

1999 USE OF FORCE

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- I. General introduction on use of force theory
 - A. The law values life above all things and seeks to avoid forceful encounters between citizens.
 1. Historical perspective-this concept has governed since the middle ages.
 2. But what about the rights of property owners? Do they have any rights?
 - B. This class is a class on legal theory and its application for police officers.
 1. Statutes lay out what the law is.
 - (a) How are laws made?
 - (1) examples of different law making bodies and types of laws they make.
 - (b) To whom do they apply?
 2. Caselaw gives guidance and clarification.
 - (a) What is caselaw?
 - (b) How are appellate decisions made?
 3. In addition, Portland Police Bureau General Orders give specific directives to Portland Police Bureau officers.
 - (a) Who makes these orders?

(b) Why are they necessary?

C. Oregon law is very specific as to the right of every person concerning the use physical force.

1. Analysis of the law of justification

(a) ORS 161.190 **JUSTIFICATION AS A DEFENSE**

In any prosecution for an offense, justification, as defined in ORS 161.195 to 161.275, is a defense.

(1) What is meant by "a defense"?

(b) ORS 161.195 **JUSTIFICATION DESCRIBED**

Conduct which would otherwise constitute an offense is justifiable and not criminal when it is required or authorized by law or by a judicial decree or is performed by a public servant in the reasonable exercise of official powers, duties or functions.

(1) When is something required or authorized by law?

(2) When is something required by a judicial decree?

(3) When is something performed by a public servant in the reasonable exercise of official powers, duties or functions?

D. Police officers and citizens stand with equal footing under most of the ORS.

E. Police officers have additional authority to use force under circumstances that a citizen could not. The Legislature has promulgated laws specific to law enforcement.

1. ORS 161.235 **USE OF PHYSICAL FORCE IN MAKING AN ARREST OR IN PREVENTING AN ESCAPE.**

2. ORS 161.239 **USE OF DEADLY PHYSICAL FORCE IN MAKING AN ARREST OR IN PREVENTING AN ESCAPE.**

F. The United States Supreme Court has a say in all of this in *Tennessee v. Garner*.

1. Firing a shot at a fleeing escapee is the equivalent of arresting that person, and, therefore, must be supported by probable cause.

G. PPB officers are also required to function within their general orders regarding the use of force.

1. 1010.10 **USE OF DEADLY PHYSICAL FORCE**
2. 1010.20 **USE OF PHYSICAL FORCE**
3. 1030.00 **USE OF BATON**
4. 1040.00 **AEROSOL RESTRAINTS**
5. 1050.00 **LESS LETHAL SHOTGUN AND MUNITIONS**
6. 870.20 **HANDCUFFING, SEARCHING AND TRANSPORTATION OF PERSONS UNDER ARREST OF DETAINED**

H. So, there are 3 concepts at work for officers in use of deadly physical force situations--the goal is to never have an officer indicted.

1. ORS requires an officer to "reasonably believe" a certain condition exists before deadly force is allowed.
2. Federal caselaw in *Tennessee v. Garner* requires probable cause before deadly force is allowed to effect an arrest.
3. PPB general order requires probable cause **and** a significant threat before deadly force allowed

II. Introduction to use of force legal theory

A. There are terms that must be clearly understood, most of which you may have studied in a previous class on ORS chapter 161:

1. Physical injury means an injury that
 - (a) impairs a person's physical condition, or
 - (b) causes substantial pain.
 - (1) examples of physical injury

2. Serious physical injury means a physical injury that either:
 - (a) creates a substantial risk of death, or
 - (b) causes serious and protracted disfigurement, or
 - (c) causes protracted impairment of health, or
 - (d) causes protracted loss or impairment of the function of any bodily organ(1) examples of serious physical injury

3. Deadly weapon means any instrument, article or substance specifically designed for and presently capable of causing death or serious physical injury.
 - (a) examples of deadly weapons

4. Dangerous weapon means any weapon, device, instrument, material, or substance which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or serious physical injury.
 - (a) examples of dangerous weapons

5. Physical force includes, but is not limited to, the use of electrical stun gun, tear gas or mace.
 - (a) can someone use physical force but not cause an injury?

6. Deadly physical force means physical force that under the circumstances in which it is used is readily capable of causing death or serious physical injury.

7. ORS 161.245 reasonable belief means
 - (a) (1) a reasonable belief in facts or circumstances which, if true, would in law constitute an offense.
If the believed facts or circumstances would not in law constitute an offense, an erroneous though not unreasonable belief that the law is otherwise does not render justifiable the use of force to make an arrest or to prevent an escape from custody.

- (b) (2) a peace officer who is making an arrest is justified in using physical force unless the arrest is unlawful and is known by the officer to be unlawful.
 - (c) When is an arrest unlawful?
 - (d) How do the above provisions affect law enforcement?
8. ORS 131.005 Probable cause means that there is a substantial objective basis for believing that more likely than not an offense has been committed and a person to be arrested has committed it.
- (a) "substantial objective basis..." who decides what this is?
 - (b) "more likely than not..." what does this really mean, and what do I need to do to establish this in my report?

B. Use of force generally

1. ORS 161.205 **USE OF PHYSICAL FORCE GENERALLY**

The use of physical force upon another person that would otherwise constitute an offense is justifiable and not criminal under any of the following circumstances:

- (a) parent, guardian, supervising person of a minor or an incompetent person
 - (1) may use reasonable physical force
 - (2) when and to the extent reasonably believes necessary
 - (3) to maintain discipline or promote the welfare of the minor or incompetent person
 - (4) applies to teachers in school, school events on or off of school property
- (b) an authorized official of jail, prison, or correctional facility
 - (1) may use physical force when reasonably believes it is necessary to maintain order and discipline.
- (c) common carriers of passengers
 - (1) may use physical force when reasonably necessary to maintain order
 - (2) deadly force only when the person reasonably believes it is necessary to prevent death or serious physical injury.

- (d) *person acting under reasonable belief another is about to commit suicide or inflict serious physical self-injury*
- (1) *may use physical force to extent reasonably believed necessary to thwart the result.*
- (e) *in self-defense or in defending a third person, in defending property, in making an arrest or in preventing an escape.*

2. Use of physical force - **General Order 10.10.20**

The Portland Police Bureau authorizes its members to use physical force in a police action:

- (a) when and to the extent it is reasonably necessary to accomplish some official purpose, and
- (b) the amount of physical force authorized may vary in degree and shall only be the amount of force that is reasonably necessary, depending upon the circumstances of each situation taken as a whole, to accomplish the official purpose.

(1) Is this different than the ORS?

C. The objective/subjective operation of ORS 161.209 **USE OF PHYSICAL FORCE IN DEFENSE OF A PERSON**

1. The standard test applied to all use of force scenarios is controlled by this statute:

A person is justified in using physical force upon another person

- (a) for self-defense, or
- (b) to defend a third person:
 - (1) from what the person reasonably believes to be the use or imminent use of unlawful physical force, and
 - (2) the person may use a degree of force which the person

reasonably believes is necessary for the purpose.

2. **Objective standard**--was it reasonable to believe that the use of unlawful force by another was imminent? What factors contributed to this decision?
3. **Subjective standard**--did you use that degree of force that was reasonably necessary under the circumstances?
4. What may be reasonable for an untrained citizen may be unreasonable for a sworn officer, i.e. trained in defensive tactics, has mace and baton, etc.
5. You take your training home with you and therefore you are always a police officer. (Subjectively under ORS, actually per **general order 10.10.10**).
6. You need to begin thinking about articulation of the underlying facts you observed.
7. What will the reasonableness of your conduct will be determined from?
 - (a) What you know
 - (b) What you can articulate about what you saw
 - (c) How and to what degree you responded
8. PPB officers are all held to the standard set out in your PPB general order. Why?

9. The PPB general order is specifically designed to limit you in keeping your conduct within the confines of the law.

III. The operation of the use of force statutes generally

A. Analysis of ORS 161.215 **LIMITATIONS ON USE OF PHYSICAL FORCE IN DEFENSE OF A PERSON** A person is not justified in using physical force upon another person if:

1. With intent to cause physical injury or death to another, the person provokes the use of unlawful physical force by that person, or
2. The person is the initial aggressor, unless they withdraw from the encounter and effectively communicate to the other person their intent to do so, and the other person continues or threatens to continue the unlawful use of force, or
3. The force involved is a product of combat by agreement
(Mutual combat)

State v. Gibson (1978) defendant came to his wife's aid in a scuffle with a bartender, where it was the wife who acted unlawfully in the first instance by grabbing the bartender, also a woman, whom she thought was "giving her man a bad time." Can defendant be prosecuted for assault if the bartender is injured?

B. Analysis of ORS 161.219 **LIMITATIONS ON USE OF DEADLY PHYSICAL FORCE IN DEFENSE OF PERSON** Deadly force is:

1. Not justified unless the person reasonably believes the other person is
 - (a) committing or attempting to commit a felony involving use or threatened use of physical force against a person, or
 - (b) committing or attempting to commit a burglary in a dwelling, or

- (c) using or about to use unlawful deadly force against a person.
2. **Objective/subjective test** as it relates to private citizens v. police officers
 - (a) objective factors = use of unlawful force imminent
 - (b) subjective factors = did person use degree of force reasonably necessary for the purpose
 3. What is the difference between a citizen and a p/o under the deadly force statute?
- A. Analysis of ORS 161.225 **USE OF PHYSICAL FORCE IN DEFENSE OF PREMISES** A person is justified in using physical force upon another person:
1. Person in lawful possession or control of premises
 2. When and to extent reasonably believes necessary
 3. To prevent or terminate what the person reasonably believes to be
 4. Commission or attempted commission of a criminal trespass in or upon the premises
 5. Deadly physical force only when reasonably believes necessary to prevent commission of arson or felony by force and violence by a trespasser, or in defense of a person.
 - (a) is this a shift away from deadly force?
 - (b) how does the law apply to arson?
- D. Analysis of ORS 161.229 **USE OF FORCE IN DEFENSE OF PROPERTY**
1. Other than deadly force: there is no lawful use of deadly force to defend property alone.
 2. May use physical force upon another person and to the extent reasonably necessary to prevent or terminate the commission or attempted commission by the other person of theft or criminal mischief of property.

3. Are there scenarios where a defense of property may shift to self-defense?

E. **Analysis of ORS 161.235 USE OF FORCE IN MAKING AN ARREST OR PREVENTING ESCAPE** (This is the 1st law enforcement statute)

A peace officer is justified in using physical force upon another person:

1. Only when and to the extent that the peace officer reasonably believes it necessary:
 - (a) to make an arrest or prevent the escape from custody of an arrested person unless the peace officer knows the arrest is unlawful; or
 - (b) for self-defense or to defend a third person from what the officer reasonably believes to be the use or imminent use of physical force while making or attempting to make an arrest or while preventing an escape

Stephens v. City of st. Helens (1962) a drunk refused to move from a chair in the police station. The court held that the officer's use of a device called a "come along" or "iron claw" which caused a shoulder separation, among other injuries, was not reasonable. Why?

F. **Analysis of ORS 161.239 USE OF DEADLY FORCE IN MAKING AN ARREST OR PREVENTING AN ESCAPE**

This is the law in Oregon re: fleeing felons. (Fleeing felons handouts and policy discussion)

1. Peace officer may only use deadly force when officer reasonably believes:
 - (a) crime committed by a person was a felony involving the use or threatened use of physical force against a person; or
 - (b) crime committed by the person was kidnapping, arson, escape 1, burglary 1, or any attempt to commit such crime; or
 - (c) when the use of deadly physical force is necessary to defend the officer or another from the use or threatened imminent use of deadly physical force; or
 - (d) the crime committed was a felony or an attempted felony and under the totality of the circumstances existing at that time and place, the use of force was necessary; or
 - (e) the officer's life or personal safety are endangered.

2. Will not justify reckless or criminally negligent conduct by an officer amounting to an offense against or with respect to innocent persons whom the officer is not seeking to arrest or retain in custody.

Lander v. Miles (1868) court held that firing a gun to secure an arrest is not justifiable when the arrest can be secured by less dangerous means.

Rich v. Cooper (1963) suspect resisted being placed in police car after duii arrest and po struck with sap 3 times: "Disputable presumption that a peace officer acted in good faith."

3. Tennessee v. Garner (1984) U.S. Supreme Court (Handout)
- (a) "where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force".
 - (b) how does Oregon law regarding use of deadly force to apprehend fleeing felons differ?
 - (c) what was the supreme court's rationale for this?
 - (1) legally, shooting a person is a "seizure" of that person.
 - (2) philosophically, "the use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use deadly force to do so...a police may not seize an unarmed, nondangerous suspect by shooting him dead".
4. Has Oregon adopted to the federal mandate?
- (a) Examine Aaskay v. Maloney (1917). Police detectives, having arrested one who they had reason to believe, and evidently believed, had committed a felony, had the right, when he broke away, to use such means and degree of force as was reasonably necessary to recapture him, including shooting at him, if without evil design and under circumstances of imperative duty.
 - (1) Is this the law today? Why not?
 - (b) State v. Haro (1993) ORS 161.209 and 161.219 must be read together, as they refer to each other. Therefore, the "necessity"

requirement applies to all uses of physical force.

- (c) we need to modify our statute to be in compliance with Garner: cross out "Reasonable belief" and add "probable cause". (Bullet=arrest).
5. The probable cause standard deals only with arrest situations.
- (a) for self-defense, defense of others, a reasonable belief is all that is necessary.
 - (b) what's the difference, then, between reasonable belief v. probable cause in a force situation?
6. How does the PPB general order on use of deadly force fit into all of this?

Use of deadly physical force-general order 10.10.10

"The use of statutorily defined weapons, barricades and vehicle ramming, constitutes deadly physical force.

The Bureau recognizes that members may be required to use deadly force when their life or the life of another is jeopardized by the actions of others. Therefore, state statute and Bureau policy provide for the use of deadly force under the following circumstances:

- (a) members may use deadly force to protect themselves or others from what they reasonably believe to be an immediate threat of death or serious physical injury,
- (b) a member may use deadly force to effect the capture or prevent the escape of a suspect where the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others, and, if feasible, some warning has been given."

G. Analysis of ORS 161.245 **REASONABLE BELIEF STATUS OF UNLAWFUL ARREST**

- 1. You can be wrong on the facts but never wrong on the law.

H. Analysis of ORS 161.249 **USE OF PHYSICAL FORCE BY PRIVATE PERSON ASSISTING ARREST**

Do not do this...

- 1. A person who has been directed by an officer to assist the peace officer to

make an arrest or to prevent an escape from custody is justified in using force when and to the extent the person reasonably believes force necessary to carry out officer's direction.

2. When directed by peace officer to assist, person may use deadly force only when:
 - (a) person reasonably believes deadly force necessary for self-defense or to defend a third person from what the person reasonably believes to be the use or imminent use of deadly force; or
 - (b) the person is directed or authorized by officer to use deadly force unless the person knows that the officer is not authorized to use deadly force under the circumstances.
3. What problems can you foresee when a citizen is directed or authorized to assist an officer making an arrest?

I. Analysis of ORS 161.255 **USE OF PHYSICAL FORCE BY PRIVATE PERSON MAKING CITIZENS ARREST**

This is arrest situation only (not a self defense situation); deadly force may not be used when merely arresting.

1. Private person acting on their own account is justified in using physical force when and to the extent they reasonably believe it is necessary to make an arrest or to prevent the escape from custody of an arrested person.
2. Justified in using deadly force only when the person reasonably believes it necessary for self-defense or to defend third person from use or imminent use of deadly physical force.

J. Analysis of ORS 161.260 **USE OF PHYSICAL FORCE IN RESISTING ARREST PROHIBITED**

1. A person may not use force to resist an arrest by a peace officer who is known or reasonably appears to be a peace officer.
2. Whether the arrest is lawful or unlawful

Careful!

3. This statute only governs reasonable force by police officers who are making an arrest.
4. Excessive force triggers the self-defense statutes as to the arrested person; the arrested person would be defending against armed police officers.

5. Where does that leave us on the objective and subjective tests? Free reign for citizen?

K. Analysis of ORS 161.265 USE OF FORCE TO PREVENT ESCAPE

1. A guard or peace officer employed in a correctional facility is justified in using physical force including deadly force when and to the extent that the guard or officer reasonably believes necessary to prevent escape of prisoner.
 - (a) how does this fit with Tennessee v. Garner and State v. Haro?

IV. General orders regarding other force issues

A. Use of baton G.O. 10.30.00

B. Aerosol restraints G.O. 10.40.00

1. Pepper mace is physical force for everyone
2. Mere possession of it does not immediately give rise to the use of physical force
3. There may be specific articulated facts that give rise to the use of physical force
4. There may be specific articulated facts that give rise to a greater level of force (deadly) in any scenario, but the mace will only be a contributing factor

C. Handcuffing, searching, and transportation of persons under arrest and detained G.O. 870.20

D. Non-lethal force such as the bean-bag shotgun. G.O. _____

V. Defenses

A. Choice of evils defense – ORS 161.200

1. Conduct which would otherwise constitute an offense is justifiable and not criminal when:
 - (a) necessary as an emergency measure to avoid an imminent public or private injury, and
 - (b) the threatened injury is of such gravity, that according to the ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.
2. Kids need food--shoplift okay?
Work in North Portland. And need gun--ccw okay?

3. Self-defense is considered a statutory choice of evils. Why?

B. Duress--ORS 161.270

1. Not a crime if actor coerced to do so by
 - (a) use or threatened use of unlawful physical force
 - (b) upon actor or third person
 - (c) force of such nature or degree as to overcome earnest resistance
2. Does not apply to murder
3. Not a defense for someone who intentionally or recklessly placed themselves in a situation where it would be probable that they would be subjected to duress.

State v. Fitzgerald (1973) inmate passed hacksaw to another because he had been told by escapee he had friends on the outside who would get the defendant--too vague a threat of future injury.

State v. Fowler (1978) third person held knife to the defendant's brother, but defendant and brother had 2 opportunities to leave = no duress.

4. Generally not a defense for a spouse acting under orders from spouse, unless there is a threat or use of physical force.

C. Entrapment == ORS 161.275

1. Not a crime if actor induced to do an act by law enforcement official, or person acting in cooperation with law enforcement, for purpose of obtaining evidence to be used against the actor in a criminal prosecution
2. Induced = actor did not contemplate and would not otherwise have engaged in the proscribed conduct
3. Merely giving the actor the opportunity to commit the offense doesn't amount to entrapment.

D. Intoxication == ORS 161.125

1. Intoxication can negate intentional or knowing mental state, but not a reckless mental state.

VI. Warrants

A. Arrest warrant-ORS 133.235

1. P/O shall state the officer's authority and reason for the arrest (3)
2. In order to make an arrest, a peace officer may use physical force (4)

3. In order to execute an arrest warrant, a peace officer may enter premises in which the officer has probable cause to believe the person to be arrested to be present
 4. If, after giving notice of the officers identity, authority, and purpose, the officer is not admitted, the officer may enter the premises, and by a breaking, if necessary.
- B. Search warrant == ORS 133.605
1. The executing officer may use the degree of force, short of deadly physical force, against persons, to effect an entry or to open containers, as is reasonably necessary for the execution of the search warrant with all practicable safety.
 2. Deadly force only where officer:
 - (a) reasonably believes that there is a substantial risk that things to be seized will be used to cause death or serious physical injury if their seizure is delayed and that the force used creates no substantial risk of injury to persons other than those obstructing the officer, or
 - (b) reasonably believes that the use of deadly physical force is necessary to defend the officer or another person from the use of threatened imminent use of deadly physical force.

State v. Mitchell (1971) Oregon recognizes exigent circumstances exception to the warrant requirement

State v. Wetteland (1972) generally, officers must knock and announce before entering premises unless some exigent circumstances.

State v. Steffes (1970) defendant, whose name matched that of a man involved in a series of hotel robberies, who had just been released from the pen, and that hotel clerks had stated that robber used a gun in each case, justified entry without knocking.

- VII. Community caretaking provisions ORS133.033 (1991)
- A. Any peace officer of this state is authorized to perform community caretaking functions—any lawful act inherent in the duty of a peace officer and to serve and protect the public, including:
 1. Enter and remain on premises of another, or stop or re-direct traffic, if it reasonably appears to be necessary to
 - (a) prevent serious harm to any person or property
 - (b) render aid to injured or ill persons

(c) locate missing persons

B. How does community caretaking affect law enforcement?

VIII. Mere conversation-do force statutes apply?

IX. Group discussion-force scenario

A. You and your partner are called to the scene of a domestic disturbance at a house. When you arrive the neighbors report loud arguments and they are concerned about the safety of the occupants. You approach the door and you hear loud arguing.

What do you do?

B. You knock on the door 5 times and yell police, but get no response. What do you do?

C. You step back and look through the window, and see two people in the back in the kitchen, arguing. It looks to you that it possibly might be getting physical but you can't tell because you only can see them passing in the doorway. What do you do?

D. You see a punch thrown by someone and you enter. The woman is clearly more aggressive and is yelling at the man, calling him a worthless piece of dirt. The man is fairly docile. What do you do?

E. The woman keeps coming at the man and looks like she might hit him. What do you do?

F. She keeps coming towards the man and you have to push her away. What do you do?

G. She approaches a 3rd time, you push her and she pushes you and says I'm going to kill him, and she does not respond rationally. What do you do? (Asp, mace, gun, takedown, cuff, arrest?)

H. Man starts reacting to what is occurring, and gets verbally hostile. What do you do? Search for officer safety okay?

I. Woman on ground starts kicking at you violently. What do you do?

J. Man pulls gun. What do you do?

(Of course, at this point you have a right to defend yourself against the man's deadly physical force. But 20-20 hindsight guaranteed to ask why you did not search for officer safety earlier)