

Police Misconduct and Civil Rights Law Report

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"LESS-LETHAL" WEAPONS AND THE FOURTH AMENDMENT

By Lynne Wilson¹

The Pentagon today unveiled what some military officials hope will become the rubber bullet of the 21st century: A weapon that uses electromagnetic waves to disperse crowds without killing, maiming, or, military officials say, even injuring anyone slightly.

New York Times (March 2, 2001)

I. INTRODUCTION

When the Pentagon went public with its new "People Zapper" vehicle-mounted electromagnetic pulse weapon [EMP] last year, one important detail was minimized; also being developed is a hand-held version for field use that is potentially marketable to local law enforcement agencies for use in individual encounters. Martin A. Lee, *The Pentagon's People Zapper: New Electromagnetic Weapon for Crowd Control*, San Francisco Bay Guardian (April 2, 2001). Touted by the U.S. Marine

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Corps as the greatest technological leap since "the advent of gun powder and the splitting of the atom," the EMP works through a special microwave transmitter. It "fires two-second bursts of focused microwave energy that causes burning sensations on the skin of people up to 700 yards away." C. Mark Brinkley, *The People Zapper: This New Secret Weapon Doesn't Kill, But It Sure Does Burn*, Marine Corps Times 10 (March 5, 2001).

This microwave beam penetrates beneath the skin's surface to a depth of 1/64th of an inch, instantaneously heating the skin to 130 degrees and causing its target to experience intense pain and confusion. Says Marine Corps Col. George P. Fenton of the Department of Defense's Joint Non-Lethal Weapons Program in Quantico, Virginia: "It's not designed to burn. It's a heat-induced sensation. It's safe, absolutely safe. You walk out of the beam and the pain goes away. There are no lasting effects." Brinkley, at 11 (noting that "the human body begins to feel pain at about 113 degrees").

Not surprisingly, others are skeptical that this so-called "non-lethal" weapon will be so benign in the real world. Researchers at the Loma Linda University Medical Center, for example, are concerned that the microwave beam if



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used at close range could “cook a person’s eyeballs” and cause cataracts or cancer. Lee, *supra*. Even the Pentagon, which maintains that the EMP has a good safety record on 72 humans and is now testing it on at least an equal number of goats, retains as classified “the amount of time the weapon must be trained on an individual to cause damage or death.” Brinkley at 10.

The “Beam of Pain” is only the latest in a mind-boggling array of less-lethal weapons that either are available now or may potentially be available to law enforcement in this country within the next decade. Other examples include: a hand-held electric water cannon, a telescopic electronic restraint staff, a “sticky shocker,” an invisible laser pulse, vortex weapons, fin-stabilized rubber projectiles, sticky foam, and acoustic shock wave devices. See, e.g., Frank Morales, *Taxonomy of Terror: What They’ll Be Firing This Season*, *Covert Action Quarterly* 13 (April-June 2001) (listing over one hundred such devices taken from “Non-Lethal Weapons Taxonomy,” *Naval War College Review*, Vol. LII, No. 2, Seq. 366 (Spring 1999)).

That the Marine Corps is hailing the EMP as akin to the rubber bullet is no consolation to those familiar with the history of that “less-lethal” weapon’s abuse. See, e.g., *Gates v. Gomez*, 60 F.3d 525 (9th Cir. 1995) (prison’s policy of using of 37mm guns loaded with rubber bullets to control mentally ill prison inmates held violative of Eighth Amendment without a psychiatrist’s prior approval as to each individual inmate). That these highly sophisticated new millennium weapons are now or will be in the hands of local police departments around the country is a cause for great concern. Given the current “War on Terrorism” atmosphere, it is not difficult to imagine the macabre uses to which the “Beam of Pain” weapon might be put.

Confusion exists over what terminology should describe these weapons. The terms “non-lethal” or “less-than-lethal” have been widely used in various U.S. and international publications to describe such weapons, but those terms imply that death will not result following their use. See, e.g., United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (adopted 1990) (encouraging the use of “non-lethal incapacitating weapons” in appropriate situations); International Association of Chiefs of Police, Concepts and Issues Paper on Civil Disturbances (October 1992) (referring to “non-lethal force” as a command option); National Institute of Justice definition of “less-than-lethal” (“devices or agents used to induce compliance with law enforcement personnel without substantial risk of permanent injury or death to the subject”). However, that is not always the case. The problem with these terms is that “so-called non-lethal weapons often turn out to be deadly.” Lee, *supra* (pointing out that pepper spray has now been implicated in more than 100 deaths).

Ironically, the Defense Department’s definition of “non-lethal” weapons does not preclude the possibility of death as a consequence of their use. Department of Defense Directive 3000.3, *Policy for Non-Lethal Weap-*

ons (7/9/96) (“discriminate weapons that are explicitly designed and employed so as to incapacitate personnel or materiel, while minimizing fatalities and undesired damage to property and environment”). To be accurate, this article will use the term “less-lethal” to describe these weapons, following the example set in recent reports out of Europe on this issue prepared by the Patten Commission in the United Kingdom and The Omega Foundation for the European Parliament. Patten Report II, *A Research Programme Into Alternative Policing Approaches Towards the Management of Conflict* (December 2001) [“Patten II”] (conducting a comprehensive analysis to establish whether a less potentially lethal alternative to the plastic baton round is available for the newly established Police Service of Northern Ireland); The Omega Foundation, *Crowd Control Technologies: Final Study for the European Union* (June 2000) (“Omega EU Study”) (the most comprehensive, well documented study of the proliferation of these weapons world-wide, addressing policy concerns from an international human rights perspective).

In light of the exponential expansion in technology, this article will address less-lethal weapons in three ways: First, it will briefly look at the recent political background that has driven the proliferation of these weapons and that seems to be pushing engineering creativity into such devices as laser grenades or “Sonic Nausea” or sticky net guns. Second, it will look in more detail at the range of weapons now available or on the horizon and at some of the problems (training, lack of medical assessment, quality control) that this proliferation has engendered. The focus will be not only on those less-lethal weapons available or being developed for crowd control but also on those used (or being developed for use) by law enforcement in individual street level encounters. Finally, this article will summarize a recent federal case that analyzes Fourth Amendment excessive force claims (including qualified immunity issues) involving individual injuries caused by the inevitable misuse of these weapons.

II. BACKGROUND

The explosion in less-lethal weapons technology in the U.S. began in 1993 with incidents in Waco, Texas on one side of the globe and Somalia on the other. It is one of the ominous legacies of the Clinton Administration in this post-9/11 era. It is a process that germinated with the Department of Justice (“DOJ”) formation of a “less-than-lethal” development program in the wake of the deadly force rule announced by the Supreme Court in *Tennessee v. Garner*, 471 U.S. 1, 11, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985) (establishing that under the Fourth Amendment police may only use deadly force “where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others”).

In May 1993, U.S. Attorney General Janet Reno went before Congress to describe the FBI’s role in the standoff with the Branch Davidians at Waco. She expressed the wish that there had been a “magic non-lethal bullet”

that could have saved the lives of the children who were incinerated there. Then, in October 1993, a large crowd in Mogadishu, Somalia turned on U.S. Military occupiers there. This resulted in the deaths of 300 Somalians and 18 U.S. soldiers who were slaughtered on film. See Omega EU Study at ¶ 6.1. Thus, Reno was expressing a desire mutual with that of the military to find a "magic bullet" to neutralize what was perceived as "the CNN factor." *Id.*

At the same time, pressure was mounting in minority communities for law enforcement to come up with less-lethal responses in individual encounters. A related factor, in the face of increasing excessive force litigation, was pressure within police departments to come up with alternative ways of handling encounters with hostile people who were mentally ill or intoxicated. Jaycor Corp., Press Release for "Sticky Shocker."

In November 1993, Reno issued a challenge to defense contractors "to turn your skills that served us so well in the Cold War to helping us with the war we're now fighting daily in the streets of our towns and cities across the Nation." Research in Action, *Technology Transfer From Defense: Concealed Weapon Detection*, National Institute of Justice Journal 35 (August 1995). To begin the process, the Department of Justice (through its research and development arm, the National Institute of Justice), set up a "Technology Assessment Program." Its purpose was to examine and transfer existing and emerging military technologies to civilian law enforcement. USAF Major Mark R. Thomas, *Non-Lethal Weaponry: A Framework for Future Integration*, Research Report from Air Command and Staff College; Maxwell AFB, Alabama (April 1998) (encouraging a redrawing of the lines between "military operations and domestic law enforcement").

In 1995, the Pentagon entered into a secret "Memorandum of Understanding [MOU]" with the Department of Justice "to formalize joint technology sharing and development efforts for law enforcement and those military operations unrelated to war." National Institute of Justice Journal, at 35. This MOU authorized the Pentagon to receive almost \$50 million to begin its secret "less-lethal weapon" research, to be jointly shared with the Justice Department. W. Hough, *High Tech Civilian Control Studied, Secret Pentagon-DoJ Memo of Understanding*, The Spotlight (7/31/1995) ("MOU").

The MOU gave examples of technologies with both "law enforcement and military applications," such as "less-than-lethal" weapons that use sticky foam or blinding light and other "technologies for subduing suspects without injury." National Institute of Justice Journal, *supra* at 36. Although the full scope of these highly secret Pentagon-funded research projects may never be known, it has been possible to group weapons projects into certain categories such as: laser research, optical munitions, acoustics, electromagnetic pulse, foam and stickums, grenade launched foam, and rubber bullets. Most of this secret research is taking place at Los Alamos and various other military or privately funded laboratories around the country. Omega EU Study at ¶ 6.1.

Because these "less-lethal weapons" projects are enshrouded in the highly classified world of "special access" Pentagon secrecy, there is a complete lack of independent or democratic oversight. Military and weapons manufacturer greed reigns with no limits and no checks on the reality of whether a particular weapon can even be operated in high stress street level situations or if so, whether long term negative health concerns outweigh its use for crowd control. Frank Morales, *Welcome to the Free World: Gas Me, Stun Me, Shoot Me, Zap Me, Douse Me, Drug Me, Shut Me Up*, Covert Action Quarterly (April-June 2001) (pointing out that the ultimate purpose of this proliferation is the elimination of dissent).

Since the MOU was signed in 1995, however, Justice Department officials participate directly with the Defense Department to approve and oversee research projects through a "Joint Program Steering Group" which is part of something called the "Defense Advanced Research Projects Agency." One commentator has noted that some DOJ personnel have come to the unsurprising discovery of massive waste and duplication. Justice officials have found in many cases "the same applications being developed in as many as six independent programs." Omega EU Study at ¶ 6.1. But so little is known about the particular weapons being developed that almost no one can even begin to question the existence of weapons such as the "Beam of Pain" until they are unveiled

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in their final stages at Pentagon press conferences or in corporate press releases. See, e.g., Jaycor Corp., Press Release "Sticky Shocker" (Dec. 1998) (announcing for use by both military and law enforcement the "manufacturability" of a "non-lethal electrical stun projectile" that has a range greater than 10 meters and attaches to clothing to impart high-voltage pulses of electricity into the body).

According to one Pentagon critic, weapons manufacturers (both conventional and less-lethal) now shape U. S. foreign and military policy to an unprecedented degree. William D. Hartung, *Stuffing the Pentagon with \$\$ is Wrong*, Newsday (1/11/99) (criticizing the \$110 billion increase in military spending from 1993 to 1999 and the total military budget — now over \$300 billion and rising — as twice as large as the combined total of all potential adversaries). Less-lethal weapons hawkers drive NATO, US, and UN "peace keeping" or "civil disturbance" policies as well. Omega EU Study at ¶ 6.1 (quoting from NATO's 1999 "non-lethal weapons" policy that such weapons "may be used in conjunction with lethal weapons systems to enhance the latter's effectiveness"). See also Center for Army Lessons Learned, *Civil Disturbances: Incorporating Non-Lethal Tactics, Techniques and Procedures*, June 2000 Newsletter, Chap. 3 ("Developing a Graduated Response Utilizing Lethal and Non-Lethal Weapons").

Over the last 30 years, the ranks of these less-lethal weapons manufacturers has grown from 13 in five countries to 369 major manufacturers, suppliers or distributors operating out of 40 countries around the world. Omega EU Study at § B-2 (entitled "Currently Available Crowd Control Weapons and Their Effects") and Appendix 1 (charting these corporations by country and by types of weapons). At this point, "less-lethal" product development is now run for these manufacturers by the joint efforts of all U.S. military branches, the Special Operations Command, the Joint Chiefs of Staff, and the Departments of Transportation, Justice and Energy. See Colonel Mazarra, *Non-Lethal Weapons Development & Doctrine - A View to the Future*, presented to Janes Non-Lethal Weapons '98 Conference, London (12/1-2/1998). It is no consolation that since 1997 that humanitarian institution the U.S. Marine Corps has been designated as the lead agency in this effort, now officially housed as the "Joint Directorate for Non-Lethal Weapons" in Quantico, Virginia. Morales, *Free World* at 8.

III. VARIETIES OF LESS-LETHAL WEAPONS

What this means for street-level policing, whether in individual encounters or in crowd control situations, is that less-lethal force choices have now multiplied to a level that is almost beyond human comprehension. United States Special Operations Command and Battelle, *Survey of Limited Effect Weapons, Munitions, and Devices* (12/29/95) ("US Survey") (a catalogue for law enforcement and military of over 400 weapons and devices). Simply placing the various weapons into categories, let alone deciding what situations might trigger a

particular device's use, is a daunting task. The following categories are helpful but not necessarily exclusive: Chemical; Diversion and Distraction Devices; Electrical; Kinetic Impact Weapons; and Mechanical Devices. The U.K. Steering Group led by the Northern Ireland Office, *Report I Relating to Public Order Equipment* (April 2001) ("Patten I") (reviewing all available literature about "less potentially lethal" weapons available or under research and advising the Secretary of State for Northern Ireland about alternatives to the Plastic Baton Round).

Descriptions follow of examples in each category. Included are summaries of public information that is known about what is currently available. Information about the biomedical effects as well as performance problems is summarized where available. According to those who have studied this phenomenon in depth, very little regulation and/or quality control exists "to ensure that adverse or even lethal effects" are avoided, let alone that these weapons actually perform as described. Omega EU Study at Abstract of Final Report to the European Union's Science and Technology Options Assessment (pointing out the lack of adequate export controls and licensing and warning against adopting "ever more powerful" crowd control weapons as "technical fixes"). Also included is a brief summary of what can be expected in the future. See, e.g., Colonel Mazarra, *A View to the Future*, Presentation at Janes Non-Lethal Weapons - Development & Doctrine Conference (12/1-2/1998) (pulsed energy and microwave weapons, advanced delivery robotics, unmanned vehicles carrying less-lethal weapons).

A. Kinetic Impact Weapons. This is defined as a class of weapon "that on impact with the human body, produces a deterrent or punishment effect through the transfer of kinetic energy in the form of blunt or penetrating trauma." Omega EU Study at ¶ 2.2. Included are "baton rounds" of wooden, rubber and plastic projectiles, truncheons, and water cannons. A "baton round" is a cartridge of various materials that is usually shot from a conventional weapon such as a 12 gauge shotgun or a 37 mm caliber weapon. Patten I at ¶¶ 87-89. Impact projectile weapons were developed to specifically address the problem of "stand off" capability, i.e., to put distance between law enforcement or military and the subject to be controlled Omega EU Study at ¶ 2.2.2.

Also included are beanbag rounds, sock rounds, and sponge grenades. The majority of commercially available less-lethal products are in this category. Patten I at ¶ 87. Beanbag rounds, for example, contain a square or circular envelope of fabric containing lead shot, are fired from a 12 gauge weapon, and are intended to be fired directly at a person and to flatten on impact. They are the most widely used impact weapon in North American police departments and have reportedly been associated with deaths. Patten I at ¶ 90; *Deorle v. Rutherford*, 272 F.3d 1272, 1277 (9th Cir. 2001) (beanbag rounds have lethal capabilities). According to the International Association of Chiefs of Police (IACP), six deaths from impact pro-

jectiles have been documented in the U.S. and Canada since 1971. IACP Training Key #510 (3/7/00).

Many different manufacturers produce many different types of impact rounds and the "quality differ(s) tremendously." Patten I at ¶ 87. Tests in the U.S. have shown that more than half of the various types are unable to hit an 18" diameter target at 25 yards. *Id.* This failure of accuracy is alarming in light of most manufacturers' recommendations that these rounds not be fired at the head, neck, face, or spine to avoid causing serious injury or even death. Patten II at 52 ("It may be impossible to be sure of avoiding [serious injury] if the round is inaccurate").

Kinetic Impact Munitions are by far the most dangerous of the less-lethal weapons and have caused "a huge number and range of injuries and deaths." Omega EU Study at ¶ 4.2.3. Injuries from rubber and plastic bullets have included fractured skulls, brain damage, blindings, scalpings, broken bones, permanent disability, soft tissue damage to internal organs, loss of sense of smell, psychological problems, and post traumatic stress. L. Rocke, *Injuries Caused By Plastic Bullets Compared With Those Caused by Rubber Bullets*, *The Lancet* (4/23/83). In the United States, a survey by the National Tactical Officers Association showed that in 95% of the cases involving impact munitions, some injuries were caused. *Police and Security News* 39 (May 1998) (historical data included a 2% death rate).

In spite of this dark record, law enforcement agencies around the world are increasing their use of impact weapons for crowd control purposes. Seattle Police used countless baton rounds during the 1999 anti-WTO protests and numerous instances of abuse of these weapons were documented. Patten II at 47-48; Omega EU Study at Fig. 9 ("Police Officer Targets WTO Protestor in Seattle; a Misuse of Kinetic Impact Weapons"). The Royal Canadian Mounted Police and the Quebec Provincial Police used almost 1,000 rounds in Quebec City in May 2001. *Id.* One famous example of the dangers of these weapons is the July 1996 incident at Drumcree, Northern Ireland, a country which has "witnessed the most intensive use of kinetic munitions in Europe" and has as a result produced the most reliable biomedical data. Omega EU Study at ¶ 4.2.3. Over 8,000 plastic baton rounds were fired into a crowd by the Royal Ulster Constabulary, resulting in 172 injuries with three patients requiring care in intensive care units. Patten I at ¶ 103.

The variety of Impact Weapons seems unlimited, with the following additional impact devices currently available: Sock Rounds (a modification of the bean bag with a "tail" to provide stabilization); Single Flexible Ball Round (a single rubber or plastic ball which may deform on impact); Multi-Ball Rounds (a single cartridge containing between 2 and 200 pellets); Fin-Stabilized Rubber Projectiles (a single rubber round with a fin for stability); Multi-Baton Rounds (3 to 5 batons in a single cartridge made of rubber, foam or wood); Encapsulated Rounds (projectiles containing liquid, powder or other materials in a protective shell). Patten II at 53. *See also*

U.S. Survey, section on "Ballistic Devices" (containing specific details about the more than 60 such weapons available to law enforcement).

The IACP has recently come out with a Training Key on Impact Projectiles. IACP Training Key #510. The IACP applauds this technology as "highly desirable since it allows officers to deliver impact energy sufficient to disable subjects from a 'safer than contact' range, thus avoiding the need to physically engage potentially violent individuals." *Id.* Further, says the IACP, "impact projectiles frequently contribute to the successful resolution of difficult problems with only minor injuries to the suspect." *Id.*

The two scenarios that pose difficult use of force choices in which impact weapons might be used are: (1) "non-compliant armed subjects who do not pose any immediate or direct deadly threat" and (2) those who engage the police in confrontational situations "with the intent of forcing officers to use deadly force against them ['suicide by officer']." *Id.* Particularly when confronted with an intoxicated, armed individual, impact projectiles rather than pepper spray or batons are recommended. The other devices require the officer to come into close proximity to the armed person, jeopardizing both persons' safety. *Id.*

The impact projectile is seen as the safer alternative conditioned on the officer's clear understanding of the performance characteristics of the weapon as well as the "marksmanship skills required to direct rounds to safe areas" such as the lower abdomen, legs or buttocks. Shots directed at such areas can incapacitate the suicidal person, allegedly causing only bruises or abrasions. "In these cases, the need to stop the behavior justify[es] the increased risk of injury." *Id.* Shots directed at the chest are to be avoided as "the chest was the aiming point in each of the six impact projectile deaths in the United States and Canada since 1971." *Id.*

The IACP Training Key also contains a discussion of the two factors that affect the potential for suspect injury when impact projectiles are used: the level of "impact energy" in the round and the body mass of the target. The calculations needed to determine "impact energy" are set out in a complicated formula. In a chilling statement buried in the Training Key, the IACP cautions officers to "take every prescribed precaution, including the visual and physical inspection of the shotgun chamber and magazine, to ensure that lethal ammunition is removed prior to the loading/deployment of the impact rounds." *But see Modified M16 for Lethal/Non-Lethal Attack*, *Janes International Defense Review* 20 No. 9 (9/1996) (U.S. Army Research Laboratory is developing a "Variable Velocity Rifle System" which allows the operator to select between lethal and non-lethal on a shot by shot basis using so-called dual purpose "bruiser ammunition").

The fundamental problem with kinetic impact weapons is that "there is only a small margin of safety between a high velocity, small cross section impact which would knock one off balance ... and the infliction of

permanent or deadly injury.” J. Rosenhead, *A New Look at Less Lethal Weapons*, *New Scientist* (12/16/76). Manufacturers cannot agree on the efficacy of these weapons: Some say they can be aimed accurately at an individual while others warn against firing directly at people, cautioning “only to ricochet them off the ground.” Police and Security Equipment (Jane’s Publications Group, UK, 1998-1999). See also Patten II at 37 (manufacturers’ data cannot be relied upon to assess a particular device’s capability). Plastic baton rounds have now been banned from police use for crowd control in Northern Ireland. Patten II at 38 (after Northern Ireland Human Rights Commission concluded that use of these impact weapons for crowd control was a “disproportionate use of force”). In the entire United Kingdom, plastic baton rounds are now to be avoided in individual encounters unless “there is an immediate threat of loss of life or serious injury.” Patten II at 48.

B. Chemical Irritant Weapons. Pepper spray and other chemical weapons such as tear gas and mace are both widely available and widely used in the U.S. for crowd control and individual encounters. Police abuses of pepper spray have been widely documented and discussed in this journal and elsewhere. See, e.g., *Headwaters Forest Defense v. County of Humboldt*, 240 F.3d 1185 (9th Cir. 2000) (whether placing pepper spray in eyes of protestors with Q-tips constituted excessive force held a fact question for the jury); Terry Allen, *Chemical Cops*, In *These Times* (4/3/00) (arguing that until an adequate oversight or regulatory system is in place, pepper spray should be banned because of its potential toxicity). Numerous problems with tear gas and other chemical irritants have been documented (lung and eye damage, potential carcinogenicity, effects on heart rate, etc.) Omega EU Study at ¶¶ 2.1.1 & 4.1 (pointing out that chemicals such as tear gas and pepper spray fall within the definition of “toxic chemical” under the Chemical Weapons Convention).

One suggestion is that these substances be treated and regulated like drugs. Omega EU Study at ¶ 4.1.1 (“it is difficult to think of a drug that would be given the go-ahead in such circumstances where the biomedical effects had not been properly evaluated”). The delayed health effects of these substances are completely unknown. This is of special concern in mass sprayings, such as in Seattle in December 1999 where the Seattle Police Department allegedly used a mixture of tear gas, mace, and pepper spray even though manufacturers warned about “the synergistic consequences of such mixing.” Omega EU Study at ¶ 4.1.1.

In spite of the known risks (let alone the unknown ones) associated with chemical irritants, the newer technology now includes weapons that are capable of dispersing chemicals in a much larger array of situations. This development is driven by the need for force options that can incapacitate a hostile or violent person from a distance. One of the more creative less-lethal weapons currently being tested is the “Ring Airfoil Pro-

jectile System.” See Patten I, Appendix A (NIJ Funded Research). This is a “doughnut shaped, rubber impact projectile” originally designed to be launched from an M-16A1 rifle. The NIJ has funded an over \$1 million research project to make alternate launchers that are more “practical” than M-16s for law enforcement and to develop a cartridge that would deliver a small “cloud” of pepper spray or tear gas to the unlucky target who is hit with the Ring Airfoil Projectile. Patten I at ¶¶ 54-56 (with photos).

Grenades have also been developed that contain chemical irritants combined with distraction devices. Patten I at ¶¶ 48 & 57 (describing “paint ball” rounds that split on impact). Weapons that disperse tranquilizers, anesthetics, and “malodorants” are also being developed. Patten I at ¶ 59. Devices that accurately deliver chemical irritants to incapacitate an individual from a distance of greater than 20 yards are considered to be most promising by those who are studying alternatives to the unreliable impact projectiles. Patten II at 63 (distinguishing between “Multiple Subject Incapacitant Rounds” that must strike the ground first and “Subject Specific Rounds” that are intended to strike the subject directly).

C. Electrical Weapons. This category includes any device that uses the effects of electricity to incapacitate a person. Patten II at 72. The method of operation involves the use of a battery to provide a high voltage impact shock to incapacitate. “The electrical stimulus delivered by the device temporarily interferes with the normal electrical signals generated by the human nervous system.” *Id.* These weapons which include Tasers, Electric Batons, Stun Guns and the still being tested “Sticky Shocker,” are capable of temporary incapacitation of the whole body. Omega EU Study at ¶ 2.3. Questions concerning the delivery methods have been raised by human rights groups, such as Amnesty International, as well as federal courts. *United States v. Tines*, 70 F.3d 891 (6th Cir. 1995) (affirming conviction of prison guards under 18 U.S.C. §§2, 242 for use of excessive force with stun guns on juvenile inmates in Memphis jail). Because they often leave no marks, these weapons are useful instruments for torture. Omega EU Study at ¶ 5.3. *But see Livingstone v. North Belle Borough*, 91 F.3d 515 (3rd Cir. 1996) (remanding back to District Court question of validity of claims release where medical evidence supported plaintiff’s contention that officer applied a stun gun to her vulva area).

A taser operates with a cartridge attached to the front end that contains two electrodes each of which is in turn attached to a coil of wire. The two electrodes are fired and attach themselves to the skin or clothing of the targeted person. When the electrodes are attached, a current can be sent down the wires and through the person’s body between the two points. Patten II at 72. This current results in involuntary muscle spasms and severe loss of muscle control. *Id.* at 73.

Much variability exists in the taser products that are available. Some models are single shot only, while others allow multiple cartridges to be inserted at the same

time. Some resemble a handgun; some can be plugged into a computer. In 1999, new higher powered tasers became available, with four times the voltage of earlier models. Patten II at 73-7; Omega EU Study at ¶ 2.3 (wires deliver 50,000+ volt shocks). Numerous problems have been cited with tasers, not the least of which is that the older versions may only be effective 50% of the time. Patten II at 76 (“focused individuals were able to fight through the effects of the electricity”). Tests conducted on the new higher powered tasers allegedly show that “the higher-powered tasers are indeed more effective, with few people capable of fighting through the effects.” Patten II at 76. The current maximum range of a taser is 21 feet, the maximum length of the wire. Patten II at 73. There is a serious risk of “ignition if the taser is fired at a target that has a flammable solvent in their clothing” or is used in an otherwise flammable environment (such as a gas station). Patten II at 84.

Stun guns are essentially tasers without the wires, since the electrodes are permanently connected to the unit. Patten II at 85. In contrast to tasers, the probes must be placed close to the person’s skin for effect and this close contact must be maintained to prevent the person from jumping out of the way of the probes. A large number of commercially available stun guns exist, some with extras such as pepper spray, high intensity lights, or loud noises, or “screw-on lengthening bars” to increase the range. *Id.*

A newly developed less-lethal weapon called the “Sticky Shocker” has been developed to “extend the range for electrically stunning a person.” Patten II at 86. It is described by the manufacturer as a “low-impact wireless projectile fired from compressed gas or powder launchers, ... accurate to a range of greater than 10 meters, sticking to the target with a glue-like substance or with short clothing attachment barbs.” Jaycor Corp., Press Release. It is considered superior to a taser or a stun gun and was specifically developed to fill “the gap between kinetic rounds and devices [such as tasers] that are useful only in close contact situations.” *Id.* Developers are hopeful that it can be used in “any stand-off encounter where an individual needs to be temporarily incapacitated without exposing law enforcement officers to unnecessary risk.” Patten I at Appendix A (NIJ Funded Research).

The “Sticky Shocker’s” voltage and “target incapacitation response” is claimed to be the same as the higher voltage stun guns. Jaycor Corp., Press Release. It can be loaded into a conventional police weapon and can fly to a targeted person 30 feet away, attach itself, and turn on and off automatically. It is allegedly considered “as safe as” the bean bag impact projectile “for impact trauma.” *Id.*

In 1999, the NIJ funded an evaluation of the health effects of the Sticky Shocker. The conclusion was that little information exists concerning the health risks of *all* electrical devices (including tasers and other stun weapons). NIJ is now funding a study of all electrical devices

to better understand their effects on health. Patten I, Appendix A (NIJ Funded Research: “Evaluation of the Human Effects of the Sticky Shocker” to Pennsylvania State University’s Institute for Non-Lethal Defense Technologies). *See also* Amnesty International, *Arming the Torturers* (March 1997) (an exhaustive study of the worldwide use of electro-shock weapons, concluding that the use of “electro-shock weapons such as stun guns, stun shields, and tasers should be suspended pending the outcome of a rigorous, independent and impartial inquiry into the use and effects of the equipment”) and Omega EU Study at ¶ 4.3.1 (detailing unsubstantiated safety and medical claims of Stun Tech Products and Taser International).

D. Miscellaneous Devices. Other less-lethal weapons that do not fit into the above categories include lasers, acoustic devices, nets, “wire entanglement systems,” and “sticky foams.” Patten II at 89-91, 97-99. Lasers can be used to cause distraction, but they do not incapacitate a person. They are used to prevent the person from returning fire by causing temporary blindness. Patten I at ¶ 72. At least two laser torch devices have been developed for law enforcement use. Serious concerns have been raised about eye injuries caused by laser and other bright lights. Such damage can be irreversible if the device is used at close range. Patten II at 90-91.

Similarly, acoustic devices can cause serious ear damage. At this time, the consensus is that using amplitudes unlikely to cause permanent ear damage would be ineffective as a disorientation device. Patten I at ¶ 64. For this reason, the Joint Non-Lethal Weapons Program of the Department of Defense officially terminated their acoustic weapons program in 1999. *Id.*

Nets and wire entanglement systems pose numerous logistical problems. They cannot be used in confined spaces or near trees or shrubs and may not be sufficiently or correctly targeted to actually incapacitate the person. Patten I at ¶ 108. The launch systems are cumbersome and have been known to cause injuries to the person using them. Some of the more extreme examples of entanglement systems use additional methods of incapacitation, including adhesives, chemical irritants, and electrical stun devices. Patten I at ¶¶ 109-110.

A “sticky foam” gun is a special weapon that fires adhesive foam from a canister that “expands to over 30 times its stored volume when dispensed.” Patten I at ¶ 113. It incapacitates the person with an “extremely tacky” material at a range of up to 10 meters. Unfortunately, the material is very difficult to remove from skin, posing a serious risk of suffocation if the foam comes into contact with the mouth or face. Patten I at ¶ 114.

E. Future or Second Generation Weapons. The Omega Foundation has warned about new technologies such as the electro-magnetic pulse weapons that are destined to become operational in the 21st Century. Omega EU Study at Executive Summary (arguing for a moratorium in Europe on such weapons until testing and li-

censing control is in place that requires legally binding guarantees from U.S. sources as to their safety). The range of these weapons is stupefying, even if only a small fraction end up in the hands of local law enforcement officers. C. Thornton, *U.S. "Army Non-Lethal Warfare Requirements" Proceedings*, Non-Lethal Defense II (The American Defense Preparedness Association) (3/6-7/1996) (anti-traction, entanglements, malodorous munitions, barriers, foams, non-lethal mines, directed energy systems, isotropic radiators, radio frequency weapons). In addition to electromagnetic pulse weapons, other weapons currently being developed in the United States that are known about from public records include "calmatives" (analgesics which induce sleep) as well as sophisticated versions of net entanglements, sticky foams, and lasers. Omega EU Study at ¶¶ 6.3.1-6.3.4. The "targets" for which these weapons are being developed include criminals, hostages, rioters, refugees, and disaster victims. Col. John B. Alexander, *Future War - Non-Lethal Weapons in Twenty First Century Warfare* 224 (St. Martin's Press 1999).

The International Committee of the Red Cross (ICRC) argues that because of the excessive secrecy in which these weapons are being developed in the United States and because of their technical characteristics which target particular aspects of the human anatomy, many of these weapons should be banned. ICRC, *The SIRUS [Superficial Injury or Unnecessary Suffering] Project and Reviewing the Legality of New Weapons*. Many of these weapons are "inherently inhumane" or capable of causing unnecessary suffering. Omega EU Study at ¶ 3.2. Furthermore, non-lethal (or less-lethal) weapons cannot be considered as a separate category since *lethal* weapons cause death less than 25% of the time, with 60% of those wounded going on to a complete physical recovery. *Id.*

IV. THE FOURTH AMENDMENT APPLIED TO LESS-LETHAL WEAPONS

Given the very recent development of the weapons discussed above, few cases exist at any level that analyze excessive force claims asserted under the Fourth Amendment. Most electro-shock weapon cases have been litigated in the prison context under the Eighth Amendment. *See, e.g., Bilal v. Driver*, 251 F.3d 1346 (11th Cir. 2001) (dismissing *pro se* prisoner's § 1983 claim that a corrections officer retaliated against him through use of a "bomb belt"). One notable exception is a recent Ninth Circuit Court of Appeals case that carefully analyzes a Fourth Amendment excessive force claim based on misuse of a less-lethal weapon. *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001). The Ninth Circuit includes an analysis of qualified immunity pursuant to the U.S. Supreme Court's recent ruling in *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001) (qualified immunity analysis is separate from ultimate question of objective reasonableness of the force used).

Deorle involved the alleged misuse of a lead-filled beanbag round by a Butte County, California police officer. On September 9, 1996, Richard Deorle became upset after being diagnosed with Hepatitis C. After consuming a half-pint of vodka and some Interferon, Deorle started to behave erratically. Eventually becoming suicidal, Deorle began screaming and banging on the walls of the Deorle house. His wife called 911 in an effort to get some relief for her husband. *Deorle*, 272 F.3d at 1276. Officer Mahon was dispatched. Mrs. Deorle left the house with their children, leaving Deorle in the house alone. He refused to let Officer Mahon in without a warrant. Officer Mahon called for backup.

At least 13 officers responded, set up roadblocks around the Deorle house, and waited for the Special Incident Response Team [SIRT] and a team of negotiators. While they waited, Deorle showed no signs of trying to attack anyone, although he was verbally intimidating. For example, although he yelled "kill me" and brandished a hatchet at one officer, he threw the hatchet into a clump of trees when told to put it down. *Id.*

Officer Rutherford was a member of the SIRT team, trained "in the deployment of force against recalcitrant suspects." *Id.* at 1277. After briefing by his superiors, Rutherford decided "to reconnoiter closer to Deorle." *Id.* He and two other officers watched Deorle from the cover of some trees. Deorle, carrying an unloaded plastic crossbow in one hand and possibly a bottle of lighter fluid in the other, began to shout at them. *Id.*

Officer Rutherford was armed with a 12 gauge shotgun loaded with a less-lethal beanbag round. *Id.* (noting that such rounds are potentially lethal at thirty feet). Rutherford shouted to Deorle to drop the crossbow and he complied. Deorle then began to walk toward Officer Rutherford at "a steady gate [*sic*]." The officer leaned up against a tree and focused the weapon on Deorle's "lower right rib area." He gave no warnings that he was going to shoot and did not order Deorle to halt. *Id.* at 1278.

Instead, Officer Rutherford waited until Deorle reached thirty feet away and then fired the beanbag round. *Id.* at 1277 n.11. The shot struck Deorle in the face, knocked him off his feet and lodged "half out of his eye." *Id.* at 1278. Deorle lost his left eye and suffered multiple fractures in his cranium as well as embedded lead shot in his skull. The team of negotiators had yet to arrive when he was shot. *Id.*

Deorle sued Rutherford, the Sheriff, the County of Butte, and Defense Technology Corporation, the manufacturer of the cloth-cased lead shot, alleging in part a 42 U.S.C. § 1983 claim for violation of Deorle's Fourth Amendment right to be free of excessive force. The district court dismissed Deorle's claims on summary judgment, holding that no civil rights violation took place, that Rutherford was entitled to qualified immunity, and that therefore no basis existed for holding the other defendants liable. *Id.*

On appeal, the Ninth Circuit made two important rulings regarding excessive force in the context of less-lethal weapons. First, the Court held that using the impact weapon on Deorle “violated Deorle’s Fourth Amendment right to be free from unreasonable seizures” as a matter of law. *Id.* at 1284. Second, the Court held that Rutherford was not entitled to qualified immunity for his use of excessive force because it should have been “clear to any reasonable officer that, under the circumstances present, firing at Deorle was objectively unreasonable.” *Id.* at 1285. In making these rulings, the Court conducted a careful analysis of how current Fourth Amendment excessive force law applies to less-lethal weapons.

A. Excessive Force Issue. In addressing whether or not the force used was “objectively reasonable,” the *Deorle* Court conducted a careful balancing of the “nature and quality of the intrusion on the individual’s Fourth Amendment interests” against the countervailing governmental interests at stake. *Id.* at 1279, citing *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) and *Tennessee v. Garner*, 471 U.S. 1, 8, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985).

To assess the “nature and quality of the intrusion,” the Court considered the “type and amount of force inflicted.” *Id.* This required a careful assessment of the level of force that a less-lethal lead-filled, beanbag round can inflict. Such a “long-range impact weapon” fired from a shotgun is meant to “stop people who are violent or hostile and are threatening injury or death to themselves or others.” *Id.* However, by Officer Rutherford’s own admission, “the cloth-cased shot was potentially lethal at thirty feet and could be lethal at distances up to fifty feet.” *Id.* at 1279. Also, Officer Rutherford admitted that “the target area for lethal capabilities would be the facial area” or the chest area near the heart. Knowing these facts, Rutherford shot at Deorle’s torso from thirty feet, hitting him in the head, removing his left eye, and lodging lead shot in his skull.

Thus, the force used was obviously enough to cause grave physical injury. *Id.* at 1279. It can kill a person if it strikes his head or the left side of his chest. *Id.* It is much greater than that applied through the use of pepper spray. *Id.*, citing *Headwaters Forest Def. v. County of Riverside*, 240 F.3d 1185, 1203 (9th Cir. 2001) (reversing dismissal of excessive force claims brought against sheriff deputies who placed pepper spray into environmental protesters’ eyes with Q-tips). It is much greater than a painful compliance hold. *Id.*, citing *Forrester v. City of San Diego*, 25 F.3d 804, 806 (9th Cir. 1994) (upholding jury verdict of no excessive force used on anti-abortion demonstrators through “nonchakus” or pain-compliance sticks after pleas to desist and warnings were given). It is more likely to cause a life-threatening injury than a dog bite. *Id.* at 1280, citing *Vera Cruz v. City of Escondido*, 139 F.3d 659, 663 (9th Cir. 1997) (“no evidence that properly trained police dogs are reasonably capable of causing death”).

The *Deorle* Court would not say that use of the beanbag impact weapon constituted “deadly force.” However, it noted that the Ninth Circuit is unique in its “extremely high deadly-force standard.” *Deorle*, 272 F.3d at 1280 n. 15. Compare *Vera Cruz*, 139 F.3d at 663 (“As we read *Garner*, deadly force is that force which is reasonably likely to cause death”) with *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988) (relying, in a dog bite case, on the Model Penal Code § 3.11(2)’s definition of deadly force as “force that the actor uses with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily injury”). The *Deorle* Court concluded that because cloth-cased shot “constitutes force which has the capability of causing serious injury,” it is “permissible only when a strong governmental interest compels the employment of such force.” *Id.* at 1280.

In assessing what governmental interests were at stake, the *Deorle* Court looked at: “(1) the severity of the crime at issue; (2) whether the suspect pose[d] an immediate threat to the safety of the officers or others; [and] (3) whether he was actively resisting arrest or attempting to evade arrest by flight and any other ‘exigent circumstances’ [that] existed at the time of the arrest.” *Id.*, citing *Headwaters Forest*, 240 F.3d at 1198-99 and *Graham*, 490 U.S. at 396-97 (factors are simply a means by which to objectively determine the amount of force necessary in a particular situation).

In *Deorle*, the officers were not present to arrest Deorle for a criminal act but rather to investigate “his peculiar behavior.” *Id.* at 1280. Pain had driven Deorle “out of control,” to the “brink of suicide.” *Deorle*, 272 F.3d at 1280-81 and 1283 (noting that he was eventually charged with “obstructing the police in the performance of their duties”). In analyzing whether using an impact weapon in this circumstance constituted excessive force as a matter of law, the Ninth Circuit made a clear distinction between arresting a criminal and using tactics to subdue an emotionally distraught person who is causing a disturbance:

The problems posed by, and thus the tactics to be employed against, an unarmed, emotionally distraught individual who is creating a disturbance or resisting arrest are ordinarily different from those involved in law enforcement efforts to subdue an armed and dangerous criminal who has recently committed a serious offense. In the former instance, increasing the use of force may, in some circumstances at least, exacerbate the situation; in the latter, a heightened use of less-than-lethal force will usually be helpful in bringing a dangerous situation to a swift end. In the case of mentally unbalanced persons, the use of officers and others trained in the art of counseling is ordinarily advisable, where feasible, and may provide the best means of ending a crisis.

Id. at 1282-83.

Thus, any governmental interest in using force against such a person is “diminished by the fact that

the officers are confronted not with a person who has committed a serious crime against others, but with a mentally ill individual.” *Id.* at 1283. Most important, the *Deorle* Court established “that where it is or should be apparent to the officers that the individual involved is emotionally disturbed,” that is a factor that must be considered in determining the reasonableness of the force used. *Id.* at 1284.

Further, the Court commented that no evidence was presented that Officer Rutherford considered “other, less dangerous methods of stopping Deorle.” *Id.* at 1282 and n.20 (noting that other officers actually used a police dog to provoke him). Finally, the Court pointed out that Officer Rutherford never gave a warning to Deorle, and that such a warning “should be given, when feasible, if the use of force may result in serious injury.” *Id.* “In the present case, the desirability and feasibility of a warning were obvious.” *Id.* at 1284 (“[t]here was ample time to give that order or warning and no reason whatsoever not to do so”).

In conclusion, the Court stated: “Viewing the facts presented by the record in the light we must, we conclude that even though Rutherford used force that is classified in this circuit as less than deadly, and that would have been so classified in other circuits as well, the force was excessive compared to the governmental interests at stake.” *Id.* at 1284. The shooting thus “violated Deorle’s [Fourth Amendment] right to be free from unreasonable seizures.” *Id.* at 1285.

B. Qualified Immunity Issue. Having decided that using the less-lethal beanbag round constituted excessive force as a matter of law, the Ninth Circuit then addressed whether Officer Rutherford was entitled to the defense of qualified immunity. In doing so, it assumed that Rutherford thought that the force he used was not excessive. It assessed whether Rutherford’s use of force was premised on a reasonable belief that such force was lawful. *Id.* at 1285, citing *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001) (“dispositive inquiry [on summary judgment] is whether it would be clear to a reasonable officer that the conduct was unlawful in the situation he confronted”).

The court stated that any police officer would know that it is objectively unreasonable to shoot – even with “beanbag” shot – an unarmed emotionally disturbed man who posed no risk of flight and no threat to the safety of others. *Deorle*, 272 F.3d at 1285-86, citing *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) (it is not necessary for the exact action to have been held unlawful). Thus, Rutherford was not entitled to qualified immunity even if “there is no prior case prohibiting the use of this specific type of force in precisely the circumstances involved.” *Id.* at 1286.

Even without a prior case prohibiting the particular conduct in a confrontation with a mentally ill person, “no reasonable officer could have believed that Rutherford’s action in shooting Deorle with a ‘less lethal’ beanbag round was appropriate or lawful.” *Id.*,

citing *Mendoza v. Block*, 27 F.3d 1357, 1362 (9th Cir. 1994) (“[a]n officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury”). That no Ninth Circuit case directly addressed the use of such impact weapons was similarly irrelevant: It would be “clear to a reasonable officer that [Rutherford’s] conduct was unlawful.” *Id.* citing *Katz*, 121 S.Ct. at 2158.

Further, any error in judgment on Rutherford’s part did not constitute a “reasonable mistake” of fact or law. *Id.* at 1286. Viewing the facts most favorably to Deorle, Rutherford was not entitled to qualified immunity for his use of excessive force as a matter of law. *Id.*

As highlighted by the IACP in its Impact Projectile Training Key (summarized at Section IIIA, above), *Deorle* presents exactly the set of circumstances in which police officers will be increasingly called upon to use less-lethal weapons such as “beanbag rounds,” that is, an emotionally disturbed or intoxicated individual who is intent on engaging police officers in a suicidal confrontation. It is precisely in these situations that the IACP recommends using Impact Projectile weapons such as a “beanbag round” to incapacitate the person. As the facts in *Deorle* show, these weapons are not as benign as they have been promised to be. But the ruling in *Deorle* presents some hope that civil rights cases involving less-lethal weapons or tactics are winnable in an otherwise darkening landscape. *Deorle*, 272 F.3d at 1286 (“[t]here was no reasonable basis for any factual or legal misperception ... no reasonable officer could have concluded that the force employed was appropriate or lawful”). See also *Headwaters Forest Defense v. County of Humboldt*, 2002 WL 27618, F.3d (9th Cir. 2002) (reaffirming, on remand after *Katz*, that defendant officers were not entitled to qualified immunity for use of pepper spray on nonviolent protesters) and *Cruz v. City of Laramie, Wyoming*, 239 F.3d 1183 (10th Cir. 2001) (use of “hog-tie” restraint on an arrestee whose diminished capacity is apparent constitutes excessive force in violation of the Fourth Amendment).

V. CONCLUSION

One of the chilling legacies of the Clinton Administration’s “Non-Lethal Warfare” doctrine is the blurring of boundaries between lethal and non-lethal weapons and “the associated blurring of boundaries between police and military operations.” As the Omega Foundation has noted, this phenomenon “has awesome implications for human rights, civil liberties and due process.” Omega EU Study at § 3. What may be considered minimal force when used by a soldier in a peacekeeping operation can be plainly illegal when used by a police officer in a democracy in which he or she is constitutionally bound to use the most minimal force appropriate for the situation. Omega EU Study at ¶ 6.2. Further, the massive, secret push to create more innovative less-lethal weapons through the military branch has now opened “a dubious Pandora’s box of new ... weapons ...

designed to be media-friendly and appear, rather than be, safe." *Id.*

The reality is that more less-lethal weapons technology will be used in local law enforcement operations, and particularly in this "War on Terrorism" era it will be important for lawyers to become educated about them. In Seattle, for example, the post-WTO protest police department was recently armed with 130 taser guns to be used in the type of scenario discussed in *Deorle*. Two months ago, a young man, apparently intoxicated and suicidal with a knife to his chest, was shot and killed by officers after two separate efforts to subdue him with the tasers failed. *Seattle Officer Kills Man Wielding Knife: Addition of Less-Lethal Weapons Defended*, Seattle Post-Intelligencer at A-1 (11/28/01). Although the two tasers were fired at the young man from six to eight feet away, neither subdued him. In fact, as predicted by the *Deorle* Court, the tasers rather seemed to "exacerbate" the situation and the young man lunged at one of the officers with the knife. Another officer shot him five times. An inquest into the incident is pending.

CASE UPDATES

In the Supreme Court

In *Correctional Services Corporation v. Malesko*, 122 S. Ct. 515 (U.S. 2001) the Supreme Court addressed the issue of "whether the implied right of action first recognized in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) should be extended to allow recovery against a private corporation . . . under contract with the Bureau of Prisons." 122 S.Ct. at 517. *Malesko* concerned a suit by a former federal prisoner against Correctional Services Corporation ("CSC"), a private corporation that was running a halfway house for federal prisoners in New York.

The Respondent, John Malesko, was sentenced to 18 months in prison for fraud in 1993. While in prison he was diagnosed with a heart condition that rendered him unable to perform any strenuous activity. In 1993 Malesko was transferred to the Le Marquis halfway house facility that was run by CSC. The Le Marquis facility instituted a policy in 1994 that inmates who resided below the sixth floor had to use the stairs from the lobby to their rooms. Malesko resided on the fifth floor of the facility and was exempted from this policy due to his heart condition.

Nonetheless, in March of 1994 a correctional officer employed by CSC insisted that Malesko use the stairs instead of the elevator. After ascending the five flights to his floor, Malesko had a heart attack and fell down, injuring his ear. Three years later Malesko filed a *pro se* lawsuit in federal court in New York against CSC and certain unnamed CSC employees alleging that his injuries were due to the "negligence" of the defendants in requiring him to climb the stairs. *Id.* at 518.

The district court ultimately appointed counsel for Malesko, who filed an amended complaint that again

alleged that Malesko's injuries were caused by the negligence of CSC and the now-named correctional officer who ordered Malesko to climb the stairs. The district court treated the complaint as alleging claims under *Bivens* and dismissed the cause of action. The court ruled that the claims against the named employee of CSC, as well as other unnamed employees, were time-barred, and with respect to CSC ruled that *Bivens* was only available against an individual and not a private corporation. *Id.*

Malesko appealed and the Second Circuit affirmed in part and reversed in part. The Second Circuit upheld the dismissal of the individual defendants on statute of limitation grounds, but held that private corporations, unlike federal agencies, may be sued under *Bivens* in order to provide a remedy for constitutional violations. In reaching this conclusion, the Second Circuit distinguished the Supreme Court case of *FDIC v. Meyer*, 510 U.S. 471, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994) which refused to extend *Bivens* to cases brought against a federal agency as opposed to a federal officer.

The Supreme Court granted *certiorari* and reversed. In a 5 to 4 decision authored by Chief Justice Rehnquist, with Justices Scalia and Thomas concurring in the judgment, the Court reviewed the history of *Bivens* and concluded that its rationale applied in only very limited situations. Justice Rehnquist noted that in the thirty years since *Bivens* was decided its reach had only been extended to include causes of actions for damages under the Fifth Amendment in *Davis v. Passman*, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979) and under the Eighth Amendment in *Carlson v. Green*, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980). 122 S.Ct. at 519.

In each of these cases, according to Justice Rehnquist, a right of action was implied due to the lack of an alternative remedy for the violation in question or, in the case of *Carlson v. Green*, because, although Green also had a remedy pursuant to the Federal Tort Claims Act ("FTCA") Congress had made it "crystal clear" that it intended the FTCA and *Bivens* to provide "parallel" and "complementary" causes of action. *Id.* at 520. Justice Rehnquist went on to state that since *Carlson v. Green*, the Court in *Bush v. Lucas*, 462 U.S. 367, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983) had specifically declined to extend *Bivens* to First Amendment claims because "[a]lthough the plaintiff had no opportunity to fully remedy the constitutional violation, we held that administrative review mechanisms crafted by Congress provided meaningful redress and thereby foreclosed the need to fashion a new, judicially crafted cause of action." 122 S.Ct. at 520.

Justice Rehnquist noted that in *FDIC v. Meyers* the Court unanimously rejected an attempt to extend *Bivens* to actions against a federal agency, noting that the basic purpose of *Bivens* is to deter unconstitutional conduct against a specific federal officer or to provide a cause of action where none previously existed. While Justice Rehnquist was careful to limit the Court's holding only