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STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

August 8, 2014

Senator Brian Boquist
900 Court Street NE S305
Salem OR 97301

Re: Citizen involvement in public safety

Dear Senator Boquist:

You have asked our office a number of questions regarding citizen involvement in public safety and law enforcement activities. We have listed each question with its answer below.

1. What was the original legal authority for neighborhood watches when formed in conjunction with a sheriff or other law enforcement?

The modern concept of neighborhood watch programs has existed for at least 40 years, in large part due to initial efforts by the National Sheriffs' Association. In 1972, responding to rising crime levels, the association began the National Neighborhood Watch Program (for a time called USAonWatch) [1] to create partnerships among law enforcement agencies, community groups and individual citizens [2] to reduce burglaries and other common neighborhood crimes. [3] Neighborhood watch street signs and community events are some of the results of these partnerships. [4] Other groups perform similar functions. For example, the National Crime Prevention Council was founded in 1982 to provide training and information concerning community crime prevention. [5]

Today there are neighborhood watch programs in many cities and counties across Oregon. These programs are usually facilitated by the city government, as in Portland [6] and Salem; [7] the county sheriff, as in Washington County [8] and Douglas County; [9] or a local police department, as in Pendleton. [10]

There are no Oregon statutes specifically authorizing or even mentioning neighborhood watches. There are, however, statutes that seem to acknowledge the kind of law enforcement-community partnerships, including neighborhood watches, that originated from the National Sheriffs' Association's efforts as described above. In 1989, the Legislative Assembly created the Oregon Crime Prevention Resource Center [11] and a grant program for community projects confronting crime, such

as "block watches, task forces and alternative programs."[12] In 1993, the Oregon Crime Prevention Resource Center was abolished and the Oregon Community Crime Prevention Information Center was created and originally housed within the Board of Public Safety Standards and Training (now housed within the Department of Public Safety Standards and Training).[13] The regulating statutes, ORS 181.750 to 181.765, describe the center's duties, which include developing a "comprehensive, long-range, integrated program, implemented by local crime prevention councils, that will mobilize all Oregon residents . . . in a year-round preventive effort to reduce both crime and delinquency."[14] The center is also directed to "[a]ct as a clearinghouse for crime prevention efforts,"[15] provide a source of "resource materials, technical assistance, knowledge and skills necessary to develop, implement and evaluate crime prevention and intervention programs,"[16] "[p]rovide ongoing, programmatic support to crime prevention efforts of law enforcement and crime prevention councils"[17] and, upon the request of a local agency, provide assistance "in the form of on-site visits, resource development and distribution, consultation, community resource identification, utilization, training and promotion of crime prevention programs or activities."[18]

It should be noted that the center's duties are subject to the "limits of available funds,"[19] and there is no mention of the center on the website of the Department of Public Safety Standards and Training, nor is it featured on the department's organizational chart.[20]

2. Today, what legally prevents or allows for independent armed neighbor watches with or without sheriff, Oregon State Police, magistrate or county commission approval?

There is nothing in state law specifically preventing or allowing a group of citizens to act as an armed neighborhood watch. When a group of private citizens not under the direction or supervision of a sheriff or other peace officer engages in activities such as firearms training, training in self-defense techniques or target shooting, or performing citizen's arrests on other persons, they are acting as a group of private citizens. As such, they have all the rights and responsibilities that any citizen possesses. That is, they can do anything that is not prohibited by law.

Regarding armed neighborhood watches *with* official law enforcement approval, there are Oregon statutes that indicate, either expressly or by implication, that sheriffs and other peace officers have the power to summon one or more private citizens to assist the sheriff or peace officer. For example, ORS 206.050 (1) provides:

> (1) When an officer finds, or has reason to apprehend, that resistance will be made to the execution or service of any process, order or paper delivered to the officer for execution or service, and authorized by law, the officer may command as many adult inhabitants of the county of the officer as the officer may think proper and necessary to assist the officer in overcoming the resistance, and if necessary, in seizing, arresting and confining the resisters and their aiders and abettors, to be punished according to law.

ORS 161.249 is a statute that also empowers a peace officer to direct one or more citizens to make an arrest or prevent an escape from custody. The statute allows a person who has been so directed to use physical force or even deadly physical force when such force is necessary to carry out the peace

officer's authorized direction.

ORS 162.245 is another statute that, by implication, authorizes a peace officer to command one or more private citizens to assist the officer in making an authorized arrest or in preventing another person from committing a crime. This statute declares that it is a violation when "upon command by a person known by the person to be a peace officer the person unreasonably refuses or fails to assist in effecting an authorized arrest or preventing another from committing a crime."

3. How does ORS 133.225 (arrest by private person) practically work, both as an individual citizen and as part of an organized group? What was the legislative intent on how this should work?

ORS 133.225 was enacted in 1973 [21] as part of the work of the Criminal Law Revision Commission. The commission was created in 1967 by the Fifty-fourth Legislative Assembly and was tasked with modernizing the criminal statutes of Oregon. [22] From 1968 to 1970, the commission drafted a proposed substantive Criminal Code. This was then converted to Senate Bill 40 (1971), [23] which was passed by the Fifty-sixth Legislative Assembly. From 1970 to 1972, the commission drafted a Proposed Criminal Procedure Code. This became Senate Bill 80 (1973), passed by the Fifty-seventh Legislative Assembly. [24]

In interpreting the meaning of statutes, courts discern the legislative intent by looking first to the text and context of the statutes and any relevant legislative history. [25] If, after a review of the text, context and legislative history, the court concludes that the meaning of the statute is ambiguous, "the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty." [26]

Concerning the commission and determining legislative intent from the criminal code revisions, the Supreme Court has stated that "[t]he commission was composed largely of sitting legislators and was charged by the legislature with revising Oregon's criminal statutes. In numerous cases, we have looked to the minutes of its deliberations as well as its published commentary on the revised code as an authoritative source of legislative history for the 1973 Criminal Procedure Code." [27] We must, therefore, examine the commission's minutes, commentary, preliminary and final drafts and audio recordings of its hearings, as well as the legislative history of Senate Bill 40 (1971) and Senate Bill 80 (1973), in determining legislative intent of any statute that originated from the criminal code revisions.

The current version of ORS 133.225 specifies that a private citizen may arrest another person for a crime committed in the presence of the citizen if the citizen has probable cause to believe the other person committed the crime. The statute does not give more specific direction, nor does it provide detail as to how, in practice, such an arrest would occur. Practical concerns and the meaning of the phrase "committed in the presence of" are discussed below. First, however, it is helpful to know the legislative history, and thus the intent, of this statute. It must also be noted that because the legislative history of ORS 133.225 (the statute authorizing citizen's arrests) is so closely intertwined with that of ORS 161.255 (the statute authorizing the use of physical force during citizen's arrests), the majority of the information below will pertain to both statutes.

Prior to its repeal by the 1973 revision, ORS 133.350, the statute authorizing arrests by private citizens, read as follows:

> **133.350.** A private person may arrest another for the causes specified in ORS 133.310 in like manner and with like effect as a peace officer without a warrant. [28]

A private citizen had the same authority as a peace officer without a warrant when arresting other persons. Until 1973, a peace officer without a warrant could arrest a person: (1) For a crime or an attempted crime committed in the officer's presence, (2) when the person had committed a felony (regardless of whether the felony was committed in the officer's presence), (3) when a felony had been committed and the officer had reasonable cause to believe the person committed it, and (4) when notified of an arrest warrant in certain circumstances. [29] Therefore, before 1973 a private citizen could arrest another person: (1) For a misdemeanor or felony committed in the citizen's presence, (2) if the other person committed a felony, or (3) if a felony was committed and the citizen had reasonable cause to believe the other person committed it.

It is also worth noting that prior to 1971 ORS 133.350 authorized citizen's arrests "in like manner" as a peace officer without a warrant. This meant that a citizen could use the same amount of physical force when making a citizen's arrest as a peace officer under ORS 133.280, which authorized "all necessary and proper means to effect the arrest." [30] That changed in 1971 with the repeal of ORS 133.280 [31] and enactment of ORS 161.255, [32] as part of the substantive criminal code revision. [33] Although ORS 133.350, until its repeal in 1973, continued to authorize citizen's arrests "in like manner" as those of a peace officer, ORS 161.255 placed specific limitations on the use of physical force during citizen's arrests. The legislative history of ORS 161.255 is discussed in greater detail below.

During the subcommittee hearings on the subject, the Criminal Law Revision Commission Subcommittee No. 1 debated the issue of how much authority to give private citizens to arrest and use physical force on other persons. The bulk of policy discussions took place during the first meeting, on May 24, 1972. [34] Charles Carnese of the Multnomah County District Attorney's Office was the main advocate of increasing the ability of a citizen to use some degree of force when making arrests. He said that since the 1971 revision (and the enactment of ORS 161.255) a private citizen still had the same authority to arrest as that of a peace officer without a warrant but could use physical force (i.e., hold the person after arrest) only if the person actually committed a felony. [35] Mr. Carnese gave an example of a citizen observing a person breaking the windows of a neighbor's house. Since this crime is usually a misdemeanor, the citizen could arrest the person but could not use any physical force to hold the person until law enforcement arrived. [36] Mr. Carnese said that citizens were violating this part of the code already, as a citizen who witnesses a crime is going to use force and fight back even if not legally authorized to do so. He suggested that a private citizen be given the authority to use reasonable force, short of deadly force, in making an arrest for a misdemeanor crime. [37]

The chairman of the subcommittee, Robert Chandler, said that he was "a little bit reluctant personally" to broaden to too many people the authority to use physical force when making arrests. [38] Donald Paillette, project director of the commission, mentioned that the discussions surrounding the use of physical force by citizens were the same as those held "the last time around" [39] and added that private citizens do not have the same knowledge of or expertise in the law, or what a crime is, that

peace officers have. [40] Mr. Carnese responded that the code already presupposed that a citizen could differentiate between a felony and a misdemeanor. [41] He said it made no sense to allow a private citizen to make an arrest but prohibit the citizen from using physical force to hold the person until law enforcement arrived, [42] as it was unnatural to expect a citizen to act that way. He recommended aligning the authority to use physical force with the authority to arrest—either allow both for felonies only or allow both for misdemeanors and felonies. [43]

Both Mr. Chandler and Representative George Cole expressed concern over exposing citizens to greater danger by granting the authority to hold an arrested person. [44] They were worried about encouraging citizens to engage in risky behavior. Representative Cole asked whether problems in this area were numerous enough to outweigh the concern for citizen safety and require such an expansion of authority to use physical force. Mr. Carnese said that there were and noted that some of the authority to use physical force had been taken away in 1971 by the substantive criminal code revision. [45] Mr. Carnese again stated that citizens would likely use force anyway, even without official authority. [46] He said that a change in the law would not be telling people to go out and use force, but instead giving lawful authority to do what most citizens were already doing. [47] Commission member Bruce Spaulding agreed that that was something citizens were already doing and the important thing was to protect them from civil liability. [48]

There was also discussion of the fact that the new 1971 use of physical force statute, ORS 161.255 (discussed below), seemed to conflict with ORS 133.260, the statute authorizing all "necessary and proper" restraint for arrest and detention, [49] and needed some clarification or modification. [50]

At the subcommittee's second meeting, on June 9, 1972, there was additional discussion of citizen's arrests and the use of physical force. Mr. Paillette, referring to a preliminary draft, explained that the proposed section allowed citizen's arrests, and physical force, for all crimes committed in the presence of the citizen. [51] The use of the term "crime" meant that the same authorization was given for both felonies and misdemeanors. [52] A witness at the hearing, Douglas County Sheriff John Truett, serving as the Legislative Chairman for the Oregon Sheriffs' Association, mentioned that the preliminary draft would solve the problem of the mismatch between the authority to arrest and the authority to use physical force. [53] He added that there was no point in giving authority to arrest without the ability to use force to detain the person until the police arrived. [54]

Representative Cole again expressed reluctance to expand a citizen's ability to use physical force when making an arrest. [55] There was discussion over authorization of the use of deadly physical force, which Mr. Paillette said had not changed. [56] Mr. Paillette explained that a citizen's authority to use physical force when arresting was under more stringent parameters than that authorized for peace officers. [57]

For the final vote of Subcommittee No. 1 on whether or not to recommend the proposed citizen's arrest and physical force sections to the full commission, only two members of the subcommittee were present, Representative Cole and Mr. Chandler. Rather than let only two people decide the issue, the subcommittee submitted the sections and the accompanying policy issue to the [58] full commission without recommendation. The draft of the citizen's arrest section submitted to the full commission was as follows:

> Section 11. Arrest by a private person. (1) A private person may arrest another person for any crime committed in his presence if he has reasonable cause to believe the arrested person committed the crime.
>
> (2) In order to make the arrest a private person may use physical [59] force as is justifiable under ORS 161.255.

At the meeting of the full commission on July 24, 1972, during which the citizen's arrest section was considered, Mr. Chandler said, "I think we generally agreed that we had to maintain some right [60] of—of a citizen to make an arrest, but we thought it should be a very narrow one." The commission members then discussed the policy behind the section. Representative Cole continued to voice his [61] concerns over authorizing a citizen to use physical force in making an arrest. Mr. Chandler said that, with or without statutory authority, a citizen would likely try to stop someone who was committing a [62] crime and that it would not be good policy to leave the citizen open to civil liability. The commission then adopted the section as submitted, and the Proposed Oregon Criminal Procedure Code Final Draft and Report published by the commission contained a version of the citizen's arrest section identical to [63] the one contained in the second preliminary draft.

As noted above, the Proposed Oregon Criminal Procedure Code became Senate Bill 80. During the 1973 legislative session, two changes were made to section 74 of Senate Bill 80 (the citizen's arrest section): (1) The phrase "reasonable cause" was changed to "probable cause" and (2) a second sentence was added to subsection (1), "A private person making such an arrest shall, without [64] unnecessary delay, take the arrested person before a magistrate or deliver him to a peace officer." Both of these changes are discussed as part of the answers to other questions below.

From the legislative history of the Criminal Law Revision Commission and Senate Bill 80, we know that the authority of a private citizen to arrest another person was intended to be narrow and confined to the specific circumstances described in ORS 133.225. This was due to concerns over exposing citizens to the risk of harm and the expectation that citizens would possess the same level of legal knowledge as peace officers. The commission and the Legislative Assembly seemed to acknowledge that citizens would continue to play a role in public safety. However, the intent was not to encourage more involvement but to protect citizens from criminal and civil liability for activity that was already taking place and to align the authority to arrest with the authority to use physical force when making the arrest.

In practice, a citizen's arrest would operate similarly to an arrest by a peace officer. The term "arrest" means "to place a person under actual or constructive restraint or to take a person into custody [65] for the purpose of charging that person with an offense." Actual restraint means that a person is physically confined or held. Therefore, the citizen could place the arrested person under actual restraint such as grabbing and holding the person's arm, subject to the limits of physical force discussed below.

Although the term "constructive restraint" is not defined, Oregon courts have looked to the plain meaning of those words to determine that the phrase means "control that is imputed as a matter of law, even if the control does not exist in fact."[66] In the context of the crime of escape, the Court of Appeals has held that "it is sufficient to establish that an individual is in constructive custody that an officer state words of arrest manifesting the purpose of apprehending a defendant,"[67] but the analysis is not dependent "on the utterance of magic words."[68] Therefore, the citizen could place the person under constructive restraint by announcing that the person is under arrest. The citizen is not required to advise the person of the reason for the arrest; in fact, Mr. Paillette stated at a subcommittee hearing that such a requirement was considered and intentionally omitted.[69]

A private citizen has the authority to make an arrest only for a crime committed in the citizen's presence.[70] The Supreme Court relied on the following definition of the phrase "committed in the presence of," in the context of making a citizen's arrest:

> The phrase "in the presence of the actor" means that the actor by the use of his senses knows that the other is committing the act which constitutes . . . the attempt to commit a felony. It is not enough that the act is done in the immediate neighborhood of the actor; he must be aware of its commission. On the other hand, it is not necessary that the act be done in the actor's immediate neighborhood. If the actor, by the use of any of his senses, perceives that an act is being done, and forthwith investigates and finds that the act constitutes a [crime], he is privileged to arrest.
>
> Illustration: . . . A, while passing B's house, hears a woman's scream. He rushes into the house and discovers that the woman was screaming because B was beating her. A is privileged to arrest B.[71]

To use one of the commission's examples, if a citizen heard glass shattering and ran outside to see a broken window and a stranger holding a rock, aiming it at another window, a court would likely consider the first window breaking to have occurred "in the presence of" the citizen.

Concerning application of ORS 133.225 to an organized group of citizens, the statute applies equally to a single citizen or a group of citizens, and the arrest is authorized as long as the group is in compliance with ORS 133.225 and 161.255. Since a private citizen has the authority to make an arrest only for a crime committed in the citizen's presence,[72] the same would hold true for a group of private citizens. Therefore, a group of citizens—whether armed or unarmed—may lawfully arrest another person only if every citizen who participates in the arrest was also present for the commission of the alleged crime. Otherwise, the members of the group who participated in the arrest but who were not present at the commission of the crime risk civil and criminal liability for an unlawful arrest and any use of physical force.

a. Is there a difference in the level of probable cause to make an arrest under ORS 133.225?

No, there is no difference in the level of "probable cause," or the meaning of the term, as it is used in ORS 133.225 (the statute governing arrests by private persons) and as it is used in ORS 133.310 (the statute governing arrests without warrants by peace officers). We know this from the

legislative history of ORS 133.225. The term "probable cause" was not used in the version of this statute that appeared in the commission's proposed final draft. Instead, the term "reasonable cause" was used, as it had been throughout the final draft and in the former Criminal Code that the commission [73] was attempting to update. The use of the term "probable cause" in current law originates from the Fifty-seventh Legislative Assembly's work on Senate Bill 80 in 1973.

During Senate Judiciary Committee hearings held in January [74] and March [75] of the 1973 legislative session there were discussions concerning the term "probable cause." On March 12, 1973, [76] the committee members mentioned a definition proposed by John DeWenter that "probable cause" meant it was "more likely than not an offense has been committed and a person to be arrested has [77] committed it." Senator Elizabeth Browne, who chaired the committee in 1973, requested discussion of a proposed motion that would substitute "probable cause" for "reasonable cause" throughout the bill. [78]

Senator John Burns mentioned that at the last meeting there was an agreement to substitute the term because of case law and described Mr. DeWenter's proposed language as the classic definition of [79] "probable cause." There is also in the legislative record a written exhibit, submitted by Clackamas County Deputy District Attorney Keith Kinsman, recommending that the term "probable cause" replace [80] "reasonable cause" to conform with contemporaneous case law concerning arrests.

Later in the 1973 legislative session, there was further discussion concerning the term "probable cause" in the House Judiciary Committee, mainly as the term pertained to misdemeanor arrests by [81] [82] peace officers. While considering an amendment motion, Mr. Paillette suggested the use of "probable cause" in order to confirm and maintain consistency with the other sections of Senate Bill 80. [83]

Before Senate Bill 80 was passed out of the House Judiciary Committee, Mr. Paillette again mentioned probable cause, but the committee made no changes to the definition or use of the term [84] throughout the bill.

Therefore, we know with some degree of certainty that the term "probable cause" was intended to have a consistent meaning throughout the Oregon Criminal Code.

b. Does ORS 133.225 allow citizens to transport an arrested person to the county jail, to a magistrate or to another location, if one exists, for public detention?

A private citizen must, "without unnecessary delay," take a person arrested under ORS 133.225 [85] to a magistrate or deliver the person to a peace officer. However, ORS 133.225 allows only this; once the arrested person has been taken or delivered, the statute does not authorize continued detention. The statute also does not authorize continued detention prior to transporting the person to a magistrate or peace officer.

In looking at the text of ORS 133.225, we believe that this statute requires a private citizen to bring the arrested person to a magistrate or peace officer as quickly as possible under the circumstances present. This is supported by Oregon case law discussing older versions of Oregon arrest statutes. ORS 133.550 (the general arrest statute), as it existed immediately before the revision, [86] required that "[t]he defendant shall in all cases be taken before a magistrate without delay." The

Supreme Court, in analyzing an even older (but nearly identical) version of this statute, [87] quoted with approval two legal encyclopedias, *American Jurisprudence* and *Corpus Juris*, as follows:

> An officer *or a private individual* who has made an arrest of a person without a warrant has authority to detain him in custody only for such time as may reasonably be necessary to procure a legal warrant . . . [88] or until a preliminary hearing of the charge against him can be had.
>
> It is the duty of an officer after making an arrest, either with or without warrant, to take the prisoner, within a reasonable time, before a justice of the peace, magistrate, or other proper judicial officer having jurisdiction, in order that he may be examined and held, or dealt with as the case requires. It is sometimes said that this must be done immediately, or forthwith, or without delay. These requirements mean no more than that it must be done promptly and within a reasonable time under all the circumstances. The officer may detain the person arrested in custody a reasonable time until he can conveniently and safely take him before a magistrate, when the circumstances preclude an immediate examination, hearing, or trial. [89]

ORS 133.550 was repealed by Senate Bill 80 in 1973, and an amended version of ORS 135.010 now regulates the timing of post-arrest appearances before the court. [90] However, other statutes continue to use similar language, e.g., ORS 133.239 (3)(a) and 133.245 (4)(a).

The citizen is therefore authorized to transport the arrested person to the magistrate or peace officer. The delivery of an arrested person to a peace officer could include transporting the person to a county jail if that is a nearby location where peace officers are likely to be found. Because the term "peace officer" includes municipal police officers, sheriffs and members of the Oregon State Police, [91] a private citizen could also bring the arrested person to a police station, a courthouse or any other nearby location where peace officers are commonly found. Taking the arrested person before a magistrate would likely entail bringing the person to a courthouse or other location where a magistrate is working.

Oregon law does not authorize taking the person to some other location for continued detention. If a private citizen were to detain another person in a manner beyond what ORS 133.225 authorizes, the citizen could be liable both criminally, for kidnapping [92] or coercion, [93] and civilly, for false imprisonment.

c. In the absence of a peace officer at the jail, or elsewhere, what is the intent and practice of bringing the "arrested person before a magistrate," inclusive of defining magistrate?

If a private citizen attempts to locate a peace officer at a county jail and is unable to find one there, we believe that a plain reading of ORS 133.225 authorizes the citizen to attempt to locate a peace officer at another location. However, if the private citizen does contact a peace officer, the citizen must deliver the person to the peace officer. If the peace officer for some reason refuses to accept or take the arrested person into custody, we do not think that ORS 133.225 authorizes the private citizen to continue to detain the arrested person until a more cooperative peace officer is located.

Alternatively, the statute authorizes taking the arrested person before a magistrate. The term

"magistrate" means someone with the "power to issue a warrant for the arrest of a person charged with the commission of a crime."[94] Circuit court judges, county judges, municipal judges, justices of the peace, judges of the Court of Appeals and justices of the Supreme Court are magistrates.[95]

The legislative history of this particular sentence in ORS 133.225 does not shed much additional light on its intent. It originated in ORS 133.560 (2), which required that "[a] private person who has arrested another for the commission of a crime shall without unnecessary delay take him before a magistrate or deliver him to a peace officer."[96] The commission's proposed final draft recommended retaining ORS 133.560 without amendment.[97] Unfortunately, there was no commentary for this section of the final draft.[98]

Subsection (2) of ORS 133.560 (1971 Replacement Part), quoted above, was added, during the Senate Judiciary Committee hearing on March 12, 1973, to what became ORS 133.225 (1). During that hearing, Chair Browne recommended adding a requirement that the private citizen must take the arrested person before a magistrate.[99] Senator John Burns made a motion to add the suggested language to the bill and the motion was adopted by consensus without discussion.[100]

Philip Roberts from the Oregon District Attorneys Association (ODAA) suggested combining ORS 133.560 (2) with what became ORS 133.225. Mr. Roberts proposed in writing that the following sentence be added to the bill: "[A]n officer may without warrant take before a magistrate a person who is arrested by a bystander and delivered to him."[101] In other documents, ODAA recommended adding ORS 133.560 (2) to the new citizen's arrest statute and eliminating the rest of ORS 133.560, rather than reenacting ORS 133.560 in its entirety, to avoid confusion.[102] ODAA proposals for amendments to Senate Bill 80 included a requirement that the citizen take the arrested person to a peace officer or magistrate and, separately, the repeal of ORS 133.560.[103] However, there were no additional explanations for these changes. We could not find any House Judiciary Committee minutes or exhibits regarding this sentence and in fact, after the Senate Judiciary Committee adopted the language, no additional changes were made.

Unfortunately, there are no Oregon cases interpreting former ORS 133.560, and cases interpreting similar language in other statutes are not helpful in understanding how this would work in practice in the case of a citizen's arrest. Although a magistrate may issue an arrest warrant, a magistrate has no general power beyond that of a private citizen to arrest a person.[104] However, for crimes committed in the magistrate's presence, the magistrate may order any citizen to arrest the person who committed the crime and may then proceed with an arraignment without a complaint or information filed prior.[105]

If a peace officer could not take custody of a person arrested by a private citizen, and the citizen took the arrested person directly to a magistrate, it is somewhat unclear what would or should happen procedurally. There are no Oregon statutes that address these circumstances, though there is clearly some sort of court hearing implied by a requirement to take an arrested person before a magistrate. By looking at other Oregon statutes and case law, we can try to determine what would be likely to happen, and what a magistrate could do, in these circumstances.

A person in custody who is arrested by a peace officer without a warrant has the right under the United States Constitution to "promptly be brought before a neutral magistrate for a judicial determination of probable cause." [106] More specifically, the probable cause determination must occur without unreasonable delay and within 48 hours unless extraordinary circumstances exist. [107] Therefore, if a person arrested by a private citizen was taken before a magistrate, the magistrate could potentially hold a probable cause hearing to determine whether the person should continue to be held in custody. This could be accomplished by having the citizen act as a witness to establish probable cause that the arrested person committed a crime. [108] A probable cause finding would allow the arrested person to lawfully remain in custody for a certain period of time, or to be released with certain conditions, until a charging decision is made by a prosecutor. After a charging decision is made, the arrested person would either be arraigned on the charging instrument or, if prosecution is declined, released.

ORS 135.010 requires that when a charging instrument has been filed, an arrested person who is in custody must be arraigned within 36 hours unless good cause is shown. The 36-hour limitation also applies to all other arrested persons in custody even if the person has not been formally charged and no charging instrument has been filed. [109] ORS 135.010 is intended to direct government actors to arraign arrested persons in a timely manner.

It is somewhat unclear whether a person arrested by a private citizen would also need to be arraigned within the ORS 135.010 time limitations and whether the limitations would begin from the moment that the person is taken into custody by the private citizen or at some later time. There are no Oregon cases on this issue. The statute contains mandatory language ("the arraignment shall be held during the first 36 hours of custody"), and there is no exception for a person arrested by a private citizen. The statute that ORS 135.010 replaced, ORS 133.550, as it existed immediately before its repeal in 1973, explicitly applied to "all cases." We believe that a court would likely find that the ORS 135.010 time limitations apply to a person arrested by a private citizen and that the time period begins from the moment the person is taken into custody, though, if there were a delay due to the fact that the person was arrested by a private citizen, the court could likely find good cause and extend the time period if necessary. Therefore, the charging decision would need to be made quickly so that an arraignment could occur in a timely manner.

4. How does ORS 161.255 (use of physical force by private person making citizen's arrest) work in practical terms, and what was the legislative intent?

As noted above, prior to 1971 a citizen could use the same amount of physical force when making a citizen's arrest as a peace officer: "[A]ll necessary and proper means to effect the arrest." [110] That changed with the 1971 enactment of ORS 161.255. Although, until its repeal in 1973, ORS 133.350 continued to authorize citizen's arrests "in like manner" to those of a peace officer, ORS 161.255 placed specific limitations on the use of physical force during citizen's arrests.

Like ORS 133.225, ORS 161.255 originated from the substantive criminal code revision. The first version of the statute was enacted in 1971 by the Fifty-sixth Legislative Assembly [111] and was based on the work of the Criminal Law Revision Commission in 1969 and 1970. [112] Although mentioned during a Subcommittee No. 1 meeting held on September 9, 1969, the section that would become ORS 161.255 generated little substantive discussion. [113] Mr. Paillette noted that the section

[114]
was generally consistent with current law and it was unanimously approved without changes.

The full commission then addressed the section during a hearing on December 12, 1969, but again there was little substantive discussion other than Mr. Paillette's statement that the section was [115] [116]
consistent with current law. The section was unanimously adopted without changes. The version of the citizen's arrest physical force section that appeared in the commission's Final Draft and Report published in July 1970 was as follows:

> **Section 31. Justification; use of physical force by private person acting on his own account to make an arrest.** (1) Except as provided in subsection (2) of this section, a private person acting on his own account is justified in using physical force upon another person when and to the extent that he reasonably believes it necessary to make an arrest or to prevent the escape from custody of an arrested person whom he reasonably believes has committed a felony and who in fact has committed a felony.
>
> (2) A private person acting under the circumstances prescribed in subsection (1) of this section is justified in using deadly physical force only when he reasonably believes it necessary to defend himself or a third person from what he reasonably believes to be the use or imminent [117]
> use of deadly physical force.

The commission's commentary to section 31 explains the section as follows: "The citizen is [118]
allowed to use physical force whenever he is in fact authorized to make an arrest. . . ." This is an inaccurate statement, for, as discussed above, section 31 created a mismatch between a citizen's authority to arrest and the citizen's authority to use physical force that was ultimately remedied in 1973.

The commission's draft of section 31 is identical to the version that ultimately appeared in [119]
Senate Bill 40 during the 1971 legislative session. Although Senate Bill 40 was heard in both the [120] [121]
Senate Criminal Law and Procedure Committee and the House Judiciary Committee, there [122]
was very little substantive discussion of section 31. Portland attorney Russell Dickson did raise an objection to the bill's removal of the right of citizen's arrests for misdemeanors. This objection was somewhat inaccurate since the authority to perform citizen's arrests was not addressed in the bill, only the authority to use physical force. Regardless, the Fifty-sixth Legislative Assembly made no changes to the commission's version of section 31 and the version quoted above is therefore identical to what [123]
was eventually codified as ORS 161.255.

After 1971 but prior to the 1973 revision, a private citizen had the same legal authority to arrest another person as a peace officer without a warrant: (1) For a misdemeanor or felony committed in the citizen's presence, (2) if the other person committed a felony or (3) if a felony was committed and the [124]
citizen had reasonable cause to believe the other person committed it. However, ORS 161.255 changed the law so that the citizen could use physical force to effectuate the arrest only if the citizen reasonably believed the other person had committed a felony and the other person had in fact [125]
committed a felony." Thus between 1971 and 1973, the ability of a citizen to use physical force to arrest a person for a misdemeanor committed in the citizen's presence did not exist. The 1971 change

also created some confusion: The "in like manner and with like effect" language of ORS 133.350 remained, [126] seeming to create two separate authorizations of force, and there were many different and possibly incongruent standards used throughout the statutes—a crime committed in the citizen's presence, a person who committed a crime, "reasonable cause" to believe a person committed a crime, "reasonable belief" that a person committed a crime and a person "in fact" committing a crime.

The mismatch between authority to make a citizen's arrest and authority to use physical force when making the arrest was rectified by the commission during its work on the proposed Oregon Criminal Procedure Code in 1971-1972. For information on the substantive policy discussions that took place on the issue of a citizen using physical force during an arrest, see the answer to question 3 above. The commission ultimately drafted a new section authorizing citizen's arrests, and proposed amendments to ORS 161.255 to be consistent with this new section. [127]

a. What force is reasonable to make a citizen's arrest? Such as cuffing and transporting the arrested to see a magistrate or peace officer?

In making a citizen's arrest, a private citizen is allowed to use the level of physical force (short of deadly force) that the citizen reasonably believes is "necessary to make an arrest or to prevent the escape from custody of an arrested person." [128] Depending on the circumstances, this could include physically holding a person, handcuffing a person and transporting a person to a magistrate or peace officer as required by law. The level of physical force used must be rooted in a reasonable belief. For example, if during an arrest a private citizen tackles and repeatedly punches a person who stopped, offered himself for arrest and was compliant and submissive leading up to the use of force, the private citizen would have difficulty asserting a reasonable belief that the force used was necessary to make the arrest. The private citizen could then be held civilly and criminally liable for any injury stemming from the arrest and could not rely on ORS 161.255 as a defense to a criminal charge.

If a private citizen was criminally charged for the use of physical force during a citizen's arrest, Oregon courts have held that "whether the degree of force employed by a defendant is excessive or disproportionate is a question for the jury to be answered from the standpoint of a reasonable person in the situation of the defendant 'under all the circumstances surrounding him.'" [129] The jury could consider each person's age and physical condition, [130] as well as the facts leading up to the arrest.

ORS 161.255 authorizes the use of deadly physical force only when a private citizen reasonably believes that that level of force is "necessary for self-defense or to defend a third person from what the [citizen] reasonably believes to be the use or imminent use of deadly physical force." [131] "Deadly physical force" is defined as "physical force that under the circumstances in which it is used is readily capable of causing death or serious physical injury." [132] This would include the actual shooting of a firearm at another person or the use of some other weapon against another person. In making a citizen's arrest, deadly physical force is authorized under ORS 161.255 only if the person arrested was causing or about to cause the death of or serious physical injury to the private citizen or a third person.

The *threat* of deadly physical force (e.g., pointing a firearm) is not the same thing as actually *using* deadly physical force (e.g., shooting a firearm at a person). [133] Therefore, in making a citizen's arrest, showing or pointing a firearm *may* be lawful if the private citizen reasonably believed it necessary to make the arrest; however, this would depend greatly on the circumstances and other means available in effectuating an arrest. If the private citizen pointed a firearm while making an arrest,

the citizen could still be charged under ORS 166.190 if the citizen was not acting in self-defense. If law enforcement officers or the district attorney's office did not believe that the citizen's actions fell within the defense described in ORS 161.255, the private citizen could also be charged with menacing [134] or unlawful use of a weapon [135] and would then have to convince a judge or jury that the citizen reasonably believed that the physical force used was necessary. If the citizen were then convicted of a felony involving the use or threatened use of a firearm, the citizen would also be subject to the enhanced sentences described in ORS 161.610.

b. What force is reasonable to "prevent the escape from custody" during the course of the above?

The level of physical force a private citizen may use to prevent an arrested person from escaping custody is the same as that authorized to make the arrest: "[W]hen and to the extent that the [citizen] reasonably believes it necessary" [136] to carry out the act, in this case preventing an escape from custody. As noted above, the level of physical force used must be rooted in a reasonable belief. For example, if an arrested person is fully compliant and does not resist the arrest, but the private citizen continues to hold the person to the ground using a pain compliance technique until law enforcement arrives, the citizen may have difficulty asserting a reasonable belief that the physical force used was necessary to prevent escape. The private citizen could then be held civilly and criminally liable for any injury stemming from the force used and could not use ORS 161.255 as a defense to a criminal charge.

The limits on the use of deadly physical force are also the same as those for making the arrest as discussed above. Deadly physical force to prevent the escape of an arrested person is only lawful when the private citizen "reasonably believes" that that level of force is "necessary for self-defense or to defend a third person from what the [citizen] reasonably believes to be the use or imminent use of deadly physical force." [137] Again, as noted above, the threat of deadly physical force is not the same as actually using deadly physical force. Showing or pointing a firearm *may* be lawful if the private citizen reasonably believed it necessary to prevent the escape of the arrested person; however, this would depend greatly on the circumstances and other means available in preventing the escape. If the private citizen pointed a firearm while making an arrest, the citizen could still be charged under ORS 166.190 if the citizen was not acting in self-defense. If law enforcement officers or the district attorney's office did not believe that the citizen's actions fell within the defense described in ORS 161.255, the private citizen could also be charged with menacing [138] or unlawful use of a weapon [139] and would then have to convince a judge or jury that the citizen had a reasonable belief that the physical force used was necessary. If the citizen were then convicted of a felony involving the use or threatened use of a firearm, the citizen would also be subject to the enhanced sentences described in ORS 161.610.

c. If a citizen group transports an arrested person to the county jail, does the jail have to take them?

No. As noted above, a citizen who has arrested another person must, "without unnecessary delay," take the arrested person to a magistrate or deliver the arrested person to a peace officer. [140] The delivery of an arrested person to a peace officer could include transporting the person to a county jail if that is a nearby location where peace officers are likely to be found.

If the citizen does in fact transport the arrested person to a county jail in order to locate a peace officer, the citizen must transfer the custody of the arrested person to the peace officer if one is found. If the citizen is unable to make contact with a peace officer at the county jail, we believe that ORS

133.225 and Oregon case law permit the citizen to continue to try to locate a peace officer for delivery, provided this is done in a timely manner. However, neither ORS 133.225 nor any other statute provides a mechanism by which citizens can bring arrested persons to county jails for direct booking.

Oregon law requires a county to provide and maintain a jail.[141] The jail must have a written policy covering, among other things, the authority to legally confine prisoners and when admission to the jail must be denied.[142] There are also statutes that provide for the emergency release of prisoners due to overcrowding.[143] However, there is no Oregon law requiring a sheriff or a county jail to accept prisoners from citizens. Each facility is permitted to adopt its own policies and procedures concerning admission.

5. What other existing statutes apply to the formation, operation and authority of an armed organized group to make citizen's arrests under the law in rural Oregon?

In addition to the main statutes discussed in this opinion, ORS 133.225 and 161.255, all statutes regulating the possession and use of firearms would apply to a group of citizens engaged in an armed neighborhood watch. Most of these statutes are found in ORS chapter 166. These include ORS 166.250 and 166.260, describing the crime of unlawful possession of a firearm and specified exceptions, respectively; ORS 166.190, describing the offense of pointing a firearm at another person; ORS 166.220, describing the crime of unlawful use of a weapon; and ORS 166.370, describing the crime of possession of a firearm or other dangerous weapon in a public building or court facility. If a citizen is carrying a concealed firearm, the citizen must have a valid concealed handgun license issued pursuant to ORS 166.291 and 166.292 or fall within one of the exceptions described in ORS 166.260.

Citizens carrying certain weapons other than firearms must be in compliance with ORS 166.240 and 166.370, and any citizen within the armed neighborhood watch who has been convicted of a felony would fall under the restrictions described in ORS 166.270. There are other statutes regulating specific types of ammunition (ORS 166.350) and specific types of firearms (ORS 166.272).

A citizen using any level of physical force against another person should be aware of all of the statutes authorizing and limiting various kinds of force in addition to the force believed necessary for making an arrest. These statutes describe the use of physical force generally (ORS 161.205), the use of physical force in defense of another person (ORS 161.209, 161.215 and 161.219) and the use of physical force in defense of real and personal property (ORS 161.225 and 161.229).

ORS 166.660, which prohibits unlawful paramilitary activity as described in that statute, may also be applicable. Any paramilitary activity that is not prohibited by ORS 166.660 or by some other law is lawful paramilitary activity. ORS 166.660 (2) describes some specific activities that are expressly declared not to constitute unlawful paramilitary activity. This should not be considered to be a complete description of activities that are outside the prohibition of ORS 166.660. As we have previously stated, the general rule is that a person or group of persons may engage in any activity that is not prohibited by law, ordinance or other governmental regulation.

6. What holes or improvements ought to be considered in existing law as it applies to the functioning of armed neighborhood watches? (Question #6 assumes for the time we cannot restore funding to DAs and sheriffs; therefore, rural self-protection is going to exist in some form.)

Current Oregon statutes contain some law enforcement powers that citizens possess, but, as noted above, the law is silent on the issue of armed neighborhood watches. It would, therefore, be a policy decision for the Legislative Assembly as to whether Oregon law should continue the status quo, increase or decrease the law enforcement powers of citizens or specifically provide for armed

neighborhood watches. For example, if a member of the Legislative Assembly were concerned that limits and rights of armed neighborhood watches were unclear, a specific statute could be passed to authorize certain uses of physical force, with the level of physical force authorized for organized watches being either greater or less than the levels allowed for individual private citizens.

Under current law, a citizen's arrest is authorized by law only when a crime is committed in the presence of the citizen. In order for a group of citizens to participate in an arrest, as with an armed neighborhood watch, the crime must be committed in the presence of each member of the group. The Legislative Assembly could choose to amend ORS 133.225 to make an exception for an armed neighborhood watch—e.g., allowing a citizen's arrest when the crime is committed in the presence of at least one member of the watch.

If the Legislative Assembly wants to sanction the use of firearms in arresting persons, it could choose to amend ORS 166.190, which prohibits the pointing of a firearm at another person except in self-defense. For example, the Legislative Assembly could amend the statute to allow the pointing of a firearm at another person during a lawful citizen's arrest if it is necessary to effectuate the arrest.

Finally, as noted above, Oregon statutes are unclear as to what exactly should happen if a person arrested by a citizen were directly taken before a magistrate, without a law enforcement agency having taken custody of the person, or a charging document having been filed, beforehand. A magistrate's duties and constraints in this situation are not defined, and it is somewhat uncertain if, and under what circumstances, the person could continue to be held in custody. The Legislative Assembly could clarify this by passing legislation that would prescribe the procedure to be followed in these circumstances.

7. What role can a circuit court judge or magistrate legally perform in authorizing the formation of citizen groups or in receiving individuals arrested by citizen groups?

We are not aware of any role that magistrates, which include circuit court judges, may lawfully perform in authorizing the formation of armed neighborhood watches or other citizen groups. As noted above, these groups function as groups of individual citizens and have all the rights and responsibilities that any citizen possesses.

Magistrates do preside over arraignments and other court appearances. Magistrates could thus be available to citizens attempting to fulfill the requirement that an arrested person be taken before a [144]
magistrate. The magistrates could hold probable cause hearings, as described above, and decide whether persons arrested by private citizens should remain in custody or be released.

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

DEXTER A. JOHNSON
Legislative Counsel

By
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[1] National Neighborhood Watch website, "Our History" <http://www.nnw.org/our-history> (visited July 29, 2014).

[2] In this opinion, we use the term "citizen" to mean a private person generally and the term "citizen's arrest" to mean an arrest by a private person. Neither term is used to denote a person's citizenship or immigration status.

[3] National Neighborhood Watch Program page, National Sheriffs' Association website, <http://www.sheriffs.org/content/national-neighborhood-watch-program> (visited July 29, 2014).

[4] *Id.*

[5] National Crime Prevention Council Strategic Plan, at 6-7, available at <http://www.ncpc.org/about/strategic-plan.pdf> (visited July 29, 2014).

[6] *See* <http://www.portlandoregon.gov/oni/article/26674> (visited July 29, 2014).

[7] *See* <http://www.cityofsalem.net/Departments/Police/Resources/CrimePrevention/Pages/NeighborhoodWatch.aspx> (visited July 29, 2014).

[8] *See* <http://www.co.washington.or.us/Sheriff/OtherServices/CrimePrevention/neighborhood-watch.cfm> (visited July 29, 2014).

[9] *See* <http://www.dcso.com/neighborhood_watch_N.asp> (visited July 29, 2014).

[10] *See* <http://ppd.pendleton.or.us/neighborhoodwatch> (visited July 29, 2014).

[11] Chapter 1067, Oregon Laws 1989 (Enrolled Senate Bill 1134).

[12] Section 1, chapter 981, Oregon Laws 1989 (Enrolled House Bill 3498).

[13] Chapter 319, Oregon Laws 1993 (Enrolled Senate Bill 158).

[14] ORS 181.755 (1).

[15] ORS 181.755 (3).

[16] ORS 181.755 (4).

[17] ORS 181.755 (5).

[18] ORS 181.755 (9)(a).

[19] ORS 181.755.

[20] Department of Public Safety Standards and Training organizational chart, available at <http://www.oregon.gov/dpsst/docs/DPSSTOrgChart.pdf> (visited July 29, 2014).

[21] Section 74, chapter 836, Oregon Laws 1973 (Enrolled Senate Bill 80).

[22] Chapter 573, Oregon Laws 1967 (Enrolled Senate Bill 212). The digital archive, "Oregon Criminal Law Revision Commission Records," maintained by the Secretary of State, is available at <http://arcweb.sos.state.or.us/pages/records/legislative/legislativeminutes/crimlaw> (visited July 29, 2014).

[23]
Chapter 743, Oregon Laws 1971 (Enrolled Senate Bill 40).
[24]
Chapter 836, Oregon Laws 1973.
[25]
State v. Gaines, 346 Or. 160, 171-172 (2009).
[26]
Gaines, 346 Or. at 172, *quoting PGE v. Bureau of Labor and Industries*, 317 Or. 606, 612 (1993).
[27]
State v. Swanson, 351 Or. 286, 295 n.8 (2011).
[28]
ORS 133.350 (1971 Replacement Part); ORS 133.350 repealed by section 358, chapter 836, Oregon Laws 1973.
[29]
ORS 133.310 (1971 Replacement Part).
[30]
ORS 133.280 (1969 Replacement Part).
[31]
ORS 133.280 repealed by section 432, chapter 743, Oregon Laws 1971.
[32]
Section 31, chapter 743, Oregon Laws 1971.
[33]
ORS 133.350 repealed by section 358, chapter 836, Oregon Laws 1973.
[34]
Minutes, Criminal Law Revision Commission Subcommittee No. 1, May 24, 1972, at 3, and June 9, 1972, at 17-18.
[35]
Minutes, Criminal Law Revision Commission Subcommittee No. 1, May 24, 1972, at 3; audio recording, Criminal Law Revision Commission Subcommittee No. 1, May 24, 1972, tape 29, side 1.
[36]
Minutes, Criminal Law Revision Commission Subcommittee No. 1, May 24, 1972, at 4.
[37]
Id. See also Audio recording, Criminal Law Revision Commission Subcommittee No. 1, May 24, 1972, tape 29, side 1.
[38]
Audio recording, Criminal Law Revision Commission Subcommittee No. 1, May 24, 1972, tape 29, side 1.
[39]
We assume he is referring here to the substantive criminal law revision of 1968-1971, though we could not locate any significant discussion on this subject during those meetings.
[40]
Audio recording, Criminal Law Revision Commission Subcommittee No. 1, May 24, 1972, tape 29, side 1.
[41]
Minutes, Criminal Law Revision Commission Subcommittee No. 1, May 24, 1972, at 5.
[42]
Id. at 6; Audio recording, Criminal Law Revision Commission Subcommittee No. 1, May 24, 1972, tape 29, side 1.
[43]
Minutes, Criminal Law Revision Commission Subcommittee No. 1, May 24, 1972, at 6.
[44]
Id. See also Audio recording, Criminal Law Revision Commission Subcommittee No. 1, May 24, 1972, tape 29, side 1.
[45]
Id.
[46]
Audio recording, Criminal Law Revision Commission Subcommittee No. 1, May 24, 1972, tape 29, side 1; Minutes, Criminal Law Revision Commission Subcommittee No. 1, May 24, 1972, at 6-7.
[47]
Id.
[48]
Minutes, Criminal Law Revision Commission Subcommittee No. 1, May 24, 1972, at 7.
[49]
ORS 133.260 (1971 Replacement Part); ORS 133.260 repealed by section 358, chapter 836, Oregon Laws 1973. *See also* ORS 133.280 (1969 Replacement Part); ORS 133.280 repealed by section 432, chapter 743, Oregon Laws 1971.
[50]
Minutes, Criminal Law Revision Commission Subcommittee No. 1, May 24, 1972, at 9.
[51]
Minutes, Criminal Law Revision Commission Subcommittee No. 1, June 9, 1972, at 17-18.
[52]
Id.

[53] *Id.*

[54] *Id.*

[55] Audio recording, Criminal Law Revision Commission Subcommittee No. 1, June 9, 1972, tape 10, side 2.

[56] *Id. See also* Minutes, Criminal Law Revision Commission Subcommittee No. 1, June 9, 1972, at 18.

[57] *Id.*

[58] Audio recording, Criminal Law Revision Commission meeting, July 24, 1972, tape 14, side 1.

[59] Article 4, Arrests and Related Procedures, Arrests, Preliminary Draft No. 2, Criminal Law Revision Commission, July 1972, at 28.

[60] Audio recording, Criminal Law Revision Commission meeting, July 24, 1972, tape 14, side 1; Minutes, Criminal Law Revision Commission, July 24, 1972, at 41.

[61] *Id.*

[62] *Id.* Judge Charles Crookham, another commission member, also mentioned the civil liability issue.

[63] Article 4, Arrests and Related Procedures, Arrests, Proposed Oregon Criminal Procedure Code Final Draft and Report, Criminal Law Revision Commission, November 1972, at 63. The Final Draft and Report contains no substantive commentary on "Section 114. Arrest by a private person."

[64] Section 74, chapter 836, Oregon Laws 1973.

[65] ORS 133.005 (1).

[66] *State v. Alexander*, 238 Or. App. 597, 603 (2010).

[67] *State v. Thomas*, 229 Or. App. 453, 460 (2009) (internal quotation marks and citation omitted).

[68] *Alexander*, 238 Or. App. at 604.

[69] Audio recording, Criminal Law Revision Commission Subcommittee No. 1 hearing, June 9, 1972, tape 10, side 2.

[70] ORS 133.225 (1).

[71] *Hatfield v. Gracen*, 279 Or. 303, 309 n.6 (1977), *quoting* Restatement of the Law (Second) § 119, comment *m*.

[72] ORS 133.225 (1).

[73] For example, see ORS 133.310 (1971 Replacement Part), the former version of the statute authorizing arrests without warrants by peace officers, allowing arrests for "reasonable cause" to believe a person committed a felony.

[74] Minutes of the Senate Judiciary Committee for January 31, 1973, at 8. The audio recording of this hearing has been missing since December 1974.

[75] Minutes of the Senate Judiciary Committee for March 12, 1973, at 3; Senate Judiciary Committee hearing audio recording, March 12, 1973, tape 9, side 1.

[76] John DeWenter was Senate Judiciary Legal Counsel during the 1973 legislative session.

[77] Amendment to subsection (11) of section 1 of SB 80, Senate Judiciary Committee exhibit, Senate Bill 80 (1973) at 336. This definition was discussed and summarized by members of the committee during the hearing on March 12, 1973.

[78] Minutes of the Senate Judiciary Committee for March 12, 1973, at 3.

[79] Senate Judiciary Committee hearing audio recording, March 12, 1973, tape 9, side 1.

[80] Senate Judiciary Committee exhibit, Senate Bill 80 (1973), at 327-333.

[81] Minutes of the House Judiciary Committee for May 17, 1973, at 10, and May 24, 1973, at 3.

[82]
As noted above, Donald Paillette served as project director for the Criminal Law Revision Commission. He also served as counsel for the House Judiciary Committee during the 1973 session.
[83]
Minutes of the House Judiciary Committee for May 24, 1973, at 3.
[84]
Minutes of the House Judiciary Committee for May 29, 1973, at 7.
[85]
ORS 133.225 (1).
[86]
ORS 133.550 (1971 Replacement Part); ORS 133.550 repealed by section 358, chapter 836, Oregon Laws 1973.
[87]
Section 13-2021, Oregon Code 1930.
[88]
Bowles v. Creason et al., 159 Or. 129, 146-147 (1938), *quoting* 4 Am. Jur., *Arrest*, 70 (emphasis added).
[89]
Bowles, 159 Or. at 146, *quoting* 5 C.J., *Arrest*, 71.
[90]
The Supreme Court described this change as follows: "ORS 135.010 was amended in 1973 to include the 36 hour and 96 hour time limits. Former ORS 133.550 . . . was repealed. The legislative history indicates that the time limits were intended to provide specific statutory guidelines for speedy arraignment. Minutes, Criminal Law Revision Commission, Full Committee, August 28, 1972, p. 30. The minutes of the House Judiciary Committee are helpful to understanding the statutory change: 'The purpose of this was to get the defendant before a magistrate as quickly as possible.' Minutes, House Judiciary Committee, Feb. 19, 1973, pp. 6, 7." *Mendacino*, 288 Or. at 236 n.4.
[91]
See ORS 133.005 for the full definition.
[92]
ORS 163.225 and 163.235.
[93]
ORS 163.275.
[94]
ORS 133.020.
[95]
ORS 133.030.
[96]
ORS 133.560 (2) (1971 Replacement Part); ORS 133.560 repealed by section 358, chapter 836, Oregon Laws 1973.
[97]
Article 4, Arrests and Related Procedures, Arrests, Proposed Oregon Criminal Procedure Code Final Draft and Report, Criminal Law Revision Commission, November 1972, at 64.
[98]
Id.
[99]
Senate Judiciary Committee hearing audio recording, March 12, 1973, tape 9, side 2.
[100]
Minutes of the Senate Judiciary Committee for March 12, 1973, at 15.
[101]
Senate Judiciary Committee exhibit, Senate Bill 80 (1973), at 28.
[102]
Senate Judiciary Committee exhibit, Senate Bill 80 (1973), at 169.
[103]
Senate Judiciary Committee exhibit, Senate Bill 80 (1973), at 327-333.
[104]
ORS 133.220.
[105]
ORS 133.340; *see also* ORS 133.110 and 135.010.
[106]
County of Riverside v. McLaughlin, 500 U.S. 44, 53 (1991), *summarizing Gerstein v. Pugh*, 420 U.S. 103, 114 (1975).
[107]
Riverside, 500 U.S. at 56-57.
[108]
Gerstein v. Pugh, 420 U.S. at 120.
[109]
State v. Clay, 84 Or. App. 514, 516 (1987).
[110]
ORS 133.280 (1969 Replacement Part); ORS 133.280 repealed by section 432, chapter 743, Oregon Laws 1971.

[111]
Section 31, chapter 743, Oregon Laws 1971.
[112]
Article 4, General Principles of Justification, Proposed Oregon Criminal Code Final Draft and Report, Criminal Law Revision Commission, July 1970, at 30-31.
[113]
Index to Drafts, Minutes and Tapes, Criminal Law Revision Commission, July 1970, at 3; Minutes, Criminal Law Revision Commission Subcommittee No. 1, September 9, 1969, at 14-16.
[114]
Minutes, Criminal Law Revision Commission Subcommittee No. 1, September 9, 1969, at 14 and 16.
[115]
Minutes, Criminal Law Revision Commission, December 12, 1969, at 25-26.
[116]
Minutes, Criminal Law Revision Commission, December 12, 1969, at 26.
[117]
Article 4, General Principles of Justification, Proposed Oregon Criminal Code Final Draft and Report, Criminal Law Revision Commission, July 1970, at 30.
[118]
Article 4, General Principles of Justification, Proposed Oregon Criminal Code Final Draft and Report, Criminal Law Revision Commission, July 1970, at 31.
[119]
Section 31 of Senate Bill 40 (1971), as introduced.
[120]
Minutes, Senate Criminal Law and Procedure Committee, February 9, 1971.
[121]
Minutes, House Judiciary Committee (full committee), April 26, 1971.
[122]
Mr. Dickson wrote several contemporaneous opinion pieces for newspapers on this issue.
[123]
Section 31, chapter 743, Oregon Laws 1971; ORS 161.255 (1971 Replacement Part).
[124]
ORS 133.310 and 133.350 (1971 Replacement Part).
[125]
ORS 161.255 (1971 Replacement Part).
[126]
ORS 133.350 (1971 Replacement Part).
[127]
Article 18, Miscellaneous Provisions, Proposed Oregon Criminal Procedure Code Final Draft and Report, Criminal Law Revision Commission, November 1972, at 290.
[128]
ORS 161.255 (1).
[129]
State v. Johnson, 225 Or. App. 545, 549 (2009), *quoting State v. Wright*, 310 Or. 430, 436 (1990).
[130]
Johnson, 225 Or. App. at 550.
[131]
ORS 161.255 (2).
[132]
ORS 161.015.
[133]
State v. Taylor, 182 Or. App. 243, 246-247 (2002).
[134]
ORS 163.190.
[135]
ORS 166.220.
[136]
ORS 161.255 (1).
[137]
ORS 161.255 (2).
[138]
ORS 163.190.
[139]
ORS 166.220.
[140]
ORS 133.225 (1)

[141] ORS 169.030.

[142] ORS 169.076 (2)(a) and (b).

[143] ORS 169.046; *see also* ORS 169.042 and 169.044.

[144] ORS 133.225 (1).