



TOXIC TREATMENT:

The Abuse of Tear Gas
Weapons in California
Juvenile Detention

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Methodology

The findings for this report are based on more than a year of research and interviews of youth and experts regarding the use of chemical agents in the California juvenile justice system carried out by staff at the ACLU Foundation of Southern California. This includes statewide public records act requests submitted separately to California's state prison agency's Division of Juvenile Justice and each of California's 58 counties in the spring of 2018¹. A copy of the template request is at Appendix A. A complete archive of the key documents – use of force and other policies, data and incident reports and training materials – produced by jurisdictions across the state's juvenile justice system is available online at: aclusocal.org/toxictreatment.

Following production, a team led by attorneys at the law firm Morgan, Lewis & Bockius, LLP undertook a review of 15,857 pages of 10,465 documents produced in response to these public records requests. Researchers tallied all data on the use of force as well as on the procurement and stockpiling of chemical agents and then conducted content analysis for particular themes, such as the types of use of force, justification cited, and also evaluated policies for trends. During the analysis, three categories emerged: jurisdictions which prohibited the use of tear gas weapons (seven counties); jurisdictions which did not operate juvenile detention facilities (10 counties); and jurisdictions which permitted the use of force involving tear gas weapons (39 counties and the state prison agency's Division of Juvenile Justice). Further analysis conducted by researchers analyzed policies and training documents to evaluate multiple issues, including: the standards under which use of force involving tear gas weapons were used, if any; the requirements for exclusion of particularly vulnerable populations, if any; the requirements for decontamination, if any.

Executive Summary



Pepper spray, formally known as aerosolized oleoresin capsicum or “OC spray,” is so toxic and dangerous that it is classified and regulated under state law as a form of tear gas. It can cause not only intense pain, but also blistering of the skin, respiratory arrest, and even an increased risk of strokes and heart attacks; its psychological and emotional impacts are uncertain.

And yet, it is alarmingly overused in California’s juvenile detention facilities, including against youth as young as 12 and those in psychiatric crises.

This ACLU Foundations of California report, the result of reviewing 10,465 documents, is the first to detail the use of these toxic chemical agents in state and county juvenile detention facilities. It finds that state and county officials used it more than 5,000 times between January 2015 and March 2018 against children and youth in juvenile facilities in 26 counties and in state facilities overseen by the Division of Juvenile Justice.

The number of incidents for that time period for the state would likely be much higher, but 13 additional counties that allow pepper spray to be used in juvenile detention facilities failed to provide data on how often it was utilized.

Banning the use of the spray in juvenile facilities is not a new idea — 35 states and seven of California’s counties have already done it.

The Los Angeles County Probation Department — which oversees one of the largest juvenile justice agencies in the world — is likely to join them soon. The Los Angeles County Board of Supervisors has directed it to eliminate the spray in its juvenile facilities by the end of the year.

It's time for the rest of California to follow suit.

The report recommends:

- A legislative, complete ban on the use of all chemical agents — including but not limited to tear gas weapons such as OC spray — against youths in the juvenile justice system in California.
- If a statewide ban is not implemented immediately, counties and state agencies that continue to allow this form of use-of-force in juvenile facilities should be required to make information involving the chemical agents publicly available on their websites.

The ACLU of California furthermore calls for robust transparency on all uses of force in juvenile detention facilities.

INTRODUCTION

Mistreated in a Fragmented Juvenile Justice System

J.C.'S STORY

Short and reed-thin, J.C. was just 14 when she was arrested, her first experience in the juvenile justice system. Her first experience with tear gas weapons would quickly follow. In an interview, she described her ordeal.

“It was on a Friday, around 5 p.m. Cops came to my house,” J.C. said.² She was eventually taken to the intake unit at her county’s juvenile hall, where she waited for hours before being placed in a unit. She described herself as feeling depressed and thinking, “I don’t belong here.”

The next morning, exactly at 6, probation officers opened doors to the shower. J.C. was allowed only a few minutes to wash. She was combing her hair at the sinks with three other girls when a fight broke out in the bathroom. A girl had used a racial slur. J.C. ducked down. *“The next thing you know, there were girls running out of the showers ... and fighting each other.”*

Staff members were screaming out codes. J.C. watched as eight staff, all dressed in black, arrived at the doors. One carried a shield. *“The person with the shield came in first and had the pepper spray in his hand,” J.C. said. The tear gas container was “black and red and the top looked like a grenade you hold down with your fingers. When they pepper sprayed it, that’s when they said something: ‘Get on the floor.’”*

J.C. was sprayed. *“My reaction was that I couldn’t breathe. I was trying everything I could to get out of there ... because I couldn’t breathe. Because I thought I was going to die. I tried to breathe in and breathed [the pepper spray] into my nose. It got in my eyes and mouth and my whole face.*

“I fell to my knees right away. I felt it when I fell to my knees. I felt it and inhaled – as if I were dying. I couldn’t see because my eyes were watery ... and it was burning.” When J.C. rubbed her eyes, it made the pain worse.

CONTINUE NEXT

Eventually, all the girls were lying on the floor, shouting about the pain in their eyes. At least 10 minutes passed, J.C. said. *“We were still laying on the floor,”* she said. *“One staff member started to hand out pillow sheets soaked in water.”* The staffer *“let us up one by one.”* The girls were handcuffed and, one by one, taken to their rooms.

“I was in my room for 15 to 20 minutes, until they cleared the restroom and got the nurse in there,” J.C. said. The nurse *“just gave me a little baggie with cream for the burn.”* As the nurse was making her rounds to the others affected, J.C. was allowed to shower for a few minutes. She was given new clothes. Her old clothes had been contaminated with pepper spray.

Lasting effects were almost immediate. Said J.C.: *“I could feel bumps on my face....I had a rash.”* Then, *“It was like you [are] putting tint on windows and there are little air bubbles – it was like that when I would push down on my face.”*

Breakfast finally arrived that morning, but J.C. did not have any. *“I wasn’t able to eat because my throat was burning. ... Whenever I would breathe in, it would burn, and it was like that for a whole two days, maybe three.”*

The physical impact on 14-year-old J.C. lingered. *“I had to sleep sitting up because I couldn’t breathe right, I couldn’t breathe through my nose...my skin was peeling...I had my skin coming off. Pus would come out like I had burned my skin. I would peel it, because it was soft – like a blister on your feet. I would pinch it with my fingers and it would pop.”*

Finally, said J.C., she was sent to the hospital, where a doctor gave Probation Department staff medication to administer to her throat and skin. After a few days, she was able to sleep normally.

“How come they can’t help us in any other way than harming us?” J.C. concluded. *“I would highly recommend not to use pepper spray. I would recommend that they train staff to deal with it in a better way rather than to harm kids and make them feel pain not just for hours but for days.”*

Like J.C., close to 90 percent of youth³ detained in California’s juvenile justice system are held by the 58 counties⁴, rather than in the state-run Division of Juvenile Justice⁵. County “juvenile halls” and “juvenile camps” detain youth under the authority of the juvenile court, before and after they are adjudicated delinquent⁶. This is the first report to analyze the use of force involving chemical agents, and, in particular, tear gas weapons used against youth in California, with a focus on youth treatment in county Probation Department detention facilities.

THIS REPORT HAS FOUR MAIN SECTIONS:

- Impact: Using Tear Gas Weapons Against Youth is Harmful and Counterproductive
- Findings: Public Records Show Widespread Abuse of Youth Using Tear Gas Weapons in California’s Juvenile Justice System
- Law & Practices: Rules in Other U.S. States, National Best Practices and Fundamental Rights Standards Support a Ban on Tear Gas Weapons in California’s Juvenile Detention Facilities
- Recommendations: Ban Tear Gas Weapons in California’s Juvenile Justice System

WHAT IS OC SPRAY?

Oleoresin capsicum (OC) spray or “pepper spray” is a type of “chemical restraint” a chemical agent that contains capsaicinoids extracted from the resin of hot peppers. According to a report published by the National Institute of Justice, OC spray, “incapacitates subjects by inducing an almost immediate burning sensation of the skin and burning, tearing, and swelling of the eyes. When it is inhaled, the respiratory tract is inflamed, resulting in a swelling of the mucous membranes ... and temporarily restricting breathing to short, shallow breaths.” In short, it is a chemical agent that is used by law enforcement agencies in the place of a physical restraint weapon and immediately compromises a person’s ability to see or breathe.

California law regulates who can possess or carry weapons and strictly regulates such chemical agents, which the law classifies as tear gas or tear gas weapons. The penal code defines tear gas as “any liquid, gaseous or solid substance intended to produce temporary physical discomfort or permanent injury through being vaporized or otherwise dispersed in air” and as a “tear gas weapon” any device “intended for the projection or release of tear gas” or capable of being “discharged or exploded” to “cause or permit the release of tear gas.” Devices used to spray youth with oleoresin capsicum are thus clearly tear gas weapons as a matter of state law.

The statute which otherwise limits who can possess or carry tear gas creates an exception for peace officers, such as the probation officers who staff juvenile detention facilities, if they have completed “a course of instruction approved by the Commission of Peace Officer Standards and Training in the use of tear gas.”

The Board of State and Community Corrections (BSCC), which is empowered to establish minimum standards for juvenile detention facilities, avoids using the state-law-defined term “tear gas weapon” to describe aerosolized oleoresin capsicum spray permitted to be carried and employed as part of approved uses of force against youth in California, instead opting for the arguably more anodyne and clinical “chemical agent.” (The relevant minimum standards neither define “chemical agent” nor include definitions of “OC spray,” “pepper spray” or “tear gas.”)

Certainly, juvenile detention facilities and those closest to the administration of California’s juvenile justice system commonly use “chemical agent,” “pepper spray” or “OC spray” to refer to aerosolized oleoresin capsicum. However, multiple use of force policies produced in response to ACLU Foundation of Southern California public records act requests explicitly cite the penal code provisions discussed above as the basis for the authority to use chemical agents as a weapon in juvenile detention facilities.

Consistent with state law definitions and such policies, then, this report uses the term “tear gas weapon” to describe the chemical agents used in California’s juvenile justice system, in order to emphasize that what is at issue here is the state-sanctioned use of chemical weapons against youth.



Despite the fact that such weapons are widely used in California’s juvenile justice system,

we have not identified a single research study that evaluates the use of tear gas weapons against youth, whose brains and bodies are still developing (thus more vulnerable to the short and long term impact of both trauma and chemical exposure), and determines that the use of such chemical agents are safe or pose no risk, although ample research demonstrating significant health risks when used against adults and various studies identify particular harms for youth.

The California Legislature specifically requires that youth in the juvenile justice system “receive care, treatment, and guidance that is consistent with their best interest” and that the “rehabilitative objectives” mandated by the law must “not include retribution.” State law also requires that “juvenile hall[s] ... shall not be deemed to be, nor treated as, a penal institution ... [but] shall be a safe and supportive homelike environment.” This report seeks to evaluate the use of tear gas weapons against youth in California’s juvenile justice system to answer a basic question: Is the state fulfilling this mandate when it is caring for youth in detention?

As our report outlines, the answer is NO. The use of tear gas weapons against youth is not merely reflective of a failure to provide care and rehabilitation in a homelike environment but is instead evidence of abusive treatment likely to cause short and long-term physical, emotional and psychological trauma and harm.

A review of 15,857 pages of 10,465 documents produced in response to a statewide public records request shows that youth in California’s juvenile justice system are subjected to hundreds of uses of force involving tear gas weapons each year. Between January 2015 and March 2018, youth in California’s juvenile justice system



were subjected to tear gas weapons more than 5,000 times. Thirteen counties did not make such data available, raising questions about the true extent of the use of tear gas weapons against youth. Further, a review of data, incident reports and the use of force policies for nearly every county in California and the state prison agency's Division of Juvenile Justice shows that tear gas weapons are used in response to youth engaged in non-violent behavior, such as property damage, and against youth who are seeking to harm themselves or attempt suicide.

These findings call for a complete reevaluation of the types of force permissibly used against youth in the juvenile justice system and an immediate ban on the use of all chemical agents in detention facilities. It also shows the need for increased and robust transparency about how youth are treated by state and county officials charged with their care and custody. Such transparency may permit the robust oversight necessary to transform the abusive culture of control of which excessive use of force is a symptom. Ultimately, these findings underscore the position recently taken by more than 50 current and former youth correctional administrators nationwide: "The time has come to close down youth prisons, once and for all."¹⁵

IMPACT

Using Tear Gas Weapons Against Youth is Harmful and Counterproductive

Youth subjected to tear gas weapons report that it is excruciatingly painful.

“It was hard to breathe because the spray, it was like ... it messes you up ... once you breathe it, you like, you start coughing. You can’t breathe.”¹⁶ Youth who have been subjected to tear gas weapons consistently describe it as traumatic: “You feel like your body is on fire,” said one youth.¹⁷

Youth have described witnessing others who have had serious allergic reactions, like those described by J.C., including breaking out with “welts all over their face” after being subjected to tear gas weapons.¹⁸ As one young person described, being subjected to OC spray

“was a horrible, frightening and very traumatic experience.

Growing up I had asthma and every time I was sprayed I would have panic attacks, could not breath[e] and on several occasions I felt like I was going to die! . . . Every time I was pepper sprayed it was a very traumatic experience, it is very difficult to breath[e] and catch your breath and mucus freely spilled out of my nose.”¹⁹

Another young person described, in interviews for the Los Angeles County Auditor-Controller, being subjected to a tear gas weapon while pregnant and feeling terrified about the potential consequences for pre-natal health, saying “That was terrible. It was a terrible day.”²⁰

We have not identified a single research study that determines the use of tear gas weapons on youth is safe or without grave risks to health and well-being.²¹ A recent systematic review of medical literature (a meta-analysis of 41 studies) documenting the health impact of various chemical irritants, including OC spray, as crowd control weapons found that the majority of people injured by the use of such agents are young adults and suggested that the research indicates that “children are more vulnerable to severe injuries from chemical toxicity” related to the use of chemical irritants like OC spray.²²

Chemical agents like OC spray have been linked to a number of short- and long-term physical effects on adults, including:

- › Intense pain, swelling and blistering of the skin.
- › Wheezing, an inability to breathe or speak and respiratory arrest.
- › Acute hypertension, which may lead to an increased risk of stroke or heart attack.
- › The deterioration of nerve tissue and permanent corneal damage.
- › A heightened risk of asphyxiation when used in conjunction with physical and mechanical restraint, or when used on individuals with respiratory conditions such as asthma.²³

A substantial proportion of youth entering the juvenile justice system have experienced trauma and abuse.²⁴ The use of chemical agents like tear gas weapons in the juvenile justice system can thus have serious effects on the psychosocial well-being of youth. Youth subjected to tear gas weapons in California have described the psychological and emotional trauma that accompany the physical harms:

“As someone who has been pepper spray[ed] myself, I know how traumatic it could be – physically and emotionally and psychologically. I like to compare solitary confinement as being as dehumanizing as pepper spray ... pepper spray is dehumanizing ... because of the fact that it is a tool that, you know, tells kids every time you are pepper spraying these 15- and 16-year-old kids. When you pepper spray them that ‘you belong in here’ and you prepare them for prison that is what you are doing when you are pepper spraying these kids – they have already endured trauma and you are just making it worse.”²⁵

Finally, use of tear gas weapons degrades the relationship between youth and staff – the social fabric of a detention setting that is crucial to healthy growth and rehabilitation in juvenile facilities. As the United States Department of Justice’s Office of Juvenile Justice and Delinquency Prevention has opined, “youth distrust of facility staff and conflict with them can undermine program efforts to alter



delinquent career paths and elevate discipline, control, and safety issues.”²⁶ Relatedly, a survey conducted by the Council of Juvenile Correctional Administrators (CJCA) found that where tear gas weapons such as OC spray are used, staff and youth fear for their safety more than they do at other facilities.²⁷ For these reasons, and, as discussed further in the “Law & Practices” section, best practices for operating juvenile detention facilities do not permit staff to possess or to use tear gas weapons like OC spray.

FINDINGS

Public Records Show Widespread Abuse of Youth Using Tear Gas Weapons in California's Juvenile Justice System

This report finds that tear gas weapons are used across California's juvenile justice system—hundreds of times each year—against youth.

Our findings show that 39 counties and the state prison agency's Division of Juvenile Justice permit the use of chemical agents including tear gas weapons against youth in detention.

The deficient policies we received included those that permit the use of tear gas weapons against youth for non-violent conduct; allow their use against youth with medical and mental health conditions that substantially increase the risk of significant or permanent harm; or which do not require immediate decontamination to remove chemical agents from youth's skin or their airways.

ECHOING FINDINGS FROM OTHER RECENT RESEARCH



The use of force findings of this study echo those of other recent studies. Earlier in 2019, the Center on Juvenile and Criminal Justice published a lengthy analysis of conditions of confinement in the state prison agency's Division of Juvenile Justice. This study found rampant increases in violence in facilities, even as populations are in decline, and reported recent analysis by the agency's Office of Inspector General finding that the division was out of compliance with its use of force policies in 45 percent of reported incidents in 2017.²⁸

In 2018, Disability Rights California and Disability Rights Advocates found disproportionate use of OC spray against youth with disabilities detained in the Kern County juvenile justice system. This included findings that OC spray “disproportionately impacts youth with mental illness and risk of self-injury” and

that “youth with [attention-deficit/hyperactivity disorder] and bi-polar disorder appear to have been pepper sprayed for behavior related to their disabilities, over which they have little control.”²⁹

Finally, in 2016, two years after concerns were raised in a complaint filed with the United States Department of Justice about conditions in San Diego's juvenile justice system, including the use of chemical agents,³⁰ by a coalition of groups led by Youth Law Center, Disability Rights California published an investigation confirming the continued excessive use of OC spray in county detention facilities.³¹

This report does not focus on evaluating positive progress in these jurisdictions, if any, since these previous reports were published but its findings confirm that the concerns raised in these reports are systemic in California's juvenile justice system.



These findings raise questions and cast doubt on the state's ability to care for youth

or provide for their healthy growth and development in facilities that permit the use of tear gas weapons. The seven counties that do not use chemical agents against youth in detention – Marin, Napa, San Francisco, San Mateo, Santa Clara, Santa Cruz and Solano – and soon the eighth – Los Angeles, which banned the use of pepper spray effective January 1, 2020 – should serve as potential models (alongside the 35 states that already ban OC spray in their juvenile justice systems). These findings are analyzed in detail in this section. The key documents related to chemical agent use in California's juvenile justice system, including policies, data and training materials, are available online at: www.aclusocal.org/en/toxictreatment-cpra.

A. TEAR GAS WEAPONS ARE USED HUNDREDS OF TIMES PER YEAR AGAINST YOUTH IN CALIFORNIA'S JUVENILE JUSTICE SYSTEM

Data produced by 26 counties and the state prison agency's Division of Juvenile Justice show that there were 5,079 uses of tear gas weapons³¹ against youth in California juvenile detention facilities in a period from January 1, 2015 to March 31, 2018. An additional 13 counties have policies allowing chemical agents use, including tear gas weapons such as OC spray, against youth but refused to or did not provide data regarding the frequency of use during the same period. Because these 15 counties reported permitting the use of tear gas weapons and because three of them provided records showing the purchase of tear gas weapons, it is very likely that the number of instances of the use of tear gas weapons against youth in California in that same period was greater.

The tables below shows the jurisdictions (California counties and the state prison agency's Division of Juvenile Justice) that provided one or more of the following:

- (a) documentation on policies showing that tear gas weapons are approved for use in their detention facilities,
- (b) records showing purchases or stockpiling of tear gas weapons or
- (c) records of incidents of use of tear gas weapons against youth (which in all cases was OC spray).

Notably, use of force incidents involving tear gas weapons often affect multiple youth, so the data reported in this section by no means represent the total number individuals affected. Importantly, this table does not include the seven counties that do not use OC spray in their juvenile detention facilities nor the 10 counties that do not operate a juvenile detention facility (but which contract with other counties to detain youth). The following counties contract with other jurisdictions to detain youth subject to the jurisdiction of their county's juvenile justice system: Alpine County³³, Amador County³⁴, Calaveras County³⁵, Calusa County³⁶, Mariposa County³⁷, Modoc County³⁸, Mono County³⁹, Plumas County⁴⁰, Sutter County⁴¹ and Sierra County.⁴² Additionally, this table does not include the three counties which have either failed to produce records on the use of chemical agents (Placer County) or were unwilling to waive copying costs associated with producing these records, and this dispute has not yet been resolved (Santa Clara County and Ventura County). While publicly-available documents indicate that Santa Clara County's Probation Department

banned OC spray in 2015, we have been unable to confirm this by a review of its production of documents, nor have we determine whether the other two counties which have not yet produced documents permit the use of tear gas weapons against youth. Because only seven counties in California (and soon to be a eighth) report not using tear gas weapons against youth, most youth detained in California's juvenile justice system are at risk of the use of tear gas weapons.

WHERE ARE YOUTH AT RISK OF THE USE OF TEAR GAS WEAPONS?			
County or State Agency	Policy Permits Use Of Chemical Agents	Did Not Provide Data On Use Of Chemical Agents	Reported Purchasing Or Stockpiling Chemical Agents
ALAMEDA	●	●	
BUTTE	●		
CALIFORNIA DEPARTMENT OF CORRECTIONS AND RE-HABILITATION	●		●
CONTRA COSTA	●		●
DEL NORTE	●		
EL DORADO	●		
FRESNO	●	●	●
GLENN	●	●	
HUMBOLDT	●	●	
IMPERIAL	●	●	
INYO	●	●	
KERN	●		●
KINGS	●		
LAKE	●	●	
LASSEN	●	●	
LOS ANGELES	●		
MADERA	●		
MENDOCINO	●		●
MERCED	●		

Table 1.

WHERE ARE YOUTH AT RISK OF THE USE OF TEAR GAS WEAPONS?			
County or State Agency	Policy Permits Use Of Chemical Agents	Did Not Provide Data On Use Of Chemical Agents	Reported Purchasing Or Stockpiling Chemical Agents
MONTEREY	●	●	●
NEVADA	●		●
ORANGE	●		
RIVERSIDE	●	●	
SACRAMENTO	●	●	
SAN BENITO	●	●	●
SAN BERNARDINO	●		●
SAN DIEGO	●		
SAN JOAQUIN	●		●
SAN LUIS OBISPO	●		●
SANTA BARBARA	●		●
SHASTA	●		●
SISKIYOU	●		
SONOMA	●		
STANISLAUS	●		
TEHAMA	●		
TRINITY	●		
TULARE	●		
TUOLUMNE	●		
YOLO	●	●	
YUBA	●		

Table 1. (Continued)

California counties omitted from this table provided records indicating that they do not operate juvenile detention facilities (10 counties) or currently prohibit the use of chemical agents (7 counties).

HOW MANY TIMES WERE TEAR GAS WEAPONS USED AGAINST YOUTH BETWEEN 2015-2018?					
County / State Agency	USE OF CHEMICAL AGENTS				
	JAN 2015 – MAR 2018	2018 (Q1 ONLY)	2017	2016	2015
BUTTE	0	0	0	0	0
CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION	414	33	111	139	131
CONTRA COSTA	121	9	52	60	
DEL NORTE	19	1	8	9	1
EL DORADO			1	3	
KERN	166	6	38	68	54
KINGS	123	3	39	81	
LOS ANGELES	1372	172	747	453	294
MADERA	37	6	12	9	10
MENDOCINO			1	7	
MERCED	361	23	86	131	121
NEVADA	3	0	0	3	0
ORANGE	117		55	48	24
SAN BERNARDINO	633	46	154	225	208
SAN DIEGO	674	41	233	147	253
SAN JOAQUIN	283	3	82	103	95
SAN LUIS OBISPO	56	5	8	14	29
SANTA BARBARA	133	15	45	48	25
SHASTA	39	2	4	7	26
SISKIYOU	3			2	1

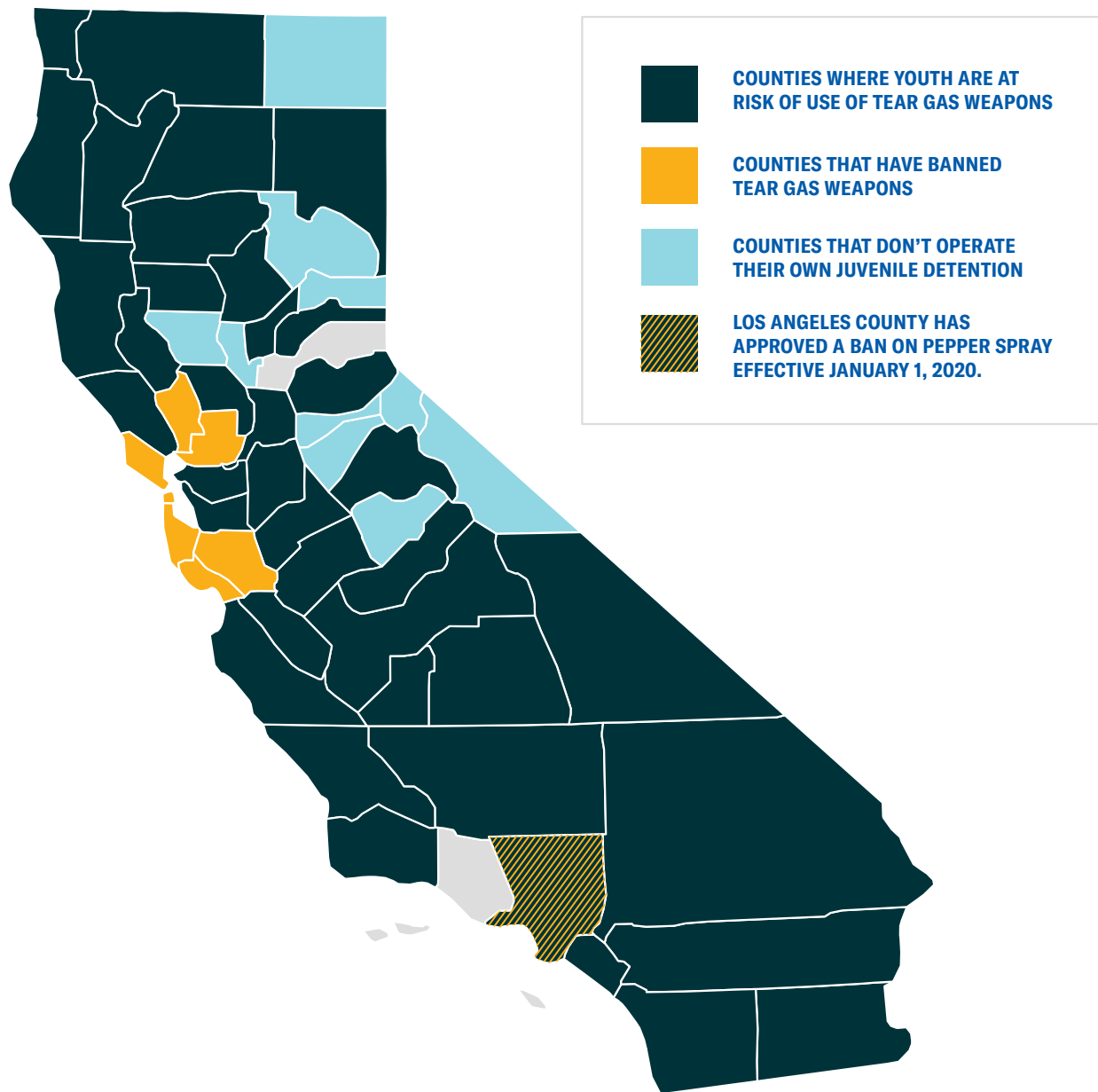
Table 2.

HOW MANY TIMES WERE TEAR GAS WEAPONS USED AGAINST YOUTH BETWEEN 2015-2018?					
County / State Agency	USE OF CHEMICAL AGENTS				
	JAN 2015 – MAR 2018	2018 (Q1 ONLY)	2017	2016	2015
SONOMA	38	2	10	12	14
STANISLAUS	84	6	20	27	31
TEHAMA	11	1	6	2	2
TRINITY	1	0	0	0	1
TULARE	324	10	88	108	118
TUOLUMNE	0	0	0	0	0
YUBA	49	2	5	16	26

Table 2. (continued)

California counties omitted from this table provided records indicating that they do not operate juvenile detention facilities (10 counties), currently prohibit the use of chemical agents (seven counties) or indicating that they permit the use of chemical agents but then did not or refused to provide data about the prevalence of such use (13 counties).

WHERE ARE YOUTH AT RISK OF THE USE OF TEAR GAS WEAPONS?



A review of records provided by six California counties and other publicly-available documents reveals that seven counties currently prohibit the use of OC spray in facilities that detain youth:

WHERE ARE YOUTH SAFE FROM THE USE OF TEAR GAS WEAPONS?	
County	Response
LOS ANGELES	NOT YET BANNED <i>Implementation of ban mandated by County Board of Supervisors by January 2, 2020.</i>
MARIN	“Marin County Juvenile Hall does not condone the use of chemical agents.”
NAPA	“Napa County does not use nor allow any chemical agents in our facility. We have no policies related to chemical agents.”
SAN FRANCISCO	“This practice does not exist in San Francisco.”
SAN MATEO	“The Department does not use chemical restraints in its facilities.”
SANTA CLARA	Santa Clara has not yet provided documents in response to our request, however the proceedings of the County’s Juvenile Justice Commission suggest that the County’s Probation Department discontinued a pilot and banned the use of OC spray in 2015.
SANTA CRUZ	“The following methods are Not Permitted: Chemical Agents: Chemical Agents are not allowed in Santa Cruz Juvenile Hall, unless deemed necessary and used by Law Enforcement Agency called in for support.”
SOLANO	“As the County does not use chemical agents at its juvenile facilities, the County has no other responsive documents to your other requests.”

Table 3.

TEAR GAS WEAPONS AND RACE

Black and brown youth are overrepresented in the juvenile justice system.⁴³ The data about chemical agent use in juvenile detention facilities provided by 26 California counties and the state prison agency's Division of Juvenile Justice do not all include granular information, such as demographic data. Even with demographic data, it is hard to compare data about uses of force against the baseline demographics of the population because – with anonymized data without unique identifiers for each victim – it is impossible to identify whether data from a particular time period might include the same individual or individuals subjected to force in multiple incidents, skewing the results. However, for those jurisdictions that did provide demographic data about use of force, the data show youth of color overwhelmingly represented in use of force incidents involving tear gas weapons:

- In Merced County, between January 2015 and March 2018, 343 of 361 incidents of use of force involving tear gas weapons were against youth not classified by the county as white.
- In Orange County, which provided ethnicity data for only 46 use of force incidents involving tear gas weapons, 43 of 46 incidents were against youth not classified by the county as white or Caucasian.

While these data do not definitively show that use of force involving tear gas weapons is as racially disproportionate as the juvenile justice system generally, they raise serious questions and emphasize the importance of more transparency about the use of force.

Data about the greatest absolute number of use of force incidents involving tear gas weapons against youth in California's juvenile justice system, presented in Table 1, may not be indicative of the prevalence of the use of tear gas weapons, given the relative size of different detention systems as well as the variation in length of stay in different counties and different facilities. Table 3 below thus shows (only for the 26 counties that provided data) the ratio of the number of incidents of use of force involving OC spray to the average daily population of those counties' detention facilities, based on data maintained by the Board of

State and Community Corrections, for 2015, 2016 and 2017. These “rankings” show that in each of those years, of the 26 counties which provided data, Merced County, San Bernardino County, Tulare County, San Joaquin County and Santa Barbara County were among the “top 10” greatest users of tear gas weapons while in at least two of those years, Kings County, Del Norte County, Los Angeles County, San Diego County, San Luis Obispo County and Shasta County made the list.

WHICH COUNTIES DO WE KNOW TO USE TEAR GAS WEAPONS THE MOST?		
THE 10 COUNTIES WITH THE HIGHEST RATES OF USE OF PEPPER SPRAY (OF THOSE WHICH PRODUCED DATA) IN		
2017	2016	2015
MERCED COUNTY	MERCED COUNTY	MERCED COUNTY
KINGS COUNTY	KINGS COUNTY	SHASTA COUNTY
SAN BERNARDINO COUNTY	SAN BERNARDINO COUNTY	SAN LUIS OBISPO COUNTY
TULARE COUNTY	SAN JOAQUIN COUNTY	SAN JOAQUIN COUNTY
DEL NORTE COUNTY	TULARE COUNTY	SAN BERNARDINO COUNTY
SAN JOAQUIN COUNTY	SAN LUIS OBISPO COUNTY	TULARE COUNTY
LOS ANGELES COUNTY	DEL NORTE COUNTY	SAN DIEGO COUNTY
SAN DIEGO COUNTY	SANTA BARBARA COUNTY	YUBA COUNTY
SANTA BARBARA COUNTY	SHASTA COUNTY	STANISLAUS COUNTY
TEHAMA COUNTY	LOS ANGELES COUNTY	SANTA BARBARA COUNTY

Table 3.

B. CALIFORNIA FAILS TO ENSURE THE TRANSPARENCY REQUIRED TO FACILITATE OVERSIGHT OF THE JUVENILE JUSTICE SYSTEM AND PROTECTION OF YOUTH FROM HARM

As shown in Table 1, 13 counties refused to or did not provide any data on the use of force involving chemical agents in their county juvenile justice detention facilities, often invoking state law protecting the confidentiality of juvenile “case file” information as a defense against the transparency mandated by the California Constitution and the state’s public records act. The relevant state law confidentiality protections are found in the Welfare & Institutions Code. The code provides that a “juvenile case file” shall be confidential and only inspected by/disclosed to a number of specified individuals or persons as ordered by the juvenile court.⁴⁴ “Juvenile case file” means “a petition filed in any juvenile court proceeding, reports of the probation officers, and all other documents filed in that case or made available to the probation officer in making his or her report, or to the judge, referee, or other hearing officer, and thereafter retained by the probation officer, judge, referee, or other hearing officer.”⁴⁵ California courts have consistently construed these protections robustly – to appropriately protect the confidentiality of juvenile delinquency records – in response to requests under the public records act or otherwise.⁴⁶

For information that falls outside of the case file, however, disclosure is the rule and secrecy the exception. The California Supreme Court has repeatedly made clear that the California Constitution (as amended in 2004 by Proposition 59) and the state’s public records act

establish that (a) access to information concerning the conduct of the people’s business is a fundamental and necessary right, (b) this right extends to every public record unless the legislature has expressly provided to the contrary, (c) any limitation on the right to access must be narrowly construed and (d) the fact that part of a responsive document falls within an applicable exception to this obligation of disclosure does not justify withholding the entire document.⁴⁷



Given these two legal regimes, use of force incident reports involving chemical agents such as tear gas weapons as well as aggregate data about the use of force are disclosable.⁴⁸ Efforts to keep all such data about how youth are treated in California's juvenile justice system secret by arguing that any and all data produced in the course of the operation of the juvenile justice system are somehow part of the juvenile case file is improper.

Perhaps the best evidence that these efforts to veil the use of tear gas weapons are inconsistent with state law obligations is that 26 California counties and the state prison agency's Division of Juvenile Justice produced voluminous amounts of data in response to the ACLU Foundation of Southern California's public records requests. Most significantly, a few counties – Contra Costa County, Madera County, Mendocino County, Merced County, Orange County, San Diego County, San Luis Obispo County, Santa Barbara County, Sonoma County, Siskiyou County, Tulare County and Yuba County – provided redacted incident reports showing important details about the use of force. (The key documents – policies, data and training materials – related to the use of chemical agents in California's juvenile justice system are available online at: www.aclusocal.org/en/toxictreatment-cpra. Counties that have taken the untenable position that such records are justifiably secret should reverse course and be transparent about how they are (mis)treating youth.

L.A.'S BAN OF OC SPRAY— YEARS IN THE MAKING

In February 2019, the Los Angeles County Board of Supervisors passed a motion that will effectuate a ban on the use of OC spray (but not all chemical agents) against youth held in detention by the county's Probation Department.⁴⁹ This ban was put into place after many years of evidence of abuse.

More than 15 years ago, in 2003, the United States Department of Justice determined that the use of chemical agents like OC spray by the Los Angeles County Probation Department likely violated the Constitution.⁵⁰ The Department of Justice then threatened to bring a lawsuit against the county to compel an end to legal violations.⁵¹ Multiple provisions of a subsequent Memorandum of Agreement reached in 2008 (under threat of litigation) obligated the department to establish new policies to restrict its use of OC spray.⁵²

The Department of Justice found the Los Angeles County Probation Department to be in substantial compliance with such obligations in 2012. But just four years later, in 2016,

the county's auditor-controller found that the Probation Department was again failing to achieve substantial compliance with provisions related to the use of OC spray.⁵³ In fact, at one facility, OC spray was used in a manner inconsistent with policy in 22% of cases reviewed by the auditor-controller.⁵⁴

Recent data made public by the Probation Department indicate that use of force involving chemical agents was alarmingly frequent and increased substantially in recent years. In March 2018, the Probation Department reported to the Los Angeles County Probation Commission that the department had attempted a review of all incident reports on the use of OC spray from 2015 to 2017 in all camps and halls.⁵⁵ The department provided only a partial report of this analysis, which revealed that:

- Between 2015 and 2017, the use of force involving OC spray in juvenile halls increased between 192% and 338% overall (no comparable data on the use of force involving OC spray in juvenile camps were presented).
- In 2017, of more than 1,600 "crisis interventions," 518 (32%) included a use of force involving OC spray (no comparable data were provided for 2015 or 2016).
- In 2017, of the 518 reported use of force incidents involving OC spray, 12% (at least 62) were in response to something determined to be "nonphysical" (i.e., not involving behavior deemed to be violent) (no comparable data were provided for 2015 or 2016).⁵⁶
- In 2017, of the 518 reported use of force incidents involving OC spray, 2% (at least 10) were in response to youth acts of self-harm (no comparable data were provided for 2015 or 2016).⁵⁷

Later, in 2018, the Probation Department produced more data to the National Broadcasting Corporation (NBC) 4 News. In late December, NBC 4 News reported that the department had subjected youth to uses of force involving OC spray 747 times in halls and camps in 2017 (at least 200 more times than it had reported to the Probation Commission).⁵⁸ NBC 4 News reported that the rate of use of force involving OC spray had increased since 2015 at eight of the nine facilities for which it had data (with a net rate increase ranging between four and 110 incidents per 100 youth) and that use of force involving OC spray increased by an average of 154% across all nine facilities, with an average increase of 248% in the halls and 58% in the camps.⁵⁹

Following these revelations, the Board of Supervisors passed a motion directing the county’s Office of Inspector General, which was created to monitor the Sheriff’s Department, to investigate use of force (including use of force involving OC spray) and report back within 45 days.⁶⁰ The inspector general’s report, which reviewed a sample of use of force incidents involving OC spray identified by the L.A. County Probation Department, identified myriad problems and recommended that the county evaluate whether the use of OC spray in Probation Department facilities “aligns with the Department’s philosophical shift toward rehabilitation and trauma informed care and its ongoing implementation of the LA Model.”⁶¹ Under pressure from community members and in response to moving testimony by youth who had been sprayed with OC spray in county detention facilities, the Board of Supervisors approved a ban that the county will implement by the end of 2019.

The changes in Los Angeles County demonstrate the vital importance of making public information about the use of force involving tear gas weapons like OC spray against youth. In the absence of robust public disclosure of data about the use of chemical agents, effective oversight of the juvenile justice system is impossible – and harmful practices can flourish and persist. An accounting of how chemical agents have been used in Los Angeles County, along with their plan to implement a ban of OC spray, will permit the development of safe and effective alternatives.



The data in this section – and particularly the fact that only 26 counties made some amount of data available –

make clear that there is an urgent need for far greater transparency and data reporting

about the use of force involving chemical agents, including tear gas weapons, in California’s juvenile justice system. When it comes to harmful practices against youth in detention, sunlight is a powerful disinfectant.

C. USE OF FORCE POLICIES IN CALIFORNIA'S JUVENILE JUSTICE SYSTEM ARE INADEQUATE TO PROTECT YOUTH FROM TEAR GAS WEAPONS

A review of use of force policies produced by California jurisdictions that detain youth shows that these policies provide inadequate guidance when it comes to tear gas weapons. A number of county policies fail to clearly limit the use of force involving tear gas weapons in response to non-violent conduct or property damage. Multiple policies also explicitly permit the use of tear gas weapons as a way to prevent youth from engaging in self-harm or attempting suicide.

State regulations providing important minimum protections to youth detained in the juvenile justice system, promulgated by the Board of State and Community Corrections, have for years required that use of force policies emphasize the “need to avoid the use of force whenever possible and using only that force necessary to ensure the safety of youth, staff and others.”⁶² Regulations effective January 1, 2019 (i.e., before the date of production of use of force policies analyzed in this report) now require that “chemical agents only be used when there is an imminent threat to the youth’s safety or the safety of others and only when de-escalation efforts have been unsuccessful or are not reasonably possible.”⁶³ A review of the use of force policies in effect in 2018, before that requirement took effect, suggests that jurisdictions across the state have historically failed to limit use of force involving tear gas weapons in the manner now required by regulations.⁶⁴

In particular, the use of force policies produced by 12 counties⁶⁵ as well as the state prison agency’s Division of Juvenile Justice were ambiguous and did not clearly limit staff ability to use force to situations in which they are responding to an imminent threat. For example, Merced County’s use of force policy specifies that OC spray “may be used when there is active resistance by the youth and a threat of harm to the youth or others.”⁶⁶ San Bernardino County’s use of force policy classifies OC spray as “a moderate level application of force” permitted when a minor “takes over threatening action physically towards staff.”⁶⁷ The state prison agency’s Division of Juvenile Justice permits force when “behavior presents a danger to the safety of any person” as well as if a child or youth “is causing substantial damage to public property.”⁶⁸

Data and incident reports produced by multiple counties demonstrate that, even when a use of force policy prohibits the use of tear gas weapons against youth for behavior that is not viewed as posing an imminent risk of harm, such weapons are still used. One OC spray

log from Contra Costa County, for example, justifies the use of a tear gas weapon simply: “refused to follow staff direction, became defiant, refused to go to room.”⁶⁹ Another such log describes a “near fight” as the justification for one use and “non-compliance” for another.⁷⁰

Similarly, state regulations in effect January 1, 2019 now require that facilities train staff on “known medical and behavioral health conditions that would contraindicate certain types of force.”⁷¹ A review of the use of force policies in effect in 2018, before that requirement took effect, suggests that jurisdictions across the state have failed to effectively limit use of force involving tear gas weapons in the way the regulations now require.⁷²

The use of force policies produced by eight counties⁷³ failed to provide clear guidance to staff on when particularly vulnerable populations should not be subjected to chemical agents. For example, the use of force policy at Kern County’s juvenile hall simply states that the department’s “guideline” is that “staff should be aware of youth identified as having respiratory problems/diagnosis” and “should be aware of distress signs after O.C. application and during decontamination.”⁷⁴ Contra Costa County’s juvenile hall policy advises that its training will include “knowledge of ... known medical and behavioral health conditions that would contraindicate certain types of force” but the policy itself includes no specific directive to staff to consider such knowledge.⁷⁵ But neither county appears to require that staff modify their action based on such awareness or knowledge.

Testimony by a defense attorney in Los Angeles County is illustrative of institutional failures to identify and protect youth whose medical conditions or other vulnerabilities place them at greater risk of harm from the use of tear gas weapons:

“P. is 14 years old. He is in special ed and he has mental health issues and significant emotional needs. He also has juvenile diabetes and a condition called hypothalamic hamartoma, a benign brain tumor that may cause seizures and impact P’s ability to think clearly. P was also on anti-psychotic medication while he was in the hall as well as medication for seizures. In other words, he had many of the red flags that make the use of pepper spray not only contraindicated but very dangerous. He was sprayed in custody, not once, not twice, but four times.”⁷⁶

Many use of force policies specifically permit (and thus arguably encourage) the use of tear gas weapons as an intervention against youth engaged in self-harm or attempting suicide.⁷⁷ Data and incident reports suggest that OC spray is regularly used against particularly vulnerable youth – especially those engaged in self-harm. In San Luis Obispo County, for

example, restraining youth from self-harm was cited as one of the justifications, or the only justification, for 14 of 29 use of force incidents involving tear gas weapons in 2015 as well as in 10 of 14 use of force incidents involving such weapons in 2016.⁷⁸

One incident report from the Mendocino County Juvenile Hall illustrates how readily the use of tear gas weapons can be deemed necessary in an incident of threatened self-harm:

JCO [name redacted] had radioed for me to come over to unit. When I entered he told me that [name redacted] had once again put his sweatshirt around his neck and was pressing down with his hands. There were 4 boys on the unit. I opened [name redacted] door and retrieved the sweatshirt from around his neck and then closed his door. He yelled out that he was using his pants next. Staff heard this and secured the 4 youths with their trays in rooms. We opened [name redacted] door and asked for his pants which he refused. We closed his door and JCO [name redacted] went to get the shield. I asked [name redacted] again for his pants and he refused. I then informed youth that if he didn't hand over pants that I would be spraying him after the count of three. Youth refused to. I released spray and then we went in and retrieved his pants using the shield. Youth was then brought out over to the shower room for decontamination for roughly 45 minutes. I spoke with youth and gave him back new clothing and his [bedding]. He agreed to let us run our program and not threaten suicide with any clothing items.⁷⁹

2016 incident report logs from Contra Costa County also reflect multiple incidents in which self-injurious behaviors were the justifications for several uses of force: "suicide attempt" and "suicidal gesture" and "hitting self, combative" and "self harming."⁸⁰ Contra Costa County's 2017 incident report logs similarly included several similar descriptions: "self harm ... banging head against wall verbal commands failed" and "self harm ... banging head against wall verbal commands failed" and "self harm ... began hitting herself in the head. Had to be placed in the wrap for 36 minutes."⁸¹

Experts raised significant concerns about the use of tear gas weapons to address behavioral health challenges or psychiatric emergencies of youth. One expert, Dr. Andrea Weisman, a juvenile and correctional mental health consultant who formerly directed health services for the Washington, D.C., Department of Youth Rehabilitative Services, explained that "the assumption is that incidents of self-injury involve some mental-health issue that is not being

addressed.”⁸² Weisman said that in a facility with “adequate mental health programming” intervention with chemical agents would never be required. The weapons would be “absolutely banned,” Weisman said, because there would be “adequately trained clinicians in sufficient number available to see kids individually and in groups.” The clinicians would work on units with officers to help them “deescalate.” Procedures would be in place, she said, so that “kids whose needs exceed the care that can be provided ... can receive such care elsewhere.”⁸³

It strains credulity that a chemical weapon was the only alternative required to stop so many youth from ending their lives or harming themselves. It is entirely inappropriate to use chemical agents in response to a young person's statements about self-harm or self-harming behavior. Such statements and actions should lead to supportive and therapeutic interventions, not the use of chemical agents which only cause further harm and trauma.

TEAR GAS WEAPONS AND SOLITARY CONFINEMENT

The use of tear gas weapons such as OC spray against youth in juvenile detention and the use of solitary confinement or prolonged room confinement are two symptoms of a failure to adequately care for and promote rehabilitation and healthy development of those in the juvenile justice system. In a sense, they are both techniques to forcefully gain a certain type of control. Perhaps unsurprisingly, but no less disturbingly, in juvenile detention settings they also often go together – sometimes in an escalating spiral: staff intervene to stop conduct with OC spray, then punish that same conduct with a period of solitary confinement, then punish further acting out in solitary (banging on a cell door, covering a window) with OC spray, leading to more solitary confinement. For this reason, some detention staff across California have complained that a recent change in state law banning solitary confinement has taken away an important weapon in the fight for control, forcing additional reliance on another.⁸⁴

One of the many incident reports produced in response to an ACLU Foundation of Southern California public records act request shows one example of such a struggle for control from an officer's notes:

On Tuesday, August 25th, 2015, at approximately 7:20 pm, I had just completed writing a report on Pod 2B about their poor behavior when ward [name redacted] began to cover his window with toilet...

...paper and clothing. I went to his room and advised [name redacted] [room number] to take the items out of his window but he would not comply. I then had [officer name] come to Pod 2B to assist with [name redacted]. When [officer name] arrived, we turned on all the lights and went to [room number] and opened the door. I told [name redacted] once more to remove the items from his window but again he did not comply. I told [name redacted] to move to the back of his room and I began removing the items from the window. As I was doing this, [name redacted] walked towards me without warning so I administered a 1-2 [second] burst of my oleoresin capsicum spray towards his facial area but he turned and picked up his blanket and covered his face while moving to the back of his room. I ordered [name redacted] to the ground but again he did not comply so I pulled the blanket off of him and again sprayed him with a 1-2 second burst of oleoresin capsicum spray. This time [name redacted] went to the ground and quit resisting. [name redacted] was instructed to stay in the prone position while I removed all items from his room before securing his door. When [officer name] arrived on the unit, we attempted to decontaminate ward [name redacted] but he refused to get into the shower. [Name redacted] was asked several more times if he was ready to be decontaminated but again he refused.⁸⁵

In response to reviewing this report, the supervisor noted “ward [name redacted] will receive a 3 day lockdown for his behavior. . .”⁸⁶ While it is theoretically possible that the staff member writing the above report omitted that they felt threatened by the youth’s movement, it is unlikely given the high degree of detail. It is similarly possible that the youth was eventually decontaminated, though the incident report suggests that officers left the youth in his room overnight, with chemical agents covering his face.

Records suggest that California counties may still be struggling to comply with the state law ban on solitary confinement: A recent incident in the same county suggests that Madera County continues to use pepper spray and prolonged room confinement in tandem (although the latter practice is illegal under state law):

On Tuesday February 13, 2018 at approximately 3:15pm or thereafter Officer [name redacted] notifies this supervising officer via phone that [name redacted] was acting up in unit 3 and reports that he was being non-compliant. I instructed Officer [name...

...redacted] to remedy the problem or call a code 2 if necessary and that I would make my way there. Upon arrival [name redacted] was standing up in the dayroom with a pencil in his hand refusing to put it down. His behavior was an immediate threat because he refused to drop the pencil and make his way into his room. He reluctantly moved and continued to be defiant. As I made initial contact to assure he was walking to his room he resisted and became more hostile and belligerent. I felt he was looking for confrontation as I tried deescalating the situation by giving him directives to calm down and sit down. [Name redacted] refused to take off his shoes which led to having to physically restrain him. In the process he kicked Cp [name redacted] and tried to grab a hold of the another officers hands while trying to control his extremities. Once under control and secured in cuffs he continued to be resistive. [Name redacted] was given instructions not to move while facing down in a prone position after he was secured in cuffs. However, without hesitation he stood up as I made my way out the door. [Officer name] was instructed to administer OC without further warning if he made a sudden move but to no effect. Moreover he made several attempts to break his sprinkler and cause more property damage by tagging on the walls and forcefully kicking the door. I also gave him plenty of opportunity to comply but at the end I had to administer a second burst of OC to stop him from further harm or damages. With the second delivery of OC it took several minutes to take effect and regain compliance.⁸⁷

A supervisor reviewing this incident noted, “due to youth [name redacted] threats and aggressive threats towards staff he will be place on room confinement until such time he is no longer a safety and security threat.”⁸⁸ The incident report does not indicate how long the youth remained in room confinement but the narrative does suggest that room confinement was “used for the purposes of punishment, coercion, convenience, or retaliation by staff,” which would violate state law prohibiting solitary confinement.⁸⁹

These incident reports underscore the types of struggles for power – and the retributive, punitive impulse – reflected in reliance on solitary confinement and pepper spray in juvenile facilities and the reasons for which best practices for detaining and caring for youth required both to be banned.



Finally, the state also requires facilities which authorize the use of tear gas weapons in state juvenile detention facilities to set out “methods and timelines for decontamination” – in order to remove harmful chemicals from youth’s skin, lungs and clothes.⁹⁰

A review of the policies in effect in 2018 suggest that many counties fail to require immediate decontamination.

The use of force policies produced by 10 counties⁹¹ as well as the state prison agency’s Division of Juvenile Justice all failed to clearly require immediate decontamination.⁹² For example, Del Norte County’s policy specifies that “once the youth has agreed to cooperate with officers and is properly controlled, the decontamination process will begin.”⁹³ Tehama County’s policy states that, “staff shall not begin the decontamination process until the contaminated youth, based on their behavior and actions, no longer presents a threat and is compliant with staff.” Yet, among the relevant behaviors proposed to staff is when “the youth’s focus is on decontamination and not retaliation or aggression towards others, and the youth is asking to be decontaminated.”⁹⁴

A number of the incidents described above, including J.C.’s story in the introduction of this report, show instances of lengthy delays in offering youth the opportunity to decontaminate – and the physical consequences of such delay. Furthermore, a number of the incident reports excerpted above seem to involve instances in which the youth were never decontaminated (such as because they were thought to be refusing the procedure). Such delays or failures to decontaminate are apparently at the heart of two separate criminal prosecutions in Los Angeles County, in which prosecutors “allege the defendants, who work as detention services officers [in the Los Angeles County Probation Department], either were unreasonable when using pepper spray or prevented the victims from being decontaminated after they were sprayed.”⁹⁵

In sum, a review of existing use of force policies alongside data and incident reports demonstrates that existing policies fail to protect youth from harm, bolstering the need for a clear and absolute ban on all chemical agents in the juvenile justice system, including tear gas weapons.

Rules in Other U.S. States, National Best Practices and Fundamental Rights Standards Support a Ban on Tear Gas Weapons in Juvenile Detention Facilities

The widespread use of tear gas weapons in California’s juvenile justice system runs counter to the rules for juvenile detention in the large majority of U.S. states and best practices for caring for youth in detention as well as fundamental human rights, constitutional and state law standards.

Research by California’s legislative counsel presented in 2018 to the State Assembly Committee on Public Safety found that at least 35 U.S. states do not permit the use of OC spray in juvenile detention facilities; of those that do, only California, Illinois, Indiana, Minnesota, South Carolina and Texas allow facility staff to carry canisters of such tear gas weapons on their persons.⁹⁶ Juvenile detention systems across the U.S. that still employ OC spray have repeatedly faced complaints or lawsuits for mistreating youth by subjecting them to excessive force through use of the substance.⁹⁷

There are no universally agreed-upon standards for the administration of juvenile justice facilities. Experts note that “the prevailing professional view and practice is to employ positive behavioral management to reduce institutional violence and improve youth behavior without requiring the use of solitary confinement, pepper spray and mechanical restraints. Such approaches entail a combination of practices, programs and policies that jointly create an orderly and rehabilitative youth correctional environment while minimizing the use of solitary confinement, restraints and other negative reinforcement techniques.”⁹⁸ The most comprehensive best practices for the detention of youth require the complete prohibition of the use of chemical agents against youth in the juvenile justice system.⁹⁹ These standards were developed by the Annie E. Casey Foundation based on the decades of work of its Juvenile Detention Alternatives Initiative. This initiative has supported state and local detention facilities in the identification and elimination of dangerous and inadequate conditions in juvenile facilities (and the reduction of legal liability) since 1992.¹⁰⁰ These standards help show just how out of step detention facilities within California’s juvenile justice system are in regard to best practices for managing detention facilities. Juvenile

facilities that have reduced or eliminated reliance on harsh measures have reported substantial improvements in outcomes as well as facility climate.¹⁰¹

In addition to these best practices and the practice of the vast majority of U.S. states, fundamental rights standards protecting those detained in the juvenile justice system also support a ban on the use of force involving chemical agents against youth.

Although international human rights law holds that children should only be detained as an absolute last resort, children, like all people deprived of their liberty, have a range of fundamental rights protected under treaties that are binding on the United States and its states and local officials.¹⁰² Among those is the right to be protected from torture and cruel, inhuman or degrading treatment or punishment. United Nations experts have determined that the use of any restraint or force against children is only permissible “when the child poses an imminent threat of injury to himself or herself or others, only for a limited time and only when all other means of control have been exhausted.” The experts recommended – as part of the legal duty to prevent torture – that countries should, among other things, follow U.N. standards for the protection of juveniles.¹⁰³ These standards require that “the carrying and use of weapons by personnel should be prohibited in any facility where juveniles are detained.”¹⁰⁴

These concerns echo the California Legislature’s requirement that juveniles (who are at no time accused or convicted of any criminal offense) “receive care, treatment, and guidance that is consistent with their best interest” and that the “rehabilitative objectives” mandated by the law must “not include retribution.”¹⁰⁵ As noted above, state law also requires that “juvenile hall[s] ... shall not be deemed to be, nor treated as, a penal institution ... [but] shall be a safe and supportive homelike environment.”¹⁰⁶



The U.S. Constitution likewise provides protections to youth in detention. Because youth in the juvenile justice system are not accused of crimes, they cannot be subjected to any punishment, let alone the “cruel and unusual punishments” prohibited by the Eighth Amendment.¹⁰⁷ The Constitution’s due process clause thus protects those in the juvenile

justice system and provides that when the government detains youth, it has heightened obligations to support detained juveniles' healthy growth, development and rehabilitation – including protecting them from mistreatment in custody. These heightened obligations to support detained juveniles' healthy growth, development and rehabilitation are breached when agents of the state subject youth detained in the juvenile justice system to conditions or treatment that constitute a “substantial departure from accepted professional judgment, practice, and standards.”¹⁰⁸

The widespread use of tear gas weapons against youth in California's juvenile justice system fails to meet the state and county's heightened obligations to support detained juveniles' healthy growth, development and rehabilitation. Because the use of force involving chemical agents is so out of step with fundamental rights, best practices and the rules in place in the vast majority of U.S. states, such chemical agents should be banned.

RECOMMENDATIONS

Ban Tear Gas Weapons in California's Juvenile Justice System

The widespread use of tear gas weapons – and in particular OC spray or “pepper spray” – against youth in state and county detention facilities in California’s juvenile justice system shows the need for an overhaul of the system. As 50 current and former leaders of youth justice agencies nationwide, including some in California, have declared: “The time has come to close down youth prisons, once and for all.” While shifting youth from large youth prisons, camps, and halls may not be immediate, state and county leaders must continue making progress in this direction. In the interim, harmful chemical agents, including but not limited to tear gas weapons, must be banned in all California juvenile detention facilities. Furthermore, jurisdictions that detain youth in California’s juvenile justice system must be transparent and make data about all uses of force against youth – particularly, until such time as bans are effective, those involving tear gas weapons – regularly and publicly available.

The ACLU Foundations of California make the following recommendations:

TO THE CALIFORNIA LEGISLATURE:

- Mandate transparency about the use of force against youth in California’s juvenile justice system, including detailed information about use of force involving chemical agents, including but not limited to tear gas weapons.
- Enact a legislative ban on the use of all chemical agents, including but not limited to tear gas weapons such as OC spray or pepper spray, against youth in the juvenile justice system.

TO THE CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION DIVISION OF JUVENILE JUSTICE:

- Make detailed information about use of force against youth involving chemical agents, including but not limited to tear gas weapons, regularly and publicly available on the division’s website.

- Implement a ban on the use of all chemical agents, including but not limited to tear gas weapons such as OC spray or pepper spray, against youth in Division of Juvenile Justice facilities.

TO COUNTY BOARDS OF SUPERVISORS:

- Mandate transparency about the use of force against youth in California's juvenile justice system, including detailed information about use of force involving chemical agents, including but not limited to tear gas weapons.
- Enact a ban on the use of all chemical agents, including but not limited to tear gas weapons such as OC spray or pepper spray, against youth in the juvenile justice system.

TO COUNTY PROBATION DEPARTMENTS:

- Make detailed information about use of force against youth involving chemical agents, including but not limited to tear gas weapons, regularly and publicly available on the probation department's website.
- Implement a ban on the use of all chemical agents, including but not limited to tear gas weapons such as OC spray or pepper spray, against youth in county juvenile camps and halls.

Endnotes

¹ A slightly more comprehensive request, seeking substantially the same records related to the use of chemical agents, was sent to the Orange County Probation Department in 2017.

² Interview with J.C. (April 11, 2019) (notes on file with the ACLU Foundation of Southern California).

³ This report uses “youth” rather than children or children and youth, because not everyone detained in the juvenile justice system is under 18. The youngest incidents involving use of tear gas weapons we identified were against 12- and 13-year-olds. *See* summary use of force data produced by Merced County (including Reports #201500425, 201500539, 2015 01178, 201501363, 201600196, 201800105) and Orange County (Juvenile Hall Restraint Reports (August 27, 2015)).

⁴ As noted above, 10 counties do not operate juvenile detention facilities but contract with others to detain youth subject to the jurisdiction of their county juvenile justice system.

⁵ A comparison of the average daily population data compiled by the Board of State and Community Corrections’ Juvenile Detention Survey <http://app.bscc.ca.gov/joq/jds/query.asp?action=v> (calculating that the annual average daily population of county detention facilities at 5435 in 2015, 4721 in 2016 and 4392 in 2017) and data compiled by the California Department of Juvenile Justice (DJJ) Division of Juvenile Justice and Data Analytics https://www.cdcr.ca.gov/juvenile_justice/research_and_statistics/index.html (calculating the annual average daily population of DJJ at 699 in 2015, 704 in 2016 and 652 in 2017) shows that county facilities held 88 percent of detained children and youth in California’s juvenile justice system in 2015, 87 percent in 2016 and 87 percent in 2017.

⁶ In the juvenile justice system, adjudication is the determination of whether a young person is found responsible for a certain offense.

⁷ U.S. Department of Justice, National Institute of Justice. *Oleoresin Capsicum: Pepper Spray as a Force Alternative* (NCJ 181655) (1994).

⁸ CAL. PEN. CODE §§ 22810 *ET SEQ.*

⁹ CAL. PEN. CODE §§ 17250, 17270.

¹⁰ CAL. PEN. CODE § 22820. *See also, e.g.,* CAL. PEN. CODE § 830.5 (defining peace officers to include probation officers for purposes of noting their power to be authorized to carry firearms); California Commission on Peace Officer Standards and Training, *Specialized Training Requirements* <https://post.ca.gov/specialized-training-requirements> (last accessed April 30, 2019) (describing that the relevant Peace Officer Standards and Training Course per Penal Code 22820 is entitled “Chemical Agents for Peace Officers”)

¹¹ Board of State and Community Corrections, *Juvenile Title 15 Minimum Standards* § 1357 (January 1, 2019)

¹² *See, e.g.,* Sacramento County Probation Department Policy and Procedure – Youth Detention Facility Use of Force Title XC Section 1357 (Revised July 19, 2011) (referencing legacy penal code section numbers regulating tear gas weapons); Lassen County Juvenile Detention Facility Policy Manual Policy Statement 5-12 (Revised

May 7, 2013) (same); Stanislaus County Probation Department Juvenile Institutions Policies and Procedures, Use of Force Section 7.12 (Revised December 2015) (same); Santa Barbara Probation Department Los Prietos Manual Chapter 5108 (Revised November 6, 2017) (same); Alameda County Probation Department Juvenile Hall Manual Section 1357.2 (Revised February 20, 2004) (same); Contra Costa Probation Department Juvenile Hall Policy and Procedure Bulletin No. 518 (Revised April 2018) (same); Siskiyou County Probation Department P&P 1357: Use of Force (Revised April 8, 2016) (same); Fresno County Probation Department Administrative Manual Policy No. 6.510 Pepper Spray Authorization and Use of (Adopted March 28, 2008) (same).

¹³ CAL. WELF. INST. CODE §§ 202(b), (e), 203. The statute permits that such “guidance” may include “punishment” as well as detention as long as measures taken are consistent with the best interest of the child and the rehabilitative objectives of the law. § 202(b), (e).

¹⁴ CAL. WELF. INST. CODE § 851.

¹⁵ See Youth Correctional Leaders for Justice, *Statement on Ending Youth Prisons*, <https://yclj.org/statement> (signatory count as shown on April 7, 2019).

¹⁶ Report of the Los Angeles County Department of Auditor-Controller to the Los Angeles County Board of Supervisors dated November 15, 2016, pages 109-110.

¹⁷ *Id.* at page 109.

¹⁸ *Id.* at page 110.

¹⁹ The California Endowment, *Online Survey Results Regarding Chemical Agents in Juvenile Facilities* (2017) (complete results on file with CDF-CA).

²⁰ Report of the Los Angeles County Department of Auditor-Controller to the Los Angeles County Board of Supervisors dated November 15, 2016, page 112.

²¹ For example the key studies cited by the National Institute of Justice in a recent review of the use of pepper spray by law enforcement do not appear to involve any distinct consideration of the risks for youth. See U.S. Department of Justice, National Institute of Justice, *The Effectiveness and Safety of Pepper Spray* (April 2003) (summarizing research findings, including research evaluating deaths involving the use of pepper spray).

²² Physicians for Human Rights & The International Network of Civil Liberties Organizations, *Lethal in Disguise: The Health Consequences of Crowd-Control Weapons* 44 (March 2016)

²³ For the most detailed accounting of the research on the affects of chemical agents on humans, with particular focus on the risks for youth see Texas Criminal Justice Coalition, *Pepper Spray in the Texas Youth Commission: Research Review and Policy Recommendations* 2-5 (November 2007). See also Center on Children’s Law and Policy, *Fact Sheet: Chemical Agents in Juvenile Facilities* (2012) citing C. Gregory Smith & Woodhall Stopford, Health Hazards of Pepper Spray, 60 North Carolina Med. J. 268 (1999). See also Council of Juvenile Corrections Administrators, *Issue Brief: Pepper Spray in Juvenile Facilities* (2011); Texas Criminal Justice Coalition Juvenile Justice Initiative, *Pepper Spray in the Texas Youth Commission* (2007)

(reviewing research).

- ²⁴ See, e.g., Karen M. Abram et al., *PTSD, Trauma, and Comorbid Psychiatric Disorders in Detained Youth*, United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention Juvenile Justice Bulletin at 1-4, June 2013 (Reporting that a longitudinal study of youth detained at the Cook County Juvenile Temporary Detention Facility in Chicago Illinois found that 92.5% of youth had experienced a traumatic event and that 11.2% had experienced post-traumatic stress disorder in the year prior to being interviewed.)
- ²⁵ Los Angeles Board of Supervisors, Public Comment of Kent Mendoza, February 5, 2019 (at minute 3:28) https://lacounty.granicus.com/MediaPlayer.php?view_id=&clip_id=6000&meta_id=328527.
- ²⁶ Andrea J. Sedlak & Karla S. McPherson, Office of Juvenile Justice and Delinquency Prevention, Conditions of Confinement: Findings from the Survey of Youth in Residential Placement 10 (May 2010) <https://www.ncjrs.gov/pdffiles1/ojjdp/227729.pdf>.
- ²⁷ Council of Juvenile Corrections Administrators, *Issue Brief: Pepper Spray in Juvenile Facilities* (2011), page 3.
- ²⁸ Center on Juvenile and Criminal Justice, *Unmet Promises: Continued Violence & Neglect in California's Division of Juvenile Justice* 39 (2019) http://www.cjcj.org/uploads/cjcj/documents/unmet_promises_continued_violence_and_neglect_in_california_division_of_juvenile_justice.pdf.
- ²⁹ Disability Rights California & Disability Rights Advocates, Investigation Report: Kern County Juvenile Correctional Facilities 14-16 (January 2018) https://www.disabilityrightsca.org/system/files/file-attachments/2018Feb6KCJCReportFinal_Accessible.pdf/.
- ³⁰ Youth Law Center et al., Complaint Against County of San Diego Department of Probation Regarding the Excessive Use of Pepper Spray and Other Civil Rights Violations in San Diego Juvenile Detention Facilities (July 25, 2014) <https://ylc.org/wp-content/uploads/2018/11/DOJ-Complaint.pdf>.
- ³¹ Disability Rights California, Report on Inspection of the San Diego Juvenile Detention Facilities (February 23, 2016) <https://www.disabilityrightsca.org/system/files/file-attachments/703001.pdf>.
- ³² In all cases, such uses of force involved OC spray.
- ³³ Contracts to detain children and youth in Del Norte County, which provided data showing use of tear gas weapons against children and youth.
- ³⁴ Contracts with multiple counties to detain children and youth.
- ³⁵ Contracts with multiple counties to detain children and youth.
- ³⁶ Contracts to detain children and youth in Yuba County, which provided data showing use of tear gas weapons against children and youth.
- ³⁷ Contracts to detain children and youth in Madera County, Kern County, Tuolumne County; Madera County and Kern County provided data showing use of tear gas weapons against children and youth while Tuolumne County reported permitting its use.

³⁸ Contracts with unspecified counties to detain children and youth.

³⁹ Contracts with unspecified counties to detain children and youth.

⁴⁰ Contracts with unspecified counties to detain children and youth.

⁴¹ Contracts with unspecified counties to detain children and youth.

⁴² Contracts with unspecified counties to detain children and youth.

⁴³ See United States Department of Justice National Disproportionate Minority Contact Databook Relative Rates Tables (2016) https://www.ojjdp.gov/ojstatbb/dmcd/b/asp/display.asp?year=2016&offense=1&display_in=1&displaytype=rri (showing overall minority referral and detention rates for youth of color at close to 1.5 times the relative rate of referral and detention of white youth).

⁴⁴ WELF. INST. CODE, § 827.

⁴⁵ WELF. INST. CODE, § 827.

⁴⁶ See, e.g., *T.N.G. v Super. Ct.*, 4 Cal. 3d 767, 780-781 (1971) (holding that arrest or detention records of juveniles who are temporarily detained and subsequently released without further proceedings are protected from disclosure under WIC § 827 and noting that this includes “information that [the police department] obtains from the youths’ detention” and referring the juvenile court’s ability to refuse to disclose “information about the juvenile detentions” (though using “detentions” to mean arrests)).

⁴⁷ See, e.g., *ACLU of Southern California v. Super. Ct. of LA Cty.*, 3 Cal. 5th 1032, 1038-39 (2017); *LA Bd. of Supervisors et. al. v. Super. Ct. & ACLU of Southern California*, 2 Cal. 5th 282, 291 (2016).

⁴⁸ Such disclosure would subject to appropriate but narrow limitations to protect privacy such as redactions to protect the identity of individual youth.

⁴⁹ Los Angeles County Board of Supervisors Motion 19-0940 “Phasing Out the Use of Oleoresin Capsicum (OC) Spray in County Juvenile Facilities” (February 19, 2019) (directing the Probation Department to develop “a plan for the phased elimination of the use of OC spray in all Los Angeles county camps and Halls before the end of calendar year 2019”).

⁵⁰ United States Department of Justice, Letter from Ralph F. Boyd, Jr. to Yvonne B. Burke dated April 9, 2003.

⁵¹ DOJ has expressed similar constitutional concerns about the use of chemical agents such as OC spray in other investigations of state and local juvenile detention facilities. See United States Department of Justice, Letter from Thomas E. Perez to Phil Bryant dated March 20, 2012; Letter from Thomas E. Perez to Mitch Daniels dated January 29, 2010.

⁵² Memorandum of Agreement between the United States and Los Angeles County (2008), ¶ 11.

- ⁵³ Report of the Los Angeles County Department of Auditor-Controller to the Los Angeles County Board of Supervisors dated December 6, 2016, page 2.
- ⁵⁴ *Id.*
- ⁵⁵ Los Angeles County Probation Commission Minutes of Regular Meeting, March 22, 2018, pages 2-6.
- ⁵⁶ The use of force involving OC spray in response to nonviolent behavior is one of the practices identified repeatedly by DOJ as likely unconstitutional in investigations of state and local juvenile detention facilities.
- ⁵⁷ The use of pepper spray on youth engaged in actual or threatened self-harm was one of the very practices identified by DOJ as likely unconstitutional more than fifteen years ago.
- ⁵⁸ Jason Kandel and Lolita Lopez, *Other Juvenile Lockups are Shunning Pepper Spray, But its Use is on the Rise in LA*, NBC4 News, December 13, 2018. Raw data reported in the story can be found [here](#) and [here](#).
- ⁵⁹ *Id.*
- ⁶⁰ Los Angeles County Board of Supervisors Motion 18-7870 “Ensuring Safety and Humane Treatment in the County’s Juvenile Justice Facilities” (December 18, 2018).
- ⁶¹ Los Angeles County Office of the Inspector General, Report Back on Ensuring Safety and Humane Treatment in the County’s Juvenile Justice Facilities at Page 19 (February 4, 2019).
- ⁶² See Board of State and Community Corrections Title 15 Minimum Standards for Juvenile Facilities § 1357 (Effective April 1, 2014) http://www.bscc.ca.gov/downloads/Juvenile_Title_15_Strike_Out_Underline_REVISIONS_effective_2014-4-1.pdf.
- ⁶³ See Board of State and Community Corrections Title 15 Minimum Standards for Juvenile Facilities § 1357 (Effective January 1, 2019) <http://www.bscc.ca.gov/downloads/Juvenile%20Title%2015%20-%20Effective%202019-1-1.pdf>.
- ⁶⁴ While the report’s authors acknowledge that these counties may have revised their use of force policies since January 1, 2019, analysis of the deficiencies of previous use of force policies is useful in understanding how use of force policies generally fail to protect children and youth from the regular use of tear gas weapons.
- ⁶⁵ Contra Costa County, Fresno County, Glenn County, Kern County, Mendocino County, Merced County, San Benito County, San Bernardino County, San Diego County, Shasta County, Tehama County and Yuba County
- ⁶⁶ See Merced County Probation Department, Merced County Juvenile Justice Complex Policy Manual Policy H-112 (Revised June 14, 2017). Note that the Merced policy also states that OC spray “may also be used as protection against threatening/attacking animals.” *Id.*
- ⁶⁷ See San Bernardino County, Probation Department Procedure O.C. Spray (Oleoresin Capsicum), Inter-Bureau Procedure 06-11-134 (Effective March 11, 2011).
- ⁶⁸ See California Department of Corrections and Rehabilitation Division of Juvenile Justice, Crisis Prevention and Management Section 2080 (Approval Date January 22, 2013).

⁶⁹ Contra Costa County O.C. Spray Log August 2015 (August 4, 2015).

⁷⁰ Contra Costa County 2016 OC (February 22, 2016 and March 23, 2016).

⁷¹ See Board of State and Community Corrections Title 15 Minimum Standards for Juvenile Facilities § 1357 (Effective January 1, 2019) <http://www.bscc.ca.gov/downloads/Juvenile%20Title%2015%20-%20Effective%202019-1-1.pdf>.

⁷² While the report's authors acknowledge that these counties may have revised their use of force policies since January 1, 2019, analysis of the deficiencies of previous use of force policies is useful in understanding how use of force policies generally fail to protect children and youth from the regular use of tear gas weapons.

⁷³ Alameda County, Contra Costa County, Fresno County, Kern County, Madera County, Sacramento County, San Bernardino and Sonoma County

⁷⁴ See Kern County Probation Department, James G. Bowles Juvenile Hall Administrative Manual § 1635.1 (Revised 2-14-2015).

⁷⁵ See Contra Costa County, Probation Department Juvenile Hall Bulletin No. 518 (Revised April 2018).

⁷⁶ Los Angeles Board of Supervisors, Testimony of Maureen Pacheco, February 19, 2019 (at minute 2:22) https://lacounty.granicus.com/MediaPlayer.php?view_id=&clip_id=6038&meta_id=332011.

⁷⁷ The report's authors identified Merced County as the only county with a policy that limits intervention in response to self-harm or a suicide attempt: "OC spray will not be applied to protect a youth from self inflicted injury or suicide unless the youth fails to respond to lesser use of force and/or becomes aggressive toward staff or other detainees." See Merced County Probation Department, Merced County Juvenile Justice Complex Policy Manual Policy H-112 (Revised June 14, 2017).

⁷⁸ See San Luis Obispo County, Probation Department "Use of Pepper Spray" (2015, 2016).

⁷⁹ Mendocino County Juvenile Hall Incident Report – C Unit Page 264 (March 3, 2016).

⁸⁰ Contra Costa County 2016 OC (July 22, 2016, September 14, 2016, September 28, 2016, December 14, 2016).

⁸¹ Contra Costa County 2016 OC (January 26, 2017, February 1, 2017, March 28, 2017).

⁸² Interview with Dr. Andrea Weisman (April 8, 2019) (notes on file with the ACLU Foundation of Southern California).

⁸³ *Id.*

⁸⁴ See, e.g., Los Angeles County Office of the Inspector General, Report Back on Ensuring Safety and Humane Treatment in the County's Juvenile Justice Facilities at Page 10 (February 4, 2019) ("Several [officers] cited a sense of crisis after following the elimination of special housing units in County facilities, stating that the inability to place youth in a solitary confinement setting made dealing with problem behaviors difficult"). The harms of solitary confinement of children are well-documented. See generally Human Rights Watch &

American Civil Liberties Union, *Growing Up Locked Down* (2013).

⁸⁵ Madera County Probation Department, Incident Report – Institutions, Report #Juvenile Detention Facility-15384-RPT-21168 (August 25, 2015).

⁸⁶ Madera County Probation Department, Incident Report – Institutions, Report #Juvenile Detention Facility-15384-RPT-21168 Review (August 25, 2015).

⁸⁷ Madera County Probation Department, Incident Report – Institutions, Report #Juvenile Detention Facility-18176-RPT-27391 (August 25, 2015).

⁸⁸ Madera County Probation Department, Incident Report – Institutions, Report #Juvenile Detention Facility-18176-RPT-27391 Review (February 14, 2018).

⁸⁹ WELF. INST. CODE § 208.3.

⁹⁰ See Board of State and Community Corrections Title 15 Minimum Standards for Juvenile Facilities § 1357 (Effective January 1, 2019) <http://www.bscc.ca.gov/downloads/Juvenile%20Title%2015%20-%20Effective%202019-1-1.pdf>.

⁹¹ Alameda County, Contra Costa County, Del Norte County, Monterey County, Nevada County, Orange County, Shasta County, Tehama County, Tuolumne County and Yolo County

⁹² While the report’s authors acknowledge that these counties may have revised their use of force policies since January 1, 2019, analysis of the deficiencies of previous use of force policies is useful in understanding how use of force policies generally fail to protect children and youth from the regular use of tear gas weapons.

⁹³ See Del Norte County, 1357 – Use of Chemical Agents (undated).

⁹⁴ See Tehama County Juvenile Detention Facility Policy and Procedure Manual Policy No. 602 (Revised February 2, 2017).

⁹⁵ Los Angeles County District Attorney’s Office, April 5, 2019: Probation Officers Charged with Unlawfully Using Pepper Spray on Teen Girls at Juvenile Hall (April 5, 2019) <http://da.co.la.ca.us/media/news/probation-officers-charged-unlawfully-using-pepper-spray-teen-girls-juvenile-hall>.

⁹⁶ Report by Legislative Counsel David Billingsley presented to the Assembly Committee on Public Safety for hearing held April 17, 2018, page 4. See also Council of Juvenile Corrections Administrators, *Issue Brief: Pepper Spray in Juvenile Facilities* (2011) (reviewing data from the national Performance Based Standards initiative showing use of OC spray an outlier among the many participating juvenile justice systems).

⁹⁷ See generally Richard Mendel, *Maltreatment of Youth in U.S. Juvenile Corrections Facilities: An Update* (2015).

⁹⁸ See *J.J. v. Litscher*, Case No. 17-CV-047-JDP Dkt. 19 Declaration of Vincent N. Schiraldi, M.S.W. ¶ 3 (W.D. Wis. June 23, 2017).

⁹⁹ The Annie E. Casey Foundation's *Juvenile Detention Facility Assessment* is among the most comprehensive recently issued standards for the administration of juvenile justice detention facilities. Annie E. Casey Foundation, *Juvenile Detention Facility Assessment: 2014 Update* (2014), page 174. Their inspection instrument requires that facilities ban the use of chemical agents including OC spray in order to be in compliance. For a review of older standards prohibiting or strictly limiting chemical agents see Council of Juvenile Corrections Administrators, *Issue Brief: Pepper Spray in Juvenile Facilities* (2011).

¹⁰⁰ Annie E. Casey Foundation, *Juvenile Detention Facility Assessment: 2014 Update* (2014), pages 1-2.

¹⁰¹ See, Virginia Department of Juvenile Justice, Transformation Plan 2018 Update (2018) <http://www.djj.virginia.gov/pdf/admin/Transformation%20Update%202018%20FINAL.pdf> (reporting on effects of reduced detention population and reduced reliance on isolation and restraint and reporting "greater safety with significant declines in the rates of acts of aggression and violence, use of force by staff, disciplinary reports with sanctions of isolation and worker's compensation claims"). But cf. Council of Juvenile Corrections Administrators, *Issue Brief: Pepper Spray in Juvenile Facilities* (2011) (noting that Virginia already prohibited the use of OC spray in juvenile detention facilities at the time of the reforms).

¹⁰² See International Covenant on Civil and Political Rights (ICCPR), Dec. 16, 1966, 999 U.N.T.S. 171; 138 CONG. REC. 8068, 8071 (1992); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 113 S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter Torture Convention]; 136 CONG. REC. 36192 (1990). While, because it is non-self-executing, the International Covenant on Civil and Political Rights, a ratified treaty, does not provide a rule of decision for U.S. courts, it does constitute an international law obligation of the United States. The Constitution and laws of the United States that apply to the instant case should, therefore, be interpreted in a manner consistent with this treaty, in order to avoid putting the United States in breach of those obligations.

¹⁰³ See Report of the United Nations Special Rapporteur on Torture on Children Deprived of Liberty ¶ 84 (March 5, 2015) (citing the United Nations Rules for the Protection of Juvenile Deprived of their Liberty).

¹⁰⁴ United Nations Rules for the Protection of Juvenile Deprived of their Liberty ¶ 65 (December 1990).

¹⁰⁵ CAL. WELF. INST. CODE §§ 202(B), (E), 203. The statute permits that such "guidance" may include "punishment" as well as detention as long as measures taken are consistent with the best interest of the child and the rehabilitative objectives of the law. § 202(b), (e).

¹⁰⁶ CAL. WELF. INST. CODE § 851.

¹⁰⁷ It is well-settled that detention by the state triggers the protection of the due process clause and the "corresponding duty to assume some responsibility for [the individual's] safety and general well-being." *DeShaney v. Winnebago Cty. Dep't. Soc. Serv.*, 109 U.S. 189, 199-200 (1989). Cf. *Brown v. Plata*, 563 U.S. 493, 510 (2011) ("To incarcerate, society takes from prisoners the means to provide for their own needs."). The U.S. Supreme Court has likewise held that the circumstances of any deprivation of liberty dictate the applicable protections. *Youngberg v. Romeo*, 457 U.S. 307, 319 n. 25 (1982) (scope of substantive due process

depends on “identifiable liberty interests and the circumstances of the case”). The U.S. Supreme Court has held that adults convicted of a criminal offense are protected by the Eighth Amendment while pre-trial detainees accused of criminal offenses are entitled to greater, substantive due process, protections. *Castro*, 833 F.3d at 1070–71 (overruling earlier precedent in light of *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015) and holding that a higher standard applies to claims by adult pretrial detainees.) *But cf. Ingraham v. Wright*, 430 U.S. 651, 669 n. 37 (1977) (reserving whether individuals in “mental or juvenile institutions” might also be able to claim the protections of the Eighth Amendment in certain circumstances).

¹⁰⁸ *Cf. Youngberg v. Romeo*, 457 U.S. 307, 323 (1982); *Gary H.*, 831 F.2d at 1433 (holding that “to the extent that the [district] court ordered due process hearings . . . and minimum sanitary, health, educational and medical resources for the inmates, the decree was clearly within the power of a federal court to assure minimum constitutional standards taught by *Youngberg*”). *See also Rohde v. Rowland*, 898 F.2d 156 (9th Cir. 1990) (finding a failure to show “that [the state’s] decisions depart so substantially from accepted professional judgment or practice as to warrant a finding of a [C]onstitutional violation.”) (unpublished decision); *Nelson v. Heyne*, 491 F.2d 352, 360 (7th Cir. 1974). Rather than take a position on whether any individual use of force reported by the state prison agency’s Division of Juvenile Justice or its counties’ probation departments was constitutionally appropriate, however, this report considers the legality of the use of tear gas weapons broadly, as a condition of confinement. The U.S. Supreme Court has yet to consider a case evaluating whether a specific use of OC spray against a youth held in a state juvenile justice detention facility is an unconstitutionally excessive use of force. Courts generally evaluate whether an individual use of force against adults by agents of the state is excessive, and thus violates Constitutional protections of due process, under a test evaluating “objective reasonableness.” *See, e.g., Graham v. Connor*, 490 U.S. 386 (1989). In our view, given the international and national consensus against the use of force involving weapons, including chemical weapons, against children and youth in the juvenile justice system, the use of tear gas weapons against children and youth should never be seen to be objectively reasonable, under any circumstances. Notably, employing varying legal rationales, the U.S. Department of Justice has repeatedly admonished state and local juvenile justice systems for unconstitutional overuse of OC spray. United States Department of Justice, Letter from Ralph F. Boyd, Jr. to Yvonne B. Burke dated April 9, 2003; United States Department of Justice, Letter from Thomas E. Perez to Phil Bryant dated March 20, 2012; Letter from Thomas E. Perez to Mitch Daniels dated January 29, 2010. *See also, J.J. v. Litscher*, Case No. 17-CV-047-JDP P.I. Mot. Hearing Tr. 5:6-15 (W.D. Wis. June 23, 2017) (Granting preliminary injunction and stating, “I find that the plaintiff has amply shown that the youths at Lincoln Hills re suffering acute, immediate, and lasting harm from the excessive use of solitary confinement. I also make a similar finding with respect to the use of OC or pepper spray ... the evidence here shows a pattern of excessive use of pepper spray.”) Additional legal authorities are discussed in Center on Children’s Law and Policy, *Fact Sheet: Chemical Agents in Juvenile Facilities* (2012).

¹⁰⁹ *See Youth Correctional Leaders for Justice, Statement on Ending Youth Prisons*, <https://yclj.org/statement> (signatory count as shown on April 7, 2019).

Appendix A

May 9, 2018

[CONTACT INFO]

RE: Public Records Act Request

To Whom It May Concern:

I am writing on behalf of the American Civil Liberties Union of Southern California (“ACLU SoCal”) to request from the [NAME] County Probation Department (“ABBREVIATION”) a copy of the records¹ detailed below. We make this request pursuant to the California Public Records Act, California Government Code section 6250 et seq., and article 1 section 3(b) of the California Constitution. To the extent that you are aware of records that may be directly related or relevant to this request, but which we do not specifically describe, we request that you provide those records as well. We request all records from January of 2015 through and including March 31, 2018.

For purposes of this request,

- All references hereinafter to the “average” shall include producing records of the mean, median, mode, and range of the data requested, whenever available.
- All references hereinafter to “each facility operated by the [ABBREVIATION]” shall include distinct and separate data from each facility operated by the [NAME] County Probation Department.
- All references hereinafter to “youth” shall include any and all wards, minors, juvenile or others, including any and all such youth under the maximum age of juvenile court jurisdiction, deprived of their liberty in any facility operated by the [NAME] County Probation Department.
- All references hereinafter to “chemical agent” shall include any and all

chemical-based agents designed to debilitate or incapacitate a person, or to cause a temporary burning sensation and inflammation of mucous membranes and eyes leading to involuntary closure, including, but not limited to, tear gas, mace, oleoresin capsicum, or pepper spray.

1. Policies and Procedures

- a. Copies of any and all of the following policies and procedures used/in effect between January 1, 2015 and March 31, 2018 (inclusive) in each facility operated by [ABBREVIATION]:
 - i. Any and all rules of conduct and disciplinary and/or behavior management policies and procedures for youth, including those governing sanctions as well as those governing incentives and/or privileges.
 - ii. Any and all behavior management or other policies and procedures governing use of force by staff, including what kind of force can be used and the continuum of appropriate force permitted in specific circumstances.
 - iii. Any and all behavior management or other policies and procedures governing use of cell/room extraction, including any requirements to video or audiotape cell/room extraction.
 - iv. Any and all behavior management or other policies and procedures governing use of de-escalation techniques by staff.
 - v. Any and all behavior management or other policies and procedures governing use of chemical agents (including the type, size/volume and approved method of deployment for those chemical agents) and methods of application as well as chemical agent cleanup/decontamination after use.
 - vi. Any and all policies and procedures regarding storage and maintenance requirements for any chemical agents permitted to be stored, used, or carried in the facility.
 - vii. Any and all policies and procedures regarding identifying or authorizing staff who are permitted to carry and/or use chemical agents in the facility.
 - viii. Any and all policies and procedures addressing medical and behavioral health conditions that would contraindicate or limit use of chemical agents.
 - ix. Any and all policies and procedures regarding identifying and evaluating youth who have been exposed to chemical agents, including any signs and symptoms requiring medical or behavioral health evaluation referral.

- x. Any and all policies and procedures regarding notification of parents or legal guardians regarding youth exposure to chemical agents.
- xi. Any and all policies and procedures on documentation and reporting requirements following any use of chemical agents.
- xii. Any and all policies and procedures on requirements to debrief or discuss use of force incidents, including use of chemical agents, with youth after the incident.
- xiii. Any and all policies and procedures on supervisory or other review of use of force incidents by staff, including use of chemical agents.
- xiv. Any and all policies and procedures regarding the information provided to youth to explain rules, rights, policies and procedures related to use of force, including but not limited to use of chemical agents (including copies of such information, as provided to youth, in each language in which it is available).
- xv. Any and all policies and procedures governing discipline of staff for violations of policies, procedures and rules governing the use of force, including use of chemical agents.

2. Training Materials

- a. Copies of any and all of the following training materials used/in effect between January 1, 2015 and March 31, 2018 (inclusive) in each facility operated by [ABBREVIATION]:
 - i. Any and all training materials on the use of chemical agents, including but not limited to permissible use and standard(s) for use, methods of application and cleanup/decontamination.
 - ii. Any and all training materials on cell/room extractions.
 - iii. Any and all training materials on the provision of medical or behavioral health services or referral before or after youth are exposed to chemical agents.
 - iv. Any and all training materials on identifying signs or symptoms of medical or behavioral health conditions that would contraindicate the use of certain types of force, including chemical agents.

- v. Any and all training materials on the use and exhaustion of less restrictive options than use of chemical agents and before the use of chemical agents.
- vi. Any and all training materials on complying with authorization, reporting and documentation requirements in connection with the use of chemical agents.
- vii. Any and all training materials on conducting a review of use of force, including on the use of chemical agents.
- viii. Any and all training materials on debriefing or discussing use of force incidents with use, including use of chemical agents, after the incident.
- ix. Any and all training materials used to ensure compliance of staff authorized to carry or use chemical agents with PENAL CODE § 22820 (requiring completion of training in the use of tear gas for any peace officer before they can purchase, possess, transport, or use tear gas or a tear gas weapon).

3. Data

- a. Any and all data on the use of chemical agents between January 1, 2015 and March 31, 2018 (inclusive) in each facility operated by [ABBREVIATION], including:
 - i. Records showing any and all aggregate data regarding average rate of use of chemical agents per month, quarter and year.
 - ii. Records showing any and all individual data regarding specific instances of use of chemical agents, including, for each instance, the incident date, time, volume or amount of chemical agent deployed, location within the facility, description of the incident (including the situation alleged to precipitate the use; for example but not limited to fight, cell/room extraction, refusal to follow a verbal order, assault, riot, etc.), and demographic information about the juvenile and staff involved, including but not limited to age, race, national origin, gender identify and gender expression. We request that individual identifying information (name) be replaced with unique identifiers so that we may observe whether the same individuals were involved in multiple incidents.
 - iii. Copies of any and all videotapes or other audio and/or visual records of use of force or cell/room extractions involving the use of chemical agents. We request that individual identifying information (recordings of name, face) be replaced with unique identifiers so that we may observe whether the same individuals

were involved in multiple incidents.

- iv. Copies of any notification of parents or guardians after chemical agent use made. We request that individual identifying information (name, addresses) be replaced with unique identifiers so that we may observe whether the same individuals were involved in multiple incidents.
- v. Copies of any and all complaints/grievance made regarding use of chemical agents, including records showing any response and any action taken. We request that individual identifying information (name) be replaced with unique identifiers so that we may observe whether the same individuals were involved in multiple incidents.
- vi. Copies of any and all incident reports or other reports related to use of chemical agents, including log book entries, entries in any electronic case management system(s), and entries in any other institutional case, data, or record management system(s). We request that individual identifying information (name) be replaced with unique identifiers so that we may observe whether the same individuals were involved in multiple incidents.
- vii. Copies of any and all internal reviews related to use of chemical agents conducted.
- viii. Records showing any staff disciplined in connection with use of chemical agents, including allegations, findings, and any disciplinary actions taken. We request that individual identifying information (name) be replaced with unique identifiers so that we may observe whether the same individuals were involved in multiple incidents.
- ix. Records of injury to staff or youth related to use of chemical agents. We request that individual identifying information (name) be replaced with unique identifiers so that we may observe whether the same individuals were involved in multiple incidents.
- x. Records showing number and volume of all containers or units of chemical agents currently maintained or stored for use.
- xi. Records showing number and volume of all containers or units of chemical agents purchased per month, quarter and year (and the total cost for such purchases).
- xii. Records showing number and volume of all containers or units of chemical

agents destroyed or discarded per month, quarter and year.

- xiii. Copies of any and all studies, inspection or accreditation reports, audits, or analyses relating to the Facilities conducted internally or by outside agencies or organizations that mention chemical agents.
- xiv. Strategic plans, committee reports, briefings, data, memoranda, final agendas, meeting minutes, or other documents or materials relating to the use of pepper spray.
- xv. Draft and final memoranda, documents, or guidance materials or directives, including but not limited to those addressing changes to policies, procedures, and training materials disclosed in response to this request, prepared by the [ABBREVIATION] related to use of chemical agents.
- xvi. Copies of any approvals or denials of any proposed changes to policies, procedures, trainings or guidelines, including but not limited to those addressing changes to policies, procedures, and training materials disclosed in response to this request, prepared by [ABBREVIATION] related to use of chemical agents.

This public records request applies to all documents in your agency's possession, including emails, video, audiotapes, and other electronic records.² It also includes documents that were created by a member of another government agency or a member of the public.³

Please respond to this request within ten (10) days, either by providing all the requested records or by providing a written response setting forth the legal authority for withholding or redacting any document and stating when the documents will be made available.⁴

Please note that the California Public Records Act allows a member of the public to request records by describing their content, rather than asking for specific documents by name; an agency that receives such a request must "search for records based on criteria set forth in the search request."⁵ Please provide entire documents, even if only parts of them are responsive to this request. If specific portions of any documents are exempt from disclosure, please provide the non-exempt portions.⁶ If any records are claimed to be exempt from disclosure, please provide a written response that describes with specificity each record that is being withheld and the claimed reason for exemption.

Please note that we are not requesting any individual youth's juvenile court case file⁷ or juvenile court records⁸ nor are we requesting personal identifying information of any

individual youth or [ABBREVIATION] staff (and have and would request(ed) that any individual identifying information (name) be replaced with unique identifiers so that we may observe whether the same individuals were involved in multiple incidents).

If you maintain or can provide records in electronic format, please provide them in electronic format to avoid copying costs.⁹ The ACLU SoCal has limited funds to reimburse your agency for the direct costs of copying these records (if your agency elects to charge for copying) or postage and we request that you waive any fees or costs for production of the documents, as the ACLU SoCal is requesting these documents in order to further the public interest. *North County Parents v. Department of Education*, 23 Cal. App. 4th 144 (1994). If you anticipate that any direct costs will nonetheless exceed \$200, or that the time needed to copy the records will delay their release, please contact me so that I can arrange to inspect the document or decide which documents I wish to have copied. Otherwise, please copy and send them as soon as possible. Finally, please provide any and all responsive documents as soon as possible and on a rolling basis.

If I can provide any clarification that will help identify responsive documents or focus this request,¹⁰ please contact me at 714.450.3962 x 107 or by email at ikysel@ACLUsoCal.org. Thank you for your time and attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'IK', is positioned above a horizontal line.

Ian Kysel

Staff Attorney

Appendix Endnotes

¹ The term “records” as used in this request is defined as “any writing containing information relating to the conduct of the public’s business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.” Gov. CODE § 6252(e). “Writing” is defined as “any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.” Gov. CODE § 6252(g).

² Gov. CODE § 6252(e).

³ See *California State University v. Superior Court*, 90 Cal.App.4th 810, 824-25 (1999).

⁴ Gov. CODE §§ 6253(c), 6255.

⁵ *California First Amendment Coalition v. Superior Court*, 67 Cal.App.4th 159, 165-66 (1998).

⁶ Gov. CODE § 6253 (a).

⁷ As used in CAL. WELF. & INST. CODE § 827

⁸ Id.

⁹ Gov. CODE § 6253.9.

¹⁰ Gov. CODE § 6253.1.

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TOXIC TREATMENT:
The Abuse of
Chemical Spray in
California Juvenile
Detention