp. 1990).

40. *Id.* §§ 12401-12458.

41. *Id.* § 12452.

42. *Id.* § 12451.

factors as anticipated effective storage life for the particular product.

(b) The amount of hazard inherent in the use of the tear gas or tear gas weapon when weighed against the amount of hazard inherent in the kinds of conduct the tear gas or tear gas weapon is designed to control.

(c) The manner in which the tear gas or tear gas weapon can be expected to be used as well as the manner in which the manufacturer or seller thereof has recommended that it be used.<sup>43</sup>

The California Department of Health Services is charged with responsibility for developing standards and promulgating regulations regarding lawful tear gas weapons.<sup>44</sup> The regulations mandate two labeling requirements. The first is a warning which must state: "WARNING: The use of this substance or device for any purpose other than self-defense is a felony under the law. The contents are dangerous-use with care."<sup>45</sup> The second requirement is a disclosure of the date on which the useful life of the tear gas weapon expires.<sup>46</sup> Manufacturers are also required to print their name and a serial number on each tear gas weapon sold, transported, or possessed under section 12451.<sup>47</sup> Alteration of the name or serial number is punishable by a fine or imprisonment or both.<sup>48</sup>

Vendors wishing to sell tear gas products must obtain an annual license from the California Department of Justice.<sup>49</sup> Vendors are subject to several conditions, including the maintenance of a permanent complete register of tear gas weapons sales.<sup>50</sup> The register must include:

(1) The purchaser's name, date of birth, and address; the purchaser's identification card number and date of issue; the purchaser's response to questions pertaining to his or her eligibility to purchase tear gas or tear gas weapons . . . .

(2) The quantity and description, including serial numbers of articles purchased.

(3) The business name, address, and telephone number; the business retail tear gas sales license number; and the name and signature of the person making the sales.

(4) The date and time of sale.<sup>51</sup>

Any prospective purchaser of an approved tear gas product must

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43. *Id.*

44. *Id.* § 12403.7(5)(b).

45. *Id.* § 12403.7(C).

46. *Id.* § 12403.7(D).

47. *Id.* § 12421.

48. *Id.* § 12422.

49. *Id.* § 12435.

50. *Id.* § 12435(d).

51. *Id.*

first obtain a valid identification card and also complete a training course certified by the Department of Justice.<sup>52</sup> A purchaser must be at least eighteen years of age (sixteen with written parental permission) and must not have been convicted of any serious criminal offenses.<sup>53</sup>

The extensiveness of these regulations on manufacturers, vendors, and consumers likely dampened much potential use of personal chemical weapons. One wonders whether this extensive regulation demonstrates some subconscious fear and anxiety about "gas,"<sup>54</sup> much greater familiarity with and acceptability of firearms, or simply the gun lobby's lack of interest in blocking regulatory legislation on tear gas.

#### IV. DENIAL OF TEAR GAS WEAPONS TO EX-OFFENDERS

Another standard feature of American weapons law is the ineligibility of convicted felons to purchase or possess weapons. Section 102 of the Federal Gun Control Act of 1968<sup>55</sup> and many state statutes make persons with a criminal record permanently or temporarily ineligible for gun ownership.<sup>56</sup> Tear gas weapons are frequently swept in under this same exclusion. For example, section 790.23 of the Florida Statutes<sup>57</sup> provides that:

(1) It is unlawful for any person who has been convicted of a felony in the courts of this state or of a crime against the United States which is designated as a felony or convicted of an offense in any other state, territory, or country punishable by imprisonment for a term exceeding 1 year to own or to have in his care, custody, possession, or control any firearm or electric weapon or device or to carry a concealed weapon, including all tear gas guns and chemical weapons or devices.

(2) This section shall not apply to a person convicted of a felony whose civil rights have been restored.

(3) Any person convicted of violating this section is guilty of a felony of the second degree . . . .<sup>58</sup>

The reason for the policy is not hard to fathom. Individuals who have proven criminal propensities should not be trusted with firearms be-

52. *Id.* § 12403.7(a)(6)(A).

53. *Id.* § 12403.7(a)(1), (4).

54. Concern about gas and other chemical weapons is evident in international law. *See, e.g., Protocol for the Prohibition of the Use in War of Asphyxiating, Poisons, or other Gases, and of Bacteriological Methods in Warfare*, June 12, 1925, 26 U.S.T 571, T.I.A.S. No. 8061, 94 L.N.T.S. 65; M. Dupuis, J. Heywood & M. Sarko, *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U.J. INT'L L. & POL'Y 415, 500 (1987).

55. 18 U.S.C. § 922 (1988).

56. *See, e.g., id.* § 922(d)(1).

57. FLA. STAT. ANN. § 790.23 (West 1989).

58. *Id.*

cause of the risk that they will use them in the perpetration of future crimes. Many criticisms have been levelled at this crude reasoning,<sup>59</sup> but courts have upheld the basic policy over the years.<sup>60</sup>

Assuming that it makes sense to impose a lifetime ban on firearms for convicted felons, does it follow that they should be denied personal chemical weapons as well? Common sense tells us that it cannot be the case that the state wishes to deny a person convicted of a serious crime access to 1) all instruments or devices that are dangerous or 2) all instruments or devices that could be used as weapons. Ex-convicts are allowed to drive automobiles and to carry many kinds of knives as well as bats, tire irons, sticks, rocks, razor blades and various other bric-a-brac that could be used to injure or kill. An ex-convict does not lose his right to self defense; moreover, as a group, ex-convicts are disproportionately likely to live in neighborhoods and engage in patterns of social life which require self defense.

Is an ex-convict with a tear gas weapon a special threat? Small tear gas devices are unlikely to prove popular with criminals.<sup>61</sup> Unlike a gun or knife, these devices will not strike terror in a victim's heart, nor will they cause serious harm even when that is intended. Furthermore, if tear gas has to be employed it may affect the user as well as the target. Thus, there is probably little risk in allowing individuals who have previously been convicted of crimes to possess personal chemical weapons. Finally, one might argue that even if street criminals were to adopt tear gas weapons, society would be much better off as this would be a de-escalation from more dangerous firearms and knives.

#### V. SENTENCE ENHANCEMENTS FOR USE OF PERSONAL CHEMICAL WEAPONS IN THE COMMISSION OF CRIMES

Sentence enhancements for persons convicted of using firearms or other weapons in the commission of crimes are a universal American "gun control" strategy. The aim is to deter gun crimes by raising the cost of such offenses. In the case of firearms, the justification is obvious: use of a firearm in the commission of a crime raises the risk of serious injury or death and therefore the nature and seriousness of the offense.

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59. There are the obvious criticisms of underinclusiveness and overinclusiveness. Why, for example, aren't certain misdemeanants, like fighting drunks and spouse abusers, made ineligible for gun ownership? Why are all felons, including embezzlers, made ineligible?

60. See *People v. Garcia*, 97 Cal. App. 2d 733, 218 P.2d 837 (1950); see also *Pettus v. Cranor*, 41 Wash. 2d 567, 250 P.2d 542 (1952), *cert. denied*, 345 U.S. 967 (1953); *State v. Krantz*, 24 Wash. 2d 350, 164 P.2d 453 (1945); *State v. Tully*, 195 Wash. 605, 89 P.2d 517 (1939).

61. *But see, e.g., State v. Millet*, 392 A.2d 521 (Me. 1978) (theft elevated to robbery when assailant sprayed tear gas on victim after convincing him to take out his wallet to make a purchase).

This justification for enhancing the sentences of firearm and knife offenses does not apply easily to personal chemical weapons which do not elevate the risk of serious injury or death. A burglar, robber, or rapist with a tear gas pen or canister is, at most, only marginally more threatening or dangerous than a fellow criminal armed only with his fists and feet. Moreover, to the extent that criminals are sentence rationalizers, offering the same sentence enhancement for committing a crime with a firearm or a canister of mace provides no incentive for choosing the latter. Thus, the rationale for aggravating the substantive offense or escalating the sentence of a person who commits an offense with a weapon should not necessarily apply to tear gas users. It might make more sense to utilize more general grading and sentencing formulae which impose a greater sanction where "serious injury" is threatened or inflicted.

Most state statutes, however, provide heavy penalties for use of tear gas in the course of an offense. State general weapons' statutes which define tear gas as a "dangerous" or "deadly" weapon enhance the penalty for committing a crime with tear gas just as they enhance the penalty for committing a crime with a firearm.<sup>62</sup> Nevada, for example, imposes the same sentence enhancement for using tear gas in the commission of a crime as it does for use of a handgun.<sup>63</sup> Under Massachusetts law, using tear gas in the commission of a felony adds up to an additional seven years incarceration, while use of a firearm adds an additional sentence of up to five years.<sup>64</sup> Michigan has a more rational scheme, treating the use of a firearm more severely than the use of a personal chemical weapon. Nevertheless, section 428.421 of the Michigan Compiled Laws<sup>65</sup> provides that unlawful use of a CS device is a misdemeanor punishable by up to two years incarceration and/or a fine of up to \$2500.<sup>66</sup> If tear gas is used in the commission of a crime, the judge may enhance the defendant's sentence.<sup>67</sup> By contrast, carrying a firearm or dangerous weapon with unlawful intent is itself a felony punishable by up to five years in prison and/or a maximum \$2000

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62. On the question of whether a tear gas gun is a dangerous or deadly weapon, see Annotation, *Tear-Gas as Dangerous or Deadly Weapon Within Statute Inhibiting the Carrying of Dangerous Weapons*, 92 A.L.R. 1098 (1934).

63. Compare NEV. REV. STAT. ANN. § 193.165 (Michie 1986) with NEV. REV. STAT. ANN. § 193.163 (Michie 1986) (A penalty equal to and in addition to the penalty for the primary offense is assessed when a firearm or tear gas is used in committing a crime).

64. MASS. GEN. LAWS ANN. ch. 265, § 18b (West 1989); MASS. GEN. LAWS ANN. ch. 269, § 10C (West 1989).

65. MICH. COMP. LAWS ANN. § 428.421 (West 1978).

66. *Id.* § 428.421(4)(2).

67. *Id.* § 428.421(4)(3).

fine.<sup>68</sup>

## VI. PERSONAL CHEMICAL WEAPONS IN POLICE AND CORRECTIONS

The handgun is firmly entrenched as the standard armament of American law enforcement personnel. In addition, police are typically armed with "impact weapons" like billy clubs and slapjacks. As long as law enforcement officers face a realistic threat of confronting armed offenders, it is unimaginable that tear gas weapons would *replace* handguns. They might, however, be substituted for impact weapons (batons or clubs) or be adopted as a supplementary weapon to provide an additional option, particularly for use in restraining and arresting drunks and other obstreperous suspects.<sup>69</sup>

Not surprisingly, all state weapons control statutes make an exception for police officers or the larger category of "peace officers." While the law of firearms does not recognize certain rifles or handguns as appropriate only for the police, certain tear gas products (hand guns and pen guns) which are not available to private citizens are available to the police.<sup>70</sup> Even so, tear gas weapons are carried only by a minority of American police officers, and training in the effective use of tear gas is minimal (which may be one of the reasons why some police are skeptical about its utility).<sup>71</sup>

If the tear gas devices now available are not adequate, there is no technological reason why tear gas could not be developed to meet the legitimate needs of law enforcement agencies. Indeed, if that were done, it might help to create a different "weapons climate" in the United States, one that attempted to meet legitimate concerns for self defense while at the same time seeking to minimize death and serious injury.<sup>72</sup>

For the most part, the same exemptions which permit easy access to tear gas weapons by police officers apply to prison officers since most state statutes make no distinction among different types of "law enforcement personnel" or "peace officers." Tear gas has a different status in penal institutions than on the streets because prison officers have

68. *Id.* § 428.423.

69. See *Bailey v. Turner*, 736 F.2d 963 (4th Cir. 1984); *Wall v. Zeeb*, 153 N.W.2d 779 (N.D. 1967).

70. For example, DEF-TEC Corporation manufactures chemical weapons for police use only. The only type of tear gas marketed for civilian use is mace. Mace dispenses liquid through an aerosol.

71. See Rohan Letter, *supra* note 11.

72. If the police were to adopt a principle or follow a goal of "minimum force," it might contribute to a gradual de-escalation of the American internal arms race. Obviously, this is conjecture. It is also possible that widespread dissemination of gas weapons to the police might lead to the use of tear gas in situations currently being handled with little or no force.

extremely limited access to firearms and there is no "gun culture" in correctional agencies. Tear gas, delivered by grenades and shotguns as well as hand held devices, is, except under very unusual circumstances, the most powerful weapon used in prisons. Personal chemical weapons have been used to subdue "acting out" inmates and, on occasion, to force inmates out of their cells.<sup>73</sup>

A good deal of litigation has been spawned by inmate plaintiffs charging that the use of tear gas against them constituted cruel and unusual punishment. In *Greear v. Loving*,<sup>74</sup> for example, a federal district court in Virginia found that "the use of tear gas is not forbidden in all instances but only when there appears to be no necessity for its use," and emphasized that courts must closely scrutinize the use of tear gas in correctional facilities.<sup>75</sup> In a similar vein, the Ninth Circuit Court of Appeals has stated that:

If then the tear gas is used in dangerous quantities, we agree with the district court that its use is justified only in those grave circumstances which would justify the use of severe and potentially lethal force.

... We agree with the trial court that use of potentially dangerous quantities of the substance is justified only under narrowly defined circumstances, but we further conclude that use of nondangerous quantities of the substance in order to prevent a perceived future danger does not violate "evolving standards of decency" or constitute an "unnecessary or wanton infliction of pain."<sup>76</sup>

Because of the inherent tensions and conflict that exist in jails and prisons, the use of chemical weapons presents special problems. There is the danger that chemical devices, including mace, will be used to punish inmates rather than to quell violence. Tear gas sprayed into a cell, especially a poorly ventilated cell, can linger for hours causing considerable discomfort. Therefore, it is not surprising that most corrections departments have stringent rules on the use of personal chemical weapons and that employment of such weapons triggers reporting requirements.<sup>77</sup>

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73. See, e.g., *Soto v. Dickey*, 744 F.2d 1260 (7th Cir. 1984), cert. denied, 470 U.S. 1085 (1985); *Spain v. Procunier*, 600 F.2d 189 (9th Cir. 1979).

74. 391 F. Supp. 1269 (W.D. Va. 1975), vacated, 538 F.2d 578 (4th Cir. 1976).

75. *Id.* at 1271.

76. *Procunier*, 600 F.2d at 195-96.

77. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 9, § 7063.3 (1988) Authorization for the use of chemical agents shall emanate from the highest authority available within the facility. In emergency cases facility staff trained in the use of chemical agents have authority to use chemical agents without authorization.

## VII. PERSONAL CHEMICAL WEAPONS AND THE LAW OF WEAPONS

There is no uniform American position on personal chemical weapons, any more than there is such a position on firearms or handguns; policy, to the extent it can be discerned, varies from state to state. For the most part, however, the regulation of tear gas devices is included in the regulation of firearms and other weapons, or specifically parallels that body of law. Little specific attention has been paid to whether small tear gas devices should even be classified as "weapons" or, if they should, whether they should be regulated differently from lethal weapons.

The rudimentary law on chemical weapons does provide some insight on attitudes and policies toward preventative self defense. Personal possession of firearms has not primarily been rooted in the right of self defense, although a substantial portion of firearms (especially handgun) owners purchase firearms for this reason.<sup>78</sup> Much of the justificatory rhetoric about firearms is based upon: 1) the need for an armed citizenry to repel foreign invasion or domestic tyranny; 2) sporting and hunting rationales; or 3) tradition and constitutional rights.

By contrast, policy on personal chemical weapons has not involved interpretation of the second amendment or its state counterparts. Implicitly, it involves judgment about the legitimacy of possessing, carrying, and using weapons for self defense. Surprisingly, given the salience of the crime problem in the United States, policy makers and scholars have generally avoided asking what weapons, if any, citizens need to protect themselves in their daily lives. A degree of willingness to allow citizens to purchase and carry some personal chemical weapons demonstrates at least implicit recognition that citizens ought to have access to some weapons in order to meet legitimate concern for self protection. Some statutes do make an explicit link with self defense.<sup>79</sup> Moreover, and in sharp contrast to firearms law, regulations on tear gas sharply limit what kinds of weapons are appropriate for private citizens' defensive needs.

Nevertheless, the law regulating the use of personal chemical weapons could hardly be called a coherent jurisprudence. While a latent or unconscious policy towards acceptance of personal chemical weapons as legitimate defensive weaponry can be discerned in various state laws, this policy is undeveloped and inexplicit. American society has not yet come to terms with how it feels about personal chemical weapons and, perhaps, how it feels about anticipatory steps to effectu-

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78. F. ZIMRING, *THE CITIZENS GUIDE TO GUN CONTROL* (1987).

79. See e.g., ARK. STAT. ANN. § 5-73-124 (1987)(personal tear gas weapon permissible if carried for self protection).



ate self defense.

### VIII. CONCLUSION

For the most part our weapons law is undifferentiated. We think in terms of crimes being committed with or without "weapons," or at most we make a binary distinction between 1) deadly weapons and 2) all other weapons. Our focus on personal chemical weapons at least raises the question of whether we need to define weapons more narrowly or to develop sound distinctions between lethal and non-lethal weapons or between offensive and defensive weapons.

Just postulating the existence of a category of defensive weapons or devices stimulates some interesting sociological questions. Why has there been so little research and development and so little technological innovation in the area of defensive weaponry?<sup>80</sup> Why haven't the American people, consumed as they are with fears for personal safety, turned in larger numbers to such devices and, more generally, to self defense programs?<sup>81</sup> Why have states and localities not encouraged their citizens to arm themselves with defensive weapons, just as some communities encourage deterring burglary and theft by marking personal property and securing windows and doors? Why has no movement developed to advocate self defense instruction in the schools?<sup>82</sup> Why haven't tear gas devices become a common article of personal apparel, like the wrist watch or umbrella?

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80. Jacobs, *Exceptions to a General Prohibition on Handgun Possession: Do They Swallow Up the Rule?*, 49 LAW & CONTEMP. PROBS. 5 (1986).

81. "According to a 1988 Gallup poll commissioned by . . . Smith & Wesson, between 1983 and 1986 gun ownership among women jumped 53 percent, to more than twelve million." P. QUIGLEY, *ARMED & FEMALE* 7 (1989).

82. In order to promote self defense, South Korea reportedly sponsors martial arts programs in schools.

