OREGON

CIVIL RIGHTS

NEWSLETTER

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Police Use of Force in Portland

David Denecke

Every day police officers are faced with dangerous and even life-threatening encounters with the public. And, every day, members of the public may be faced with dangerous and even life-threatening encounters with the police. This article will attempt to explain how law and public policy deal with this intersection of policing and private rights when the police use force.

At least four sets of rights and responsibilities are involved in evaluating police use of force: (1) the rights of the individual against whom force is used, (2) the rights of the public in whose name force is used, (3) the rights of the body politic (government) whose police employee uses force, and (4) the rights of the individual police officer who carries out the use of force.

The Law

This article will not attempt a detailed discussion of all the law that draws the legal lines regarding police use of force. The basic source of an individual's legal protections against wrongful police use of force are found in the United States Constitution (the Fourth Amendment, which establishes the "right of the people to be secure . . . against unreasonable searches and seizures," and the Fourteenth Amendment, which establishes the right to "due process" and "equal protection of the laws"). Private vindication of these constitutional rights is provided to an individual by § 1983 of the Civil Rights Act of 1871. Private tort claims rights also exist, as in, for instance, ORS 30.265 and ORS 30.020 (Oregon's tort claims and wrongful death statutes).

The basic measure of whether police use of force is lawful is whether the force used is "reasonable" in light of all the circumstances. The amount of force that may reasonably be used is determined legally from the perspective of a reasonable police officer at the scene. The primary federal case governing this inquiry is *Graham v. Connor*, 490 U.S. 386 (1989), which interprets the rights of the police and individuals in light of the Fourth Amendment. The components of the analysis under *Graham* are (1) the severity of the crime involved, (2) whether the person poses an immediate threat to the safety of the police or others, and (3) whether the person is "actively" resisting arrest.

The police right to use force is limited further if the police know that the person is mentally ill, emotionally distraught, unarmed, in a situation exacerbated by wrongful police conduct, or in a situation in which alternative, less forceful, or less painful procedures are reasonably available to take the person into custody. The right to use deadly force in compliance with the Fourth Amendment is subject to an even more rigorous standard. The question then is whether the suspect also poses a significant threat of death or serious physical harm to the police or bystanders. *Tennessee v. Garner*, 471 U.S. 1 (1985).

Unlike state government, local government police forces do not have immunity from damages for the deprivation of an individual's constitutional rights under the Eleventh Amendment to the U.S. Constitution. Also, the liability of the employer police department for a police officer's wrongful use of force, under § 1983, does not follow traditional respondeat superior rules. Liability depends, instead, on whether the government's police force was carrying out a policy or decision that was officially adopted or customarily followed. *Edelman v. Jordan*, 415 U.S. 651 (1974); *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

The range of factual circumstances to which the courts have applied these constitutional tests is almost limitless: car chases, armed and unarmed children, armed and unarmed fleeing felons, mistaken identity, drugged suspects, physically or mentally ill suspects, accidental gun discharge, innocent bystanders, use of tasers and bean bags resulting in death, use of routine manual physical force resulting in death. Many rules of police

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Supreme Court Update

Kyle Busse
Busse & Hunt

Elizabeth Bonucci
Fisher & Phillips LLP

Certiorari Granted

***Borough of Duryea v. Guarnieri*, No. 09-1476 (Oct. 12, 2010)**

In this case out of the Third Circuit Court of Appeals, the Court will determine whether public employees may sue their employers for retaliation under the First Amendment's petition clause even when the underlying protected conduct was a matter of private concern, a question on which the circuits are split. The Third Circuit held that the plaintiff, a public employee, could bring a petition-clause claim based on alleged retaliation for filing a private grievance against the municipality defendant. (To bring a claim for retaliation under the First Amendment's free speech clause, a public employee's protected conduct must have been a matter of public concern.)

***Thompson v. North American Stainless*, No. 09-291 (June 29, 2010)**

The Court will hear this case out of the Sixth Circuit Court of Appeals regarding whether a third party is protected under the anti-retaliation provisions of Title VII. The plaintiff in this case alleged that he was terminated in retaliation for his wife's filing a gender-based discrimination complaint with the EEOC against their mutual employer. The district court granted summary judgment in favor of the employer, and the Sixth Circuit affirmed. The court reasoned that because the plaintiff did not engage in any protected activity himself, he was not in the class of persons protected from retaliation under Title VII.

***Wal-Mart Stores, Inc. v. Dukes*, No. 10-277 (Dec. 6, 2010)**

Please see page 4 of this newsletter for a discussion of this case. ✦

Kyle Busse, an associate of Busse & Hunt, represents employees in employment cases. Elizabeth Bonucci, an associate of Fisher & Phillips LLP, represents employers in labor and employment law.

Section Cosponsors CLE on Litigating Cases

On October 15, the OSB Civil Rights Section and the OSB CLE Seminars Department presented "Successfully Litigating a Civil Rights Case." The CLE seminar opened with Bureau of Labor and Industries Commissioner Brad Avakian reporting on recent changes in civil rights laws and enforcement strategies, as well as on potential legislation for the upcoming legislative session.

Next, Roger J. DeHoog of the Special Litigation Unit, Trial Division, at the Oregon Department of Justice (DOJ) and Steven Wilker of Tonkon Torp LLP gave advice about pleading a civil rights claim in the wake of the *Twombly* and *Iqbal* cases. Allison Rhodes and Judith A. Parker of Hinsaw & Culbertson LLP followed with an hour on ethics, focusing on fee issues and settlement considerations.

U.S. District Court Judges John V. Acosta, Anna J. Brown, and Thomas M. Coffin began the afternoon with a panel on how practitioners can most effectively advocate in civil rights cases. Next, Liani J. H. Reeves of the Torts Section, Trial Division, at DOJ spoke about dealing correctly with discovery obligations concerning electronically stored information. Beth Englander of Disability Rights Oregon, Kimberly K. Tucker of Swanson Thomas & Coon, and Alexander M. Bassos of Metropolitan Public Defender in Portland discussed how to deal with the special challenges of representing clients with mental illnesses. Rounding out the day, Judge Susan M. Leeson, a staff mediator with the U.S. District Court in Oregon, moderated a discussion by William W. Manlove III of the Portland City Attorney's Office and Dana L. Sullivan of Buchanan Angeli Altschul & Sullivan LLP of key considerations in the mediation of civil rights cases. ✦

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The purpose of this publication is to provide information on current developments in civil rights and constitutional law. Readers are advised to verify sources and authorities.

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The Civil Rights Unit at the Oregon Department of Justice

Diane Schwartz Sykes
Oregon Department of Justice

Attorney General John Kroger considers protecting the civil rights and civil liberties of all Oregonians to be one of the Oregon Department of Justice's top priorities. Attorney General Kroger successfully pursued funding during the 2009 legislative session, and hired attorney Diane Schwartz Sykes to lead the effort, to create a Civil Rights Unit at the Oregon Department of Justice (DOJ).

The Civil Rights Unit coordinates with district attorneys and the DOJ Criminal Justice Division to identify hate crime victims, monitor hate groups, and prosecute Oregon's hate crime statutes in the appropriate cases. DOJ recently launched an online hate crime reporting system to facilitate and enhance hate crime reporting. The Civil Rights Unit conducts outreach to educate the community about hate crimes and available resources.

Attorney General Kroger is committed to a woman's right to choose. The Civil Rights Unit is prepared to ensure that women maintain unfettered access to clinics and hospitals that offer reproductive services, including pregnancy termination and emergency contraception. Currently, DOJ monitors religious and secular hospital mergers to assess whether a restriction in access to reproductive services would result.

The Civil Rights Unit also places high priority on defending the rights of Oregonians to peaceably assemble and engage in protected free speech afforded by Article I, Section 8, of the Oregon Constitution. DOJ has provided testimony to a public body on proposed legislation and has filed amicus pleadings in a case involving infringement on the right to assemble and exercise free speech.

Wage theft is a pervasive problem in Oregon and nationally. Immigrant populations are often targeted with intentional nonpayment of wages by individuals and businesses that are apparently undeterred by enforcement of civil remedies. The Department of Justice Civil Rights Unit coordinates with the Criminal Justice Division to pursue criminal sanctions against pervasive and repeat offenders to ensure that Oregonians receive the wages they are rightfully owed.

Veterans and their families are often targeted or taken advantage of. Fortunately, servicemen and women who return from deployment are afforded reemployment rights and protections under Oregon and federal law. These rights include the ability to resume employment at the position, rate of pay, and benefits that a veteran would have attained if not for the period of deployment. Attorney General Kroger, who is a veteran, remains fully committed to ensuring that veterans enjoy these protections.

Discrimination in the gay, lesbian, bisexual, and transgender (GLBT) community continues to persist. The Civil Rights Unit intends to challenge discriminatory treatment wherever it may exist and enforces the Oregon Family Fairness Act.

The Oregon Department of Justice has historically played a role in regulating discriminatory practices in trade and commerce through enforcement of the Unlawful Trade Practices Act (UTPA). The UTPA is a tool that the Civil Rights Unit may use to ensure that vulnerable populations, such as the elderly, veterans, and minorities, are not targeted for the deceptive sale of goods and services. DOJ also enforces the Elderly Persons & Persons with Disabilities Abuse Prevention Act to prevent physical or financial abuse of the elderly and disabled.

The Civil Rights Unit is working to ensure that minority contracting statutes, intended to benefit minorities, women, and disadvantaged and emerging small businesses, are fully complied with. If a non-disadvantaged business seeks certification in order to bid on contracts that it would not otherwise be eligible to receive, the Civil Rights Unit will initiate litigation under the False Claims Act to deter these practices.

DOJ seeks opportunities to work with state and federal agencies to strengthen statewide enforcement of civil rights. As a member of the Oregon Human Trafficking Task Force, the Civil Rights Unit accepts referrals from law enforcement agencies to enforce Oregon's involuntary servitude and human trafficking laws. The Attorney General's Office will utilize its authority, under the Oregon Racketeer Influenced and Corrupt Organizations Act (RICO), to pursue individuals and businesses that exploit human labor (often immigrants) for their economic advantage.

The Oregon Bureau of Labor and Industries (BOLI) administratively enforces civil wage and hour laws and has primary authority to enforce ORS 659A, the civil rights statutes for employment, housing, and public accommodations. The DOJ Civil Rights Unit is interested in partnering with BOLI and other state agencies to pursue litigation in circumstances involving repeat offenders, egregious facts, and multistate actions. The Civil Rights Unit has already referred several matters to BOLI, and DOJ and BOLI partnered to defend the Worker Freedom Act. The attorney general has the authority to litigate fair housing cases, in cooperation with BOLI, and will actively pursue housing discrimination and predatory lending cases when appropriate.

Through aggressive enforcement and partnership, the Oregon Department of Justice Civil Rights Unit is committed to a united effort to advance the civil rights and liberties of all Oregonians. ✦

Diane Schwartz Sykes heads up the Civil Rights Unit for the Oregon Department of Justice.

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Recent Decisions

Ninth Circuit Court of Appeals

Richard F. Liebman
Amy L. Angel
Barran Liebman LLP

***Alcazar v. Catholic Archbishop of Seattle*, 598 F.3d 668, *petition for rehearing en banc granted*, 617 F.3d 1101 (9th Cir. 2010)**

Suing the archbishop under the Washington Minimum Wage Act, the plaintiff alleged that he was not appropriately compensated for work he performed during training to become an ordained priest. Affirming the district court, a three-judge panel of the Ninth Circuit held that the First Amendment's "ministerial exception," which protects religious institutions from suits under employment statutes when application of the statute would interfere with their decisions about ministers, barred the plaintiff's suit.

The court announced a new test for the ministerial exception, holding that an employee cannot claim protection of an employment statute when he (1) is employed by a religious institution, (2) was chosen for the position based on religious responsibilities, and (3) performs religious duties and responsibilities. The case was argued to an en banc panel on September 22.

***Brownfield v. City of Yakima*, 612 F.3d 1140 (9th Cir. 2010)**

The ADA allows an employer to insist that an employee undergo a disability-determination exam only if it is "job-related and consistent with business necessity." In this case, a municipal police officer argued that the city violated this standard when it "preemptively" ordered him to undergo a mental health evaluation after he exhibited emotionally volatile behavior (including a series of angry and violent outbursts, both on and off the job), without waiting for a negative impact on his job performance.

The Ninth Circuit disagreed, concluding that because the city had reasonable cause to question the officer's competence to perform his job, it satisfied the job-related/business necessity standard when it insisted on the examination, without waiting for more dire results to follow.

***Carver v. Holder*, 606 F.3d 690 (9th Cir. 2010)**

When a charging party prevails before the EEOC but does not obtain all of the relief sought, the charging party may not simply challenge in court the finding with respect to the relief. Instead, the charging party is limited to either a trial *de novo*, putting at issue both liability and damages, or a suit to support the EEOC award as rendered; the challenging party may not challenge only part of the decision.

***Doyle v. City of Medford*, 606 F.3d 667 (9th Cir. 2010)**

A group of retired municipal employees sued on a Fourteenth Amendment due process theory, alleging that the city improperly deprived them of a property interest when it denied them city-funded health benefits, which they argued were mandatory under a state statute, ORS 243.303, obligating health benefits "insofar as and to the extent possible." Following the Oregon Supreme Court's ruling, on a certified question from the Ninth Circuit, that under ORS 243.303 a local government could, in the exercise of good faith discretion, choose not to offer employee health benefits, the Ninth Circuit held that the statute was too indeterminate to create a protectable property interest under the Fourteenth Amendment.

***Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010)**

The plaintiff and others sued Wal-Mart alleging sex discrimination (in pay and promotions) in violation of Title VII. The trial court certified a class of women employed at Wal-Mart at any time since December 26, 1998, who had been or may be subjected to the challenged practices; the class potentially includes some 1.5 million Wal-Mart employees. The retailer fought class certification on a number of grounds, including that individual interests predominated, and that the case was not appropriate for class resolution. The Ninth Circuit, en banc, denied the retailer's challenge to class certification on the claims for declaratory and injunctive relief and back pay. The court remanded the punitive damages claims, however, for the lower court to determine whether there should be a separate class of current employees seeking punitive damages, and also to determine whether a separate class for former employees was appropriate.

The U.S. Supreme Court granted certiorari in this case, No. 10-277, on December 6, 2010.

***EEOC v. Prospect Airport Services, Inc.*, No. 07-17221, 2010 WL 3440119 (9th Cir. Sept. 3, 2010)**

Other males had welcomed a female co-worker's sexual advances, but welcomeness is subjective and individual. The evidence showed that the plaintiff had no prior romantic or sexual relationship with the female employee, had told her that he did not welcome such a relationship despite her "relentlessness" propositions, and had complained to management, whose response was inadequate. Therefore the Ninth Circuit reversed the lower court's grant of summary judgment for the employer on the plaintiff's sexual harassment claim.

***Hawn v. Executive Jet Mgmt., Inc.*, 615 F.3d 1151 (9th Cir. 2010)**

When male pilots engaged in sexual harassment of a female flight attendant, it was no defense to state that females had engaged in similar conduct against them without being terminated since, in this case, the male pilots did not report any such behavior until after they had themselves been terminated.

***Murray v. Principal Fin. Grp., Inc.*, 613 F.3d 943 (9th Cir. 2010)**

In determining whether a plaintiff is an independent contractor or an

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employee, "a court should evaluate 'the hiring party's right to control the manner and means by which the product is accomplished.'" Applying that test, the court found that the plaintiff, an insurance agent, was an independent contractor, noting that she was free to decide when and where she worked, maintained her own office, scheduled her own time off, did not earn vacation or sick pay, was paid solely on commission, and reported herself as self-employed to the IRS.

***Porter v. Winter*, 603 F.3d 1113 (9th Cir. 2010)**

A former civilian Navy Department employee won a portion of his administrative case against the Navy alleging Title VII violations (gender discrimination and retaliation). He filed suit to recover the attorney fees and costs he was awarded in the administrative proceeding, and the Navy challenged the trial court's jurisdiction. The Ninth Circuit joined the Eighth and Tenth Circuits in following the Supreme Court's decision in *New York, Inc. v. Carey*, 447 U.S. 54 (1980), which held that the jurisdiction over Title VII claims extends to suits to enforce attorney fees and costs awarded for Title VII violations.

***Spencer v. World Vision, Inc.*, 619 F.3d 1109 (9th Cir. 2010)**

To qualify as a "religious organization" under Title VII, an organization does not have to be affiliated with any particular church. In this case, a Christian humanitarian relief organization was held to be covered by the exemption from Title VII even though it was not affiliated with any particular Christian church.

***Traxler v. Multnomah County*, 596 F.3d 1007 (9th Cir. 2010)**

The Ninth Circuit joined the Fourth, Fifth, and Tenth Circuits and disagreed with the Sixth Circuit in finding that the court, not the jury, determines both the availability of front pay and the amount of the award, since the award of front pay under the FMLA is based on the statutory provision permitting the trial court to award "such equitable relief as may be appropriate." (29 USCA § 2617(a)(1)(B)).

***United Steelworkers v. Shell Oil Co.*, 602 F.3d 1087 (9th Cir. 2010)**

If a wage-and-hour class action was properly removed to federal court under the Class Action Fairness Act, the federal court should retain jurisdiction even after denying class action status.

***Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935 (9th Cir. 2009)**

When a complaint has been filed asserting class status but the plaintiff has not yet filed for certification, the defendant may, nonetheless, move to deny class certification.

Oregon Court of Appeals

***Livingston v. Metropolitan Pediatrics LLC*, 234 Or. App. 137 (2010)**

The plaintiff, a former pediatrician with the defendant's medical clinic, sued under a variety of statutory and common law theories, alleging that he was retaliated against after he lodged internal complaints about the clinic's storage of vaccines. The clinic moved to compel arbitration pursuant to the parties' employment agreement, which the plaintiff opposed on the grounds that it was unconscionable based on (most notably) its attorney-fee and cost-shifting features, its confidentiality provisions, and its requirement that arbitration be conducted under the rules of the American Arbitration Association. The plaintiff also contended that his obligation to arbitrate employment disputes did not survive the termination of the employment agreement containing the arbitration clause. The Oregon Court of Appeals rejected the plaintiff's arguments, finding that the agreement was not unconscionable as a matter of law and that the agreement to arbitrate survived termination of the employment contract. ✦

The authors represent employers in labor and employment law.

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POLICE USE OF FORCE CONTINUED FROM PAGE 1

engagement have been pronounced, and many judgments have been made, both for and against the force used, but the clear conclusion to be drawn from all these situations is that there is no easy answer.

The Rights of the Government and Police Discipline

Whether an individual's rights were violated when the police used force is usually determined by a court or jury, deciding for or against the police officer and the officer's employers (the government). The liability involved can be civil or criminal, and in most high-profile public cases, also political. Either the populace supports its police and elected officials or it does not. Either the public is informed and empowered by the fact-finding process, or it is not. Either the public supports the outcome, or it does not. The public's support of and confidence in the proper use of force is important, both to the police and to the public.

To try to ensure that public confidence and support exist, many governments and police forces, including Portland's, have adopted detailed policies on when and how police force may be used; the reporting of the use of force to police management; the review of police use of force by police and government; the adoption of an employment discipline process to hold police accountable for wrongful use of force; and, under collective bargaining agreements, a process for police officers to appeal the employer discipline that may be imposed.

This article focuses on the city of Portland, as the police officers' employer, and the city's process of evaluating police use of force, as well as the administration of discipline for alleged wrongful use of force. This process is both an employment procedure (providing the employee police officer due process when deciding whether the officer should be

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disciplined) and a government and police department process to evaluate whether policies and procedures for use of force are adequate and effective. The employee-discipline process is not a public forum, and evidence, findings, and discipline recommendations are generally not public information.

Portland's use-of-force process incorporates police management, citizen, and peer police review. In 2004, under former Police Chief Derrick Foxworth and former Portland Mayor Tom Potter, Portland created a Use of Force Review Board. The Use of Force Review Board was charged with the responsibility of reviewing incidences of use of force by the Portland Police Bureau and then advising the police chief on proper discipline. This review process examined all situations involving alleged wrongful use of deadly force, all in-custody deaths, and the use of less-than-deadly force that is allegedly outside of police policy and training parameters.

City of Portland policies on police conduct, including use of force, can be found in the *Portland Police Bureau Manual of Policy and Procedure*, at www.portlandonline.com/police/index.cfm?c=29867. These directives (over 650 pages, as of 2009) are modified from time to time, but Directives 1010, 1026, 1030, 1040, 1050, and 1051 cover policies and procedures regarding use of force.

The purpose of the Use of Force Review Board has been to evaluate whether an individual police officer's conduct complies with policy directives. Because directives must be interpreted in light of police training, board members also must know how the police training department trains the officers, and how to evaluate whether a police officer's conduct follows that training. (When I joined the Use of Force Review Board in 2004, its members were required to undergo 13 weeks of intensive, hands-on police training on virtually all aspects of police use of force.)

Discipline of Portland police officers is an employment matter and is ultimately decided upon by the chief of police. Disciplinary decisions are reviewable by either the mayor or a Portland city commissioner, whoever is overseeing the Portland Police Bureau at the time (currently, the mayor). The Use of Force Review Board (now renamed, as explained below) makes recommendations to the chief of police, and the chief either accepts or modifies the recommendation. The board may, for example, conclude that particular conduct does not comply with a police use-of-force directive and may recommend that the police officer receive a 30-day suspension without pay. The police chief can accept or reject the determination that the action is "out of policy" (contrary to a police directive) and can accept or reject the disciplinary action recommended. Discipline can range from police-commander counseling of the officer involved, up to, and including, termination of employment.

Further complexity in the disciplinary process is created by the terms of the collective bargaining agreement (CBA) between the city and the police union. Under the CBA, discipline and discharge of police union members are subject to contractual requirements and, potentially, union grievances. (Grievance procedures have historically existed because union police officers are denied the right to strike according to the collectively bargained-for union contract. In exchange, police officers have the right, through a grievance process, to have a third-party arbitrator, in effect, overrule the discipline handed down by the city. The arbitrator's decision is often a compromise of some sort and cannot be appealed.)

In 2010 Portland made some changes to its use-of-force review process. Today review of police use of force is conducted by a body called the Police Review Board (Portland City Code 3.20.140), which combined the former Performance Review Board and Use of Force Review Board into one body. The new board has authority over cases in which an officer faces suspension without pay and in certain cases that involve use of force (officer-involved shooting, in-custody death, officer-caused physical injury requiring hospitalization, and out-of-policy uses of less than lethal weapons).

The makeup of the voting membership of the board also changed, to include five voting members: one citizen member (two in cases of use of force); one peer officer member (two in cases of use of force); the commander or captain who supervises the officer, the assistant chief who leads the service branch that the officer is attached to, and the director of the Independent Police Review Division (a division of the Portland Auditor's Office). Formerly, members of the board were selected solely by the police chief, but now the Portland city auditor recommends the citizen members, who are approved by the Portland City Council.

As provided by the new ordinance, the Police Review Board is facilitated by a non–Police Bureau employee, who is also responsible for submitting to the chief of police the board's recommended findings and proposed discipline in each case. At least twice a year, the board will issue a public report summarizing its findings and possible training or police issues.

Impressions of the Discipline Process

I was a member of the Use of Force Review Board for over five years. During that time, I sat on hearings involving several high-profile cases of alleged wrongful use of force and other police wrongdoing. This experience has, for me, opened a window into the complexity and challenge of big-city policing.

Training

Police conduct is dictated, in part, by the department's *Manual of Policy*

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and Procedure. There are over 1,000 police officers in the Portland Police Bureau, and these policies and procedures (directives) form the rules of engagement for police work. Each officer must be carefully hired and then thoroughly trained in the department's policy directives and technical methods to deal with potentially life-threatening circumstances.

Public Misimpressions

Here are my thoughts on five common misimpressions about police use of force.

1. Some people think that police officers can use force as a means of punishment. The use of force by police, however, should never be used as punishment. Police are employed to observe, investigate, and, if necessary, arrest people and take them into custody, but never to punish. Police are not jurors or judges, nor are they empowered to punish.

2. The police should never harm an individual. Though we would all like to see no harm come to anyone, use of force, and sometimes harm, is sometimes inevitable. There are some expectations that must be remembered: (1) everyone, citizen and police alike, has a reasonable expectation to be unharmed and to be treated with dignity; (2) police officers have the right to expect that their lawful commands will be followed; and (3) police officers swear an oath to uphold the law, and that may mean making lawful arrests, using lawful force and, if necessary, protecting himself or herself, protecting others, and possibly inflicting lawful harm or even death on another.

3. Some people think that police officers are protected by a code of silence. I can state unconditionally that in the discipline process in Portland, a code of silence, or protection of police officers, is not at work. Everyone involved, from the mayor to the chief of police to the Police Review Board, is very aware of the board's responsibilities to the officer, the city, and the public. Never in my experience on the board did its members, or the chief, attempt to hide facts or "go light" on an officer. To the contrary, peer officers and supervisors are sometimes more critical and particular about police conduct and adherence to directives than are the citizen members.

4. To some, the discipline review process appears to always take too long. There is no question that in many cases the discipline process has, in fact, taken too long. As with any crime, allegations of wrongful police conduct must be investigated thoroughly. These investigations may be difficult, expensive, and time consuming. The possibility of wrongful use of force may sometimes not be known until after the incident. Portland, like most cities, has an internal investigations division that is charged with investigating police conduct. When it is known that a use-of-force allegation will arise, an investigation begins immediately.

The time it takes for the discipline process to be conducted is a burden on both the police force and the individual officer. Officer-involved shootings and charges of excessive use of force sometimes result in paid administrative leave, at great cost to the taxpayers. Officers accused of wrongful use of force must work under a stressful cloud of suspicion and accusation and, as a result, may be removed from regular duty. Portland has taken steps to speed up the discipline process, but the process will, in most cases, not be fast enough, for all involved.

5. Some people think that the Portland Police Bureau has made no changes in its use of force. Most police forces are organized and operate on a semi-military model, and police forces are, by their hierarchical nature, rigid and resistant to change. At least in Portland, however, public perception, political pressure, enlightened management, lawsuits, and better technology and training have changed the way the police use force. Contrary to news headlines and popular perception, police use of deadly force has substantially declined, compared to prior periods. Tasers, bean bags, other less-than-lethal alternatives, and training have undoubtedly saved many lives. There is no doubt that these less-than-lethal alternatives can be overused and misused, but without them, more people would die in confrontations with the police.

Training, Safety, and Fear

Police officers are trained to expect and be entitled to obtain public compliance with their lawful commands. These commands must be reasonable and can range from "Come here, I want to talk to you" to "Drop the weapon!" Police are taught that there is a continuum of increasing degrees of force measures they may use under proper circumstances to obtain compliance with their lawful commands.

The decision to use force is not made in a vacuum. The danger to the suspect, the police officer, and bystanders must be considered. A foot chase or car chase is inherently dangerous and is not to be undertaken, except in appropriate circumstances. If the police are trying to handcuff a suspect and meet resistance, they may use force to obtain the suspect's cooperation. If the police are trying to move a suspect and the suspect refuses to be moved, the police may use force to accomplish the move. If the arrestee is spitting at the police, for their protection police may use a bag cover the person's head. If a suspect is armed with a dangerous weapon, in some circumstances the threatened officer may shoot the suspect in self-defense, in order to stop the threat to the officer. To many of us, these may seem like reasonable measures for the police to use.

Despite the extensive training that each police officer is required to undergo, problems arise. A suspect's emotional turmoil or mental illness

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can rise to the level of self-destruction, and some people may want to die at the hands of the police through "suicide by cop." The inebriated, drugged, highly upset, or mentally ill suspect presents a special problem. These people may be unable, or unwilling, to comply with lawful commands. The use of tasers and bean bags may be less-than-lethal alternatives, but these alternatives are not always present or effective, or the time needed to use them may not be available.

Police are trained in the principals of physical action and reaction. That is, under certain circumstances, the officer cannot reasonably defend himself against an armed suspect because the officer cannot react quickly enough. Unlike depictions on television, the time required for a police officer to react to the sight of a weapon being used is usually too short. As a result, police are trained to act first if threatened with serious physical injury, by using the force reasonably necessary to stop a perceived threat. If a suspect is holding a knife or gun and is perceived to be an immediate threat to the police officer or bystanders, the officer is trained to "stop the threat"—to defend himself, or the bystanders, or to gain compliance with the officer's lawful commands. There may also be no time for a command; split-second decisions have to be made. If deadly force is necessary, training dictates that the threat be stopped by the officer firing his or her weapon at the "center mass," the body torso. Thus an officer's shot is often lethal.

Some situations may also give rise to deadly mistakes: a police officer mistakes a cell phone for a gun, for example, or mistakes a person's reaching for a car registration in the glove box as reaching for a weapon. A police officer responds to a reported "breaking and entering" and encounters a young man under the bed covers. The police officer reasonably commands him to get up and "show your hands," but it turns out that the young man is the lawful tenant and does not speak English. The outcome in such a situation can be tragic.

During tense situations, the attitude of both the police and the suspect is very important to the outcome. If police are overly fearful or aggressive when responding to a threatening or ambiguous situation, they may overreact or compound the confrontation. If a suspect is armed, drunk, on drugs, resistant, or suicidal, the confrontation may spiral out of control. Racial and ethnic stereotypes and language differences can heighten misunderstanding, fear, and anger during emotionally charged crisis encounters. A person high on drugs may run naked in freezing temperatures, resist arrest with the equivalent strength of many people, and have no reaction to a taser or even a gunshot wound (a phenomena sometimes known as "excited delirium"), which may make arrest without use of significant force almost impossible.

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We must consider the implications involved in the use for force for the suspect, the police, and the government. The results may be the suspect's serious injury or death, police injury or death, accusations against police officers, loss of jobs, potential civil and criminal liability, and, for the government, the cost of investigation, police time off during investigation, high litigation defense costs, potentially millions of dollars spent on liability, and the litigation of police union grievances.

One thing is certain about police use of force: The public needs the best-suited, best-trained, best-equipped police force possible. Citizens' lives, public trust, and civic order depend on it. ✦

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