

A Path to Curbing Racial Profiling: An Overview and a Call to Action

The early March of this year, Portland Mayor Tom Potter told a Somali immigrant who had been stopped four times in 18 months that the police actions “smacked of racism.”¹ More egregious cases have come to the attention of the Northwest Constitutional Rights Center in recent months: in one case, a young African American male had been pulled over nearly 20 times in less than two years—and three times on a single day. The purported reasons for the stops, according to police reports, were minor traffic violations, such as failing to signal a turn or having the front tires of his vehicle in the pedestrian crosswalk. Citywide statistics have revealed that these are not isolated cases of racial profiling by the Portland police.

The Portland Police Bureau recently released traffic stops data for 2004 and 2005. In the traffic stops in both years, African Americans and Hispanic/Latino drivers were overrepresented. Thirteen percent of the total number of stops in each year were of drivers who were African Americans, despite the fact that African Americans constitute only about 6% of the Portland population.² By contrast, whites make up about 79% of the population but were stopped in only 69% of the traffic stops in 2005. Moreover, African Americans and Latinos/Hispanics were twice as likely to be searched during the stops as whites, despite the fact that whites were found to have contraband more often than either minority group. (Police found contraband in 10% of the stops of white drivers, compared to 8% of the stops of African American drivers and

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7.3% of the stops of Latino/Hispanic drivers.)³

Unfortunately, recent statewide research has revealed similar trends throughout Oregon. For example, 30% of Hispanics and 40% of African Americans in Oregon reported one or more traffic stops by police in the past year, compared to only 20% of Caucasians who reported one or more stops.⁴ Moreover, 21% of African American respondents reported being stopped by police two or more times within the past 12 months, compared to only 6% of other respondents from the same geographical area. Finally, 40% of Hispanics and 73% of African Americans said that they thought police lied about the reason for the stop, compared with only 25% of whites.⁵

Local anecdotal evidence supports these findings. The Portland chief of police admitted in a 2005 court affidavit that the department trains officers to make pretextual traffic stops.⁶ In 2004, Portland police shot and killed an unarmed African American man after pulling him over for failure to signal a turn. The shooting was the third time an unarmed African American person was shot by Portland police in three years.⁷ As recently as 2004, none of the 123 sheriff patrol deputies in Clackamas County were minorities.⁸ In response to several complaints of profiling, the NAACP has raised concerns with the Salem Police Department.⁹ Incidents

of racial profiling have also prompted calls for reform in Eugene.¹⁰

These stories and statistics reflect what many Portland residents have experienced for decades. Before the Portland stops data were released, the community-based organization Oregon Action, along with the Northwest Constitutional Rights Center, organized a series of community listening forums to facilitate a dialogue about racial profiling between community members and the police in response to concerns. Both organizations have come up with policy recommendations that address community concerns. Achieving systemic reform, however, will require a concerted effort of political pressure and effective litigation in cases of racial profiling. This article is an overview of the current state of the law in the Ninth Circuit and in Oregon state courts, and we hope it will encourage Oregon attorneys to consider litigating such cases.

**Federal Civil Rights Litigation:
An Option to Effect Change**

When city officials and law enforcement agencies fail to adequately address the issue, litigation may bolster community-based efforts to end racial profiling. Several developments make this an area ripe for impact litigation. First, there is

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Supreme Court Update

Decided

***Beard v. Banks*, No. 04-1739 (June 28, 2006)**

In this 6–2 decision, the U.S. Supreme Court reversed the Third Circuit by ruling that a maximum security prison in Pennsylvania can withhold newspapers, magazines, and photographs from the most difficult inmates in an effort to promote security and good behavior. The policy does not violate the prisoners' First Amendment rights because prisons can put reasonable restrictions on the constitutional rights of inmates.

***Burlington Northern & Santa Fe Railway Co. v. White*, No. 05-259 (June 22, 2006)**

The Court affirmed the Sixth Circuit, ruling 9–0 in favor of a female forklift operator who sued her employer for retaliatory discrimination under Title VII of the Civil Rights Act of 1964. The employee had complained of sexual harassment by her boss and was later transferred to a job that was equal in pay and benefits but required "dirtier" and "more strenuous" work. She was also suspended. The Court held that Title VII's anti-retaliation provision covers only those actions "that would have been materially adverse to a reasonable employee or job applicant," meaning "the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."

***Clark v. Arizona*, No. 05-5966 (June 29, 2006)**

On the final day of the Court's 2005–2006 term, it ruled 5–4 in favor of upholding Arizona's insanity law against a diagnosed paranoid schizophrenic man who presented evidence that he shot and killed a police officer pursuant to a routine traffic stop because he believed that the officer was an alien, his town had been taken over by aliens, and he was being held captive and tortured. Arizona's insanity

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law allows only evidence that is related to proving that the defendant did not know right from wrong. The Court ruled that the insanity law did not violate the defendant's due process rights.

***Davis v. Washington*, No. 05-5224; *Hammon v. Indiana*, No. 05-5705 (June 19, 2006)**

The Court unanimously upheld the Washington Supreme Court in *Davis*, holding that an alleged victim's statements to a 911 operator naming her assailant were not testimonial statements and thus did not make the declarant a witness subject to the Sixth Amendment confrontation clause because the statements had a primary purpose of helping the police provide emergency assistance. In *Hammon*, the Court reversed the Indiana Supreme Court, holding that statements by an alleged victim to officers while there was no longer an emergency in progress were testimonial because her statements concerned "what happened" instead of "what is happening."

***Hamdan v. Rumsfeld*, No. 05-184 (June 29, 2006)**

The Supreme Court ruled 5–3 for Hamdan, Osama bin Laden's chauffeur who was captured in Afghanistan and transported to Guantanamo Bay Naval Station in Cuba for alleged war crimes in the "war on terror." In reversing the D.C. Court of Appeals, the Court held that the Bush administration's establishment of war crimes tribunals at Guantanamo Bay violates both the Geneva Convention and the Uniform Code of Military Justice. The Court also held that President Bush's presidential powers do not permit the establishment of the tribunals, and that Congress's Authorization for the Use of Military Force resolution does not expand his presidential powers so as to permit the establishment of the tribunals.

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When Does the First Amendment Protect Public Employee Speech on Non-Work-Related Topics?

Attorneys representing public employers or employees will likely have the opportunity to assess or litigate a First Amendment retaliation claim. An emerging and sometimes titillating subset of First Amendment law addresses employee speech on matters unrelated to the employee's job duties or government functions. These cases explore whether public employers can restrict off-duty or non-work-related speech by public employees on topics like sex, bigotry, politics, and religion.

This article first explains the basic framework applicable to these First Amendment claims, and then surveys First Amendment cases in which public employees engaged in speech that was unrelated to their job duties or government functions.

Evaluating First Amendment Claims by Public Employees: A Brief, Simplified Primer

Public employees do not relinquish all of their First Amendment rights simply by reason of their employment in the public service.¹ Instead, public employees have the right to speak freely as citizens on matters of public concern, consistent with the interests of the government employer in promoting efficient and effective government operations.²

In evaluating First Amendment claims by public employees, courts employ a two-step inquiry, commonly referred to as the *Pickering* balancing test.³ The threshold inquiry is whether the employee spoke as a citizen about a matter of public concern.⁴ If the speech was made pursuant to official duties (that is, the employee was not speaking as a citizen) or pertains to matters of purely personal interest, the First Amendment is not implicated and no further analysis is necessary.⁵

If, on the other hand, the speech at issue was not made pursuant to official duties and relates to a matter of public concern, then the second step of the *Pickering* test requires the court

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The threshold inquiry is whether the employee spoke as a citizen about a matter of public concern.

to balance the employee's interest in expression against the employer's interest in "promoting the efficiency of the public services it performs through its employees."⁶ Balancing the employee and employer's interests is done on a case-by-case basis, and "[a]lthough such particularized balancing is difficult, the courts must reach the most appropriate possible balance of the competing interests."⁷

In applying the second step of the *Pickering* balancing test, the time, manner, place, and context in which the dispute arose must be considered.⁸ In weighing the competing interests, the public's interest in receiving informed opinions about government operations weighs in favor of the employee.⁹ In weighing the employer's interest, pertinent considerations include whether the statement impairs discipline by superiors, disrupts harmony among co-workers, has a detrimental impact on close working relationships, impedes the performance of the employee's duties, or interferes with office operations.¹⁰ If the employer attempts to restrict speech to avoid a disruption in operations, the alleged disruption must be reasonably likely to occur and cannot be entirely speculative.¹¹

If, after balancing these competing interests, the employee's interest in expression outweighs the government's interest in maintaining efficient operations, then the First Amendment protects the employee from any ad-

verse employment action undertaken because of the protected speech.

Applying the First Amendment to Public Employee Expression on Non-Work Issues

When the government is acting as an employer, it may, under certain circumstances, restrict an employee's speech even when the employee is not at work or is speaking on non-work-related topics. The parameters of such restrictions are not entirely clear, but are emerging through case law.

Reasonable restrictions on public employee speech are more likely to survive challenge than outright bans on speech.¹² However, public employers attempting to restrict employee speech do so at the risk of violating the First Amendment. On the other hand, public employees opting to voice their personal opinions do so at the risk of jeopardizing their jobs, especially if the employee serves a policymaking function or has contacts with the public in his or her capacity as a public official.¹³

The following summaries focus on cases in which a public employer took action against a public employee for engaging in speech related to religion, bigotry, sex, or politics.

Religious Expression

Expression of religious views and prayer are generally considered related to matters of public concern, but such expression while at work may be subject to reasonable restrictions.¹⁴

In *Berry v. Department of Social Services*, 447 F.3d 642 (9th Cir. 2006), the public employer prohibited Mr. Berry from discussing religion with clients, conducting prayer meetings in the office, and displaying religious items in his office that would be visible to clients. In upholding the employer's restrictions on religious speech, the Court stated:

The Department has successfully

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navigated between the Scylla of not respecting its employee's right to the free exercise of his religion and the Charybdis of violating the Establishment Clause of the First Amendment by appearing to endorse religion. Specifically, we hold that the public employer's interest in avoiding violations of the Establishment Clause and in maintaining the conference room as a nonpublic forum outweighs the resulting limitations on Mr. Berry's free exercise of his religion at work.¹⁵

Although some restrictions on religious expression may survive a First Amendment challenge, a complete ban on all religious speech and the storage or display of religious artifacts will not.¹⁶ In *Tucker v. California Department of Education*, 97 F.3d 1204 (9th Cir. 1996), the Ninth Circuit recognized that a ban on all religious expressions "simply goes too far."¹⁷

Expression of Personal Views on Race or Homosexuality

Speech about beliefs on race or homosexuality is generally considered to relate to matters of public concern.¹⁸ However, expressions of hostile, derogatory, or discriminatory views by public employees may not receive First Amendment protection.¹⁹

In *Lumpkin v. Brown*, 109 F.3d 1498 (9th Cir. 1997), the Ninth Circuit upheld the dismissal of Reverend Lumpkin from his position on the San Francisco Human Rights Commission because of his public statements condemning homosexuality.²⁰ The Court reasoned that the city had a "heightened expectation that its Human Rights Commissioners refrain from speaking publicly in a way that mocks the City's antidiscrimination policy."²¹

In balancing the interests of the individual against the interests of the employer, law enforcement and firefighters have also been held to a heightened standard because part of their job is to "safeguard the public's opinion of them, particularly with

regard to a community's view of the respect that police officers and firefighters accord the members of that community."²²

Expression Related to Sex

Expression concerning sexual activity between consenting adults is not considered a matter of public concern.²³

In *City of San Diego v. Roe*, 543 U.S. 77 (2004), the plaintiff police officer created a sexually explicit video and sold it on the adults-only section of eBay. The officer was terminated for "conduct unbecoming of an officer, outside employment, and immoral conduct."²⁴ The Supreme Court upheld the termination, finding that the police officer's expression did not address a matter of public concern because it did "nothing to inform the public" about operations at the police department.²⁵ Because the speech at issue was not protected, the Court did not apply the *Pickering* balancing test.

Political Expression

Politically motivated comments are considered to address matters of public concern and have been afforded First Amendment protection when the employee's interest in expression outweighs the employer's interest in restricting speech.

In *Rankin v. McPherson*, 483 U.S. 378 (1987), a clerical employee in a county constable's office was fired after she stated that if someone attempted to assassinate the president, "I hope they get him."²⁶ The Supreme Court held that speech addressing the "policies of the President's administration" plainly pertained to matters of public concern.²⁷ Although the statement was made at the workplace, there was no evidence presented that it interfered with the efficient functioning of the office, discredited the office, or demonstrated a character trait that made the employee unfit for duty.²⁸ In weighing the interests, the Court held that when "the employee

serves no confidential, policymaking, or public contact role, the danger to the agency's successful functioning from that employee's private speech is minimal."²⁹

Conclusion

As evidenced by the case law discussed above, application of the *Pickering* balancing test results in different outcomes depending on the speech at issue, the nature of the employment relationship, and the effect of the speech on government operations.

Whether representing a public employer or employee in a First Amendment claim, attorneys should prepare themselves to navigate this emerging area of law. ♦

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Endnotes

1. *City of San Diego v. Roe*, 543 U.S. 77, 80, 125 S. Ct. 521, 523 (2004).
2. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1958 (2006); *Connick v. Myers*, 461 U.S. 138, 143, 103 S. Ct. 1684, 1688 (1983); *Fender v. Oregon City*, 811 F. Supp. 554, 560 (D. Or. 1993), *aff'd*, 1994 U.S. App. LEXIS 27750 (9th Cir. 1994), citing *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 1735 (1968).
3. See generally *Pickering v. Board of Educ.*, 391 U.S. at 568.
4. *Connick v. Myers*, 461 U.S. at 147.
5. *Brewster v. Board of Educ.*, 149 F.3d 971, 978 (9th Cir. 1998); *Garcetti v. Ceballos*, 126 S. Ct. at 1958 (employee statements made in the course of performing official duties do not amount to protected speech); *Connick v. Myers*, 461 U.S. at 147 (when an employee speaks on matters of personal concern, the courts will not judge "the wisdom of a personnel decision taken by a public agency"). See also *McKinley v. City of Eloy*, 705 F.2d 1110, 1115 (9th Cir. 1983) (speech dealing with personnel disputes and grievances and of no relevance to the public's evaluation of the government is not protected).
6. *Pickering v. Board of Educ.*, 391 U.S. at 568.
7. *Connick v. Myers*, 461 U.S. at 150.
8. *Id.* at 152-153; *Rankin v. McPherson*, 483 U.S. 378, 388, 107 S. Ct. 2891, 2899 (1987).
9. *City of San Diego v. Roe*, 543 U.S. at 82.
10. *Pickering v. Board of Educ.*, 391 U.S. at 570-573; *Rankin v. McPherson*, 483 U.S. at

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388. See also *United States v. National Treasury Employees Union*, 513 U.S. 454, 485, 115 S. Ct. 1003, 1022 (1995)(interest supporting a policy with widespread impact must be stronger than the interest supporting a single supervisory decision).

11. *Berger v. Battaglia*, 779 F.2d 992 (4th Cir. 1985)(demotion of police officer unconstitutional because there was no evidence that a comedy performance in blackface disrupted internal operations and any disruption outside of the police department was speculative).

12. *Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 645 (9th Cir. 2006)(reasonable restrictions on speech upheld); *Tucker v. California Dep't of Educ.*, 97 F.3d 1204, 1217 (9th Cir. 1996)(an outright ban on all religious speech goes "too far").

13. *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673 (1976)(policymaker may be terminated for political expression to ensure that the representative government's interests are not undercut); *Meltzer v. Board of Educ.*, 336 F.3d 185 (2d Cir. 2003)(termination of high school teacher upheld because teacher was an active contributing member of the North American Man-Boy Love Association); *Calef v. Budden*, 361 F. Supp. 2d 493 (D. S.C. 2005)(teachers act with the "imprimatur of the school district which employs them" and the district's interest in "dissociating itself" from the plaintiff's political views outweighs the teacher's interest in speaking out against the war in Iraq and the

president); *Locurto v. Giuliani*, 447 F.3d 159 (2d Cir. 2006)(upholding dismissal of police and fire employees who participated in parade float that was overtly racist).

14. *Berry v. Dep't of Soc. Servs.*, 447 F.3d 642 (9th Cir. 2006)(restricting employee from discussing religion with clients and using public meeting rooms for prayer does not violate First Amendment); *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517 (9th Cir. 1994)(restricting high school teacher from discussing religion does not violate First Amendment).

15. *Berry v. Dep't of Soc. Servs.*, 447 F.3d at 645 (restriction on religious speech upheld where the employer's interest in avoiding violations of the Establishment Clause outweighed the employee's interest in engaging in religious speech while on the job).

16. *Tucker v. California Dep't of Educ.*, 97 F.3d 1204 (9th Cir. 1996).

17. *Id.* at 1217.

18. *Lumpkin v. Brown*, 109 F.3d 1498 (9th Cir. 1997)(condemning homosexuality addresses a matter of public concern); *Locurto v. Giuliani*, 447 F.3d 159 (2d Cir. 2006)(participation in parade while expressing racist views addresses matter of public concern); but see *Tindle v. Caudell*, 56 F.3d 966 (8th Cir. 1995)(dressing up in blackface Halloween costume "to have a good time" does not constitute speech addressing a matter of public concern).

19. *Id.*

20. *Lumpkin v. Brown*, 109 F.3d 1498 (9th Cir. 1997).

21. *Id.* at 1501.

22. *Locurto v. Giuliani*, 447 F.3d 159 (2d Cir. 2006)(upholding dismissal of police and fire employees who participated in parade float that was overtly racist).

23. *City of San Diego v. Roe*, 543 U.S. 77 (2004); *Thaeter v. Palm Beach County*, 449 F.3d 1342 (11th Cir. 2006).

24. *City of San Diego v. Roe*, 543 U.S. at 79.

25. *Id.* at 84.

26. *Rankin v. McPherson*, 483 U.S. at 381.

27. *Id.* at 386-387.

28. *Id.* at 388.

29. *Id.* at 390-391. But see *Elrod v. Burns*, 427 U.S. at 367(policymaker may be terminated for political expression to ensure that the representative government's interests are not undercut); *Meltzer v. Board of Educ.*, 336 F.3d 185 (2d Cir. 2003)(termination of high school teacher upheld because teacher was an active contributing member of the North American Man-Boy Love Association); *Calef v. Budden*, 361 F. Supp. 2d 493 (D. S.C. 2005)(teachers act with the "imprimatur of the school district which employs them" and the district's interest in "dissociating itself" from the plaintiff's political views outweighs the teacher's interest in speaking out against the war in Iraq and the president).

Recent Decisions

***Dark v. Curry County*, 451 F.3d 1078 (9th Cir. 2006)**

In remanding this Oregon case for trial, the Ninth Circuit held that a reasonable juror might find that two of the three accommodations proposed by the plaintiff for his epilepsy were reasonable. The plaintiff first asserted that a temporary change in his duties would be effective accommodation, but the court held that the county was not obligated to restructure his position by exempting him from essential functions. However, the court found that reassignment might be a reasonable accommodation, considering the positions that were contemporaneously available and positions that became available within a reasonable period. The court also found that the county might have reasonably accommodated the plaintiff by allowing him to use accumulated sick leave or unpaid medical leave. Recovery time of an unspecified duration may be reasonable in a particular case.

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***Deveraturda v. Globe Aviation Security Serv.*, 454 F.3d 1043 (9th Cir. 2006)**

The court held that a private employer is not required to give a WARN Act notice when the layoff of its employees is ordered by the federal government and the private employer had nothing to do with conditions that brought layoffs about.

***United States v. Ziegler*, No. 05-30177, 2006 WL 2255688 (9th Cir. Aug. 8, 2006)**

The court held that the employee did not have a reasonable expectation of privacy in material in his office computer. Therefore, the child pornography that the employee had downloaded onto that computer was admissible in criminal proceedings after the employer turned the com-

puter over to the FBI. The court found that a company's mere ownership of a computer may not be sufficient alone to defeat an expectation of privacy, but when coupled with a right of company access, routine monitoring, and a prohibition against private use, there is no reasonable expectation of privacy.

Federal Rule of Appellate Procedure 32.1

On August 12, 2006, the U.S. Supreme Court approved a new Federal Rule of Appellate Procedure 32.1, which permits attorneys to cite unpublished opinions in the federal circuit courts. The rule takes effect January 1, 2007, and only specifically allows the citing of unpublished opinions that are filed after January 1, 2007. The Ninth Circuit currently prohibits the citing of unpublished opinions. ♦

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Hudson v. Michigan,
No. 03-9168 (June 15, 2006)

The police officers in this case obtained a warrant to search a person's home for drugs and firearms, but they failed to knock and waited only three to five seconds after announcing themselves before they entered the person's home. In a 5–4 ruling affirming the Michigan Court of Appeals, the Supreme Court held that a violation of the Fourth Amendment's knock-and-announce rule does not require exclusion of evidence, except in cases in which its deterrence of improper police conduct outweighs its substantial social costs.

Kansas v. Marsh,
No. 04-1170 (June 26, 2006)

The Court reversed the Kansas Supreme Court in a 5–4 decision, holding that Kansas's death penalty statute constitutionally instructs jurors to impose death when mitigating and aggravating factors are equal. The Court held that while state systems must rationally narrow the class of death-eligible defendants and permit a jury to render a reasonable, individualized sentencing determination, states have discretion in imposing the death penalty, including the manner in which mitigating and aggravating circumstances are weighed.

Randall v. Sorrell, No. 04-1528;
Vermont Republican State Committee v. Sorrell, No. 04-1530;
Sorrell v. Randall, 04-1697
(June 26, 2006)

The Court held 6–3 that a Vermont statute that imposes expenditure and contribution limitations on campaigns for state office violates the First Amendment. In reversing the Second Circuit, the Court held that limiting the amount that candidates for state office can spend on their campaigns violates the First Amendment. Furthermore, although Vermont had a compelling interest in preventing campaign corruption, the statute's contribution limits were not so narrowly tailored as to avoid placing an unreasonable burden on protected speech rights.

Samson v. California,
No. 04-9728 (June 19, 2006)

The Supreme Court ruled 6–3 that the Fourth Amendment does not forbid police from conducting a warrantless and suspicionless search of a parolee. Here, an officer's search of a parolee yielded methamphetamine. The parolee unsuccessfully challenged the California statute that requires prisoners eligible for state parole to consent in writing to a search or seizure based only on their status as a parolee.

Sanchez-Llamas v. Oregon,
No. 04-10566; *Bustillo v. Johnson,*
No. 05-51 (June 28, 2006)

The Court affirmed decisions from the supreme courts of Oregon and Virginia, holding 5–4 that even assuming without deciding that the Vienna Convention creates judicially enforceable individual rights of consular notification and access to a foreign detainee, a state's failure to notify a foreign detainee of his rights under the Convention does not require suppression of statements made to police.

U.S. v. Gonzalez-Lopez,
No. 05-352 (June 26, 2006)

In a 5–4 vote, the Court affirmed the Eighth Circuit's decision that the erroneous denial of a defendant's choice of counsel violates the Sixth Amendment and is grounds for reversing a conviction. Here, the defendant attempted to change lawyers before trial, his pro hac vice motion for his new counsel was erroneously denied, and he was later convicted of conspiracy to distribute marijuana.

Youngblood v. West Virginia,
No. 05-6997 (June 19, 2006)

In a per curiam opinion, the Supreme Court ruled that withholding material evidence obtained after a prisoner's conviction violates due process as stated in *Brady v. Maryland*, 373 U.S. 83 (1963). Here, the prisoner's attorney found an exculpatory note after the prisoner was convicted and sentenced to 25–60 years for sexual assault. Evidence existed showing that the note had been shown

to the investigating police officer, but that the officer had refused to take it and told the owner to destroy it.

Certiorari Granted

Gonzales v. Planned Parenthood, et al., No. 05-1382 (June 19, 2006)

The Court agreed to hear a case from the Ninth Circuit regarding the constitutionality of the Partial-Birth Abortion Ban Act of 2003. The Ninth Circuit held that the act was unconstitutional on three grounds: it imposed an undue burden on a woman's right to choose, it was unconstitutionally vague, and it failed to include a health exception for the mother. ♦

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Video Available Traffic Stops CLE

The Civil Rights Section co-sponsored a CLE entitled "Traffic Stops, Civil Rights, and You" in 2004, following several police shootings arising out of traffic stops. The CLE explored legal and political issues surrounding traffic stops that lead to violence and how cultural differences between citizens and police can affect traffic stops. The CLE, which provided diversity training to help bridge the cultural gap, was taped. A limited number of videos are available at \$25 each. The CLE has been approved for 1.25 General CLE credits and 1.0 Diversity CLE credits. If you would like to purchase a video, please contact Dennis Steinman at dsteinman@kelrun.com.

growing recognition of the problem in Oregon, as evidenced by the passage of Senate Bill 415 (2001), which urges law enforcement agencies to establish voluntary traffic-stop data collection programs and created a state committee to analyze and report on the data collected.¹¹ Second, local law enforcement agencies, including those in Portland and Eugene, now collect stop data. Finally, the Ninth Circuit has made several statements in dicta that suggest it is receptive to racial-profiling claims. *United States v. Montero-Camargo*, 208 F.3d 1122, 1135 n.24 (9th Cir. 2000) (“A significant body of research shows that race is routinely and improperly used as a proxy for criminality.”); *Washington v. Lambert*, 98 F.3d 1181, 1187 (9th Cir. 1996) (“We cannot help but be aware that the burden of aggressive and intrusive police action falls disproportionately on African-American, and sometimes Latino, males.”)

In the federal courts, victims of racial profiling can pursue legal action under 42 U.S.C. § 1983 on the basis that law enforcement officers’ conduct violated the Fourth Amendment and the equal protection clause of the U.S. Constitution. Plaintiffs may also pursue other civil rights actions, including actions under 42 U.S.C. §§ 1981, 1985, and 1986 and Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d). Because the burden of proof of discriminatory intent required to successfully allege a violation under these statutes is similar to that under § 1983, they are not discussed further here. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 276 (2001) (Title VI plaintiffs must prove intentional discrimination); *Caldeira v. County of Kauai*, 866 F.2d 1175, 1182 (9th Cir. 1989) (absence of a § 1983 violation precludes a § 1985 claim based on the same facts). This article focuses on Ninth Circuit and Oregon District jurisprudence on Fourth Amendment and equal protection claims for racial profiling and identifies the proof necessary to survive a motion for summary judgment.

Fourth Amendment Protections

The Fourth Amendment’s prohibition against unlawful searches and seizures grants broad discretion to police officers conducting stops in the field. A seizure occurs when a reasonable person would not feel free to end the encounter with the law enforcement officer. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). Such stops, however, need only be reasonable to withstand Fourth Amendment scrutiny. *Terry v. Ohio*, 392 U.S. 1, 9 (1968). Police officers meet this threshold if they have “a reasonable suspicion supported by articulable facts that criminal activity may be afoot.” *United States v. Sokolow*, 490 U.S. 1, 7 (1989). In *Sokolow*, the U.S. Supreme Court held that an officer’s reliance on a profile of criminal characteristics could lead to reasonable suspicion. *Id.* at 11.

Race or ethnic appearance alone is insufficient to justify a stop or arrest. *United States v. Montero-Camargo*, 208 F.3d 1122 (9th Cir. 2000). Courts will not inquire into the officer’s actual motive, however, if an officer observes any violation of law justifying the stop. *Whren v. United States*, 517 U.S. 806, 813 (1996).¹² Thus, a plaintiff asserting a Fourth Amendment claim on the basis of racial profiling by the defendant officer may succeed if he or she can show that the law enforcement officer stopped him or her without reasonable suspicion of any traffic violation or other unlawful activity. *United States v. Jimenez-Medina*, 173 F.3d 752, 754 (9th Cir. 1999).

A victim of racial profiling may also assert a Fourth Amendment claim if police prolong the stop or otherwise act unreasonably in view of the reason for the stop. *Florida v. Royer*, 460 U.S. 491, 500 (1983). For example, under ordinary circumstances, when the police have only reasonable suspicion to make an investigatory stop, drawing weapons and using handcuffs and other restraints will violate the Fourth Amendment. *Washington v. Lambert*, 98 F.3d at 1187. See also *United States*

v. Higareda-Santa, 826 F. Supp. 355, 358–359 (D. Or. 1993) (holding that the officer had reasonable suspicion that the driver was drunk to justify a stop but unlawfully prolonged the detention when he continued questioning after he knew the driver was not intoxicated).

Equal Protection Claims

In addition to Fourth Amendment claims, a victim of racial profiling may assert that an officer’s actions violated the Fourteenth Amendment guarantee of equal protection of the law. Unless there is an explicit policy authorizing stops based on race (which is unlikely), a plaintiff must prove that the police officer acted with intent to discriminate based on race. *Bingham v. Manhattan Beach*, 341 F.3d 939, 948 (9th Cir. 2003). This is a high evidentiary hurdle.

In *Bingham*, the plaintiff pointed to the following facts as evidence of racial motivation: (1) he was African American and the officer was white, (2) the officer could see the plaintiff’s race prior to the traffic stop, (3) the stop occurred in a city that was predominantly white, and (4) the officer said that he pulled the plaintiff over for erratic driving but never issued a citation. *Id.* at 948. The court held that these facts failed to set forth sufficient evidence of racial motivation to survive a motion for summary judgment. *Id.* On the other hand, in *Jordan v. City of Eugene*, the court distinguished *Bingham* and held that the plaintiff presented sufficient evidence to survive summary judgment—an officer stopped and frisked him, an African American man, but did not stop or frisk his four white companions. No. 05-6164-TC, 2006 U.S. Dist. LEXIS 38839, at *24 (D. Or. June 12, 2006) (unpublished opinion).

An officer’s “racially tinged” statements can also provide sufficient evidence of discriminatory intent. See *Serrano v. Francis*, 345 F.3d 1071, 1083 (9th Cir. 2003). In *Serrano*, the plaintiff asserted an equal protection

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challenge to a prison disciplinary hearing on the ground that the hearing officer was racially biased. *Id.* at 1082. During the hearing, the officer said, “I do not know how black people think, and I’ll never know” and told the plaintiff that he was “not O.J. Simpson or Johnnie Cochran.” *Id.* at 1083. The Ninth Circuit found that the officer’s statements were sufficient evidence of discriminatory intent to survive a motion for summary judgment. *Id.* See also *Christopher v. Nestlerode*, 373 F. Supp. 2d 503, 519 (M.D. Pa. 2005) (holding that conflicting accounts of whether the officer recognized the plaintiff’s race before the stop, whether the officer had a valid reason for the stop, and what was said during the stop made intent a question for the jury). These cases suggest that a victim of racial profiling will have to present similar “smoking gun” evidence in order to survive summary judgment.

Statistical evidence may bolster a claim of intentional discrimination when racial disparities “are very difficult to explain on nonracial grounds.” *Washington v. Davis*, 426 U.S. 229, 242 (1976). A precinct-by-precinct analysis of the traffic stops data collected by the Portland police shows that African Americans are more likely to be pulled over in precincts where African Americans account for a smaller percentage of the population than in other precincts. For example, an African American living in the Northeast Precinct, where African Americans constitute about 20% of the population, is 2.3 times more likely to be pulled over than a white driver in the same precinct.¹³ By contrast, in the Southeast Precinct, where only 2% of the population is African American, black drivers are 4.4 times more likely to be stopped than white drivers. This suggests that Portland police officers may be targeting African Americans driving through areas of Portland that are predominantly white.

However, only in “rare cases [has] a statistical pattern of discriminatory

impact demonstrated a constitutional violation.” *McCleskey v. Kemp*, 481 U.S. 279, 293 (1987). In *McCleskey*, for example, the Court rejected evidence that the odds of a defendant’s receiving the death penalty in Georgia when the victim was white were 4.3 times higher than when the victim was African American—even after controlling for nonracial variables. *Id.* at 286. The Court reasoned that it required proof beyond statistical patterns for Georgia as a whole to show that invidious discrimination led to the judgment in an individual case. *Id.* at 293–294.

Similarly, in *United States v. Armstrong*, 517 U.S. 456, 470–471 (1996), criminal defendants sought discovery on a selective prosecution claim based on the fact that in every one of the 24 crack-cocaine cases closed by the public defender’s office the prior year, the defendant was African American. *Id.* at 459. The Court rejected this evidence as insufficient to require further discovery because the plaintiffs “failed to show that the Government declined to prosecute similarly situated suspects of other races.” *Id.* at 458.

While neither the Ninth Circuit nor the District of Oregon has directly addressed the issue, other federal courts have distinguished *Armstrong* from civil racial-profiling cases. For example, in *Chavez v. Illinois State Police*, the court held that racial-profiling plaintiffs could use statistics to prove discriminatory effect in support of their equal protection claim. 251 F.3d 612, 640 (7th Cir. 2001). The court held that *Armstrong* did not apply because the racial-profiling case involved police conduct, not prosecutorial discretion, and was a civil complaint, not a criminal prosecution. *Id.* See also *Rodriguez v. California Hwy Patrol*, 89 F. Supp. 2d 1131, 1140–1142 (N.D. Cal. 2000) (reaching the same conclusion). The Ninth Circuit has recognized that racial profiling is pervasive in law enforcement and that “[s]tops based on race

or ethnic appearance . . . send a clear message that those who are not white enjoy a lesser degree of constitutional protection.” *Montero-Camargo*, 208 F.3d at 1135, n.24; see also *Washington v. Lambert*, 98 F.3d at 1187. Thus, the court may be persuaded to distinguish *Armstrong* in civil cases and allow statistical evidence to support an equal protection claim.

Class Action Issues

Federal class actions against police departments showing that federal constitutional or statutory rights were violated can be a powerful remedial mechanism to address racial profiling. Litigators must go to court prepared, however, to win class certification and prove municipal liability. These issues are discussed briefly below.

Class certification requires proof that (1) the class is so numerous that joinder is impracticable, (2) there are questions of law and fact common to the class, (3) the claims of the representative parties are typical of the class, and (4) the representative parties will adequately protect the interests of the class. Fed. R. Civ. Proc. 23(a). Rule 23(b)(2) permits class actions for declaratory or injunctive relief when the defendant “has acted or refused to act on grounds generally applicable to the class.” Plaintiffs seeking a class action for damages may do so under Rule 23(b)(3) if they can show that common questions of law or fact predominate and class resolution is “superior to other available methods for the fair and efficient adjudication of the controversy.”

To establish numerosity, a plaintiff must demonstrate some evidence or reasonable estimate of the number of purported class members. See *Siles v. ILGWU Nat’l Retirement Fund*, 783 F.2d 923, 930 (9th Cir. 1986). The Ninth Circuit has suggested that a class with less than 40 plaintiffs could suffice. *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1319 (9th Cir. 1982), vacated on other grounds,

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459 U.S. 810 (1982). In addition, “the relatively small size of each class member’s claim” supports a finding that joinder would be impracticable. *Id.* at 1320. This might prove helpful to racial-profiling plaintiffs since the harm suffered during a single illegal stop by police may not be sufficient to justify bringing an individual suit.

In *Hodgers-Durgin v. De la Vina*, for example, two named plaintiffs represented a class defined “as all persons of Latin, Hispanic or Mexican appearance who have been, are, or will be traveling by motor vehicle” on the highways in certain Arizona counties. 199 F.3d 1037, 1040 (9th Cir. 1999). Though the named plaintiffs lacked standing to seek injunctive relief because they failed to prove likelihood of future injury (since they had been stopped only once in ten years), the court noted that plaintiffs who had been stopped several times, had they been named plaintiffs, would have cleared this hurdle. *Id.* at 1044–1045.

Even if plaintiffs are able to certify a class, however, they must prove municipal liability if they want to achieve citywide reform. Municipal liability under § 1983 requires proof of a policy or custom that led to the deprivation of the plaintiff’s constitutional rights. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978). The plaintiff must demonstrate that the official policy or custom is itself unconstitutional or that the city’s “deliberate indifference” to the plaintiff’s constitutional rights was the direct cause of the injury. *Canton v. Harris*, 489 U.S. 378, 389 (1989).

A municipality’s failure to train its employees may amount to “deliberate indifference” if lack of training reflects a conscious choice by city policymakers (that is, gross negligence will not meet the evidentiary burden). The lower courts have heeded the Supreme Court’s warning to avoid “second-guessing municipal employee-training programs” and have steered clear of evaluating whether employee trainings are sufficient. *Id.*

at 391–392. Thus, it appears that any amount of training may be enough to rebut a charge of deliberate indifference on the part of the municipality.

A plaintiff may show deliberate indifference, however, if the municipality has failed to train its employees and there is “a pattern of violations from which a kind of ‘tacit authorization’ by city policymakers can be inferred.” *Id.* at 397 (J. O’Connor, concurring in part and dissenting in part). To prevail under that theory, plaintiffs must show (1) a clear and persistent pattern of illegal activity; (2) notice or constructive notice on the part of the policymaking official; (3) the official’s tacit approval of the unconstitutional conduct, such that the deliberate indifference amounts to an official policy of inaction; and (4) the inaction directly led to the constitutional deprivation. *M.N.O. v. Magana*, 2006 U.S. Dist. LEXIS 13042, at *27 (D. Or. March 6, 2006) (unpublished opinion). See also *Merritt v. County of Los Angeles*, 875 F.2d 765, 770 (9th Cir. 1989).

The Portland Police Bureau requires its officers to receive classes in “cultural competency” and to complete a computer-based course called “Perspectives in Profiling” which, according to the bureau, “allows officers to be introspective regarding unconscious biases that may factor in their decision-making.”¹⁴ Despite these trainings however, the traffic stops data show that Portland police officers continue to use race as a factor in their decisions to stop drivers. The Ninth Circuit has not considered whether any kind of training, including training that appears to have no effect in curbing unconstitutional practices within a police department, is sufficient for a municipality to defeat a charge of “deliberate indifference.”

State Claims: An Untested Option

The U.S. Constitution sets only the floor, not the ceiling, for individual rights and liberties. States are free to afford their citizens a higher

level of protection from selective law enforcement. Racial-profiling plaintiffs in Oregon, however, have not yet availed themselves of potential state causes of action.

The Oregon Constitution and state laws offer several potential avenues to redress racial profiling. For example, seizures or searches for evidence to be used in a criminal prosecution that are conducted without a warrant or suspicion of wrongdoing violate Article I, § 9, of the Oregon Constitution. *Nelson v. Lane County*, 304 Or. 97, 101, 743 P.2d 692 (1997). In *Nelson*, the Oregon Supreme Court analyzed the legality of DUI roadblocks under state law separately from its Fourth Amendment analysis, indicating a willingness to depart from federal jurisprudence on search and seizure issues.

In addition, like the Fourteenth Amendment’s guarantee of equal protection, “Article I, section 20, of the Oregon Constitution prohibits disparate treatment of groups or individuals by virtue of invidious social categories.” *Hewitt v. State Accident Ins. Fund Corp.*, 294 Or. 33, 43, 653 P.2d 970 (1982). Though the Oregon courts apply a suspect-class analysis similar to the federal courts’ jurisprudence under the equal protection clause, they have on occasion extended greater protections to Oregon citizens. See *id.* at 41–46 (holding that gender-based classifications are subject to strict scrutiny in Oregon even though the U.S. Supreme Court applied only intermediate scrutiny).

For example, in *Tanner v. Oregon Health Sciences University*, the Oregon Court of Appeals held that homosexuality was a suspect classification though federal courts have so far rejected that contention. 157 Or. App. 502, 524, 971 P.2d 435 (1998). In addition, the court stated that intentional conduct is not required for discrimination to be actionable under Article 1, § 20. *Id.* at 525 (citing *Zockert v. Fanning*, 310 Or. 514, 523, 800 P.2d 773 (1990)). Rather, “what

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is relevant is the extent to which privileges or immunities are not made available to all citizens on equal terms." *Id.* This holding, however, has yet to be tested in the context of law enforcement practices.

Finally, Oregon law provides a civil action for damages for violations of the state's criminal anti-intimidation statute. ORS § 30.198 (2006). A prevailing plaintiff is entitled to attorney fees under the law. *Id.* A person violates the anti-intimidation law if he or she intentionally threatens or subjects another to offensive physical contact on the basis of race. ORS § 166.155 (2006). Though there is no case law on the issue, victims of racial profiling might try to assert this cause of action when law enforcement officers' actions are particularly egregious.

A Call to Action

In the recent community listening sessions on racial profiling in Portland, one African American man who was stopped and questioned by police for no apparent reason simply asked of the detaining officer, "Give me the same respect you would give the next person." Yet, despite the well-documented, nationwide problem of racial profiling, police continue to single people out based on their race. Litigation may be an effective tool to fight this practice, especially when plaintiffs can prove municipal liability.

Class actions present another avenue for litigation when a sufficient number of individuals have common questions of law and fact. While class certification and establishing municipal liability are significant hurdles, this litigation can have a positive effect in pressuring decision makers to implement much-needed reform. Nevertheless, even cases against individual officers may force departments to take a hard look at how race plays a part in their tactics. Because racial-profiling litigation poses challenges, the Northwest Constitutional Rights Center has set aside resources to support collaborating attorneys with this type of public interest litigation in Portland, as part of its long-term effort to end this practice within the Portland Police Bureau. ♦

Shauna Curphey will start as the Northwest Constitutional Rights Center's fellow attorney in October 2006; Alejandro Queral is the Center's executive director. For more information about the Northwest Constitutional Rights Center or to make a donation, please contact Mr. Queral at aqueral@nwrc.org, or visit www.nwrc.org.

Endnotes

1. Ryan Frank & Maxine Bernstein, "Potter Says Police Stops 'Smacked of Racism'," *The Oregonian*, March 2, 2006, at A1, available at www.oregonlive.com/news/oregonian/index.ssf?/base/news/1141271727212480.xml&coll=7&thispage=1.
2. See Portland Police Bureau, *Traffic Stops Data Collection*, www.portlandonline.com/police/index.cfm?c=eccie (accessed Sept. 4, 2006). Latino/Hispanic drivers were also overrepresented in the traffic stops, although they were stopped at lower rates than African Americans.
3. *Id.*

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4. Oregon Criminal Justice Commission, *Law Enforcement Contacts Policy and Data Review Committee: 2005 Annual Report*, http://159.121.112.123/Racial_Profiling/lecc2005final2.pdf; Peter Wong, "Study Says Many See Profiling," *Statesmen Journal*, Feb. 24, 2006, at A1.

5. *Id.*

6. Frank, *supra*, note 1.

7. Portland Copwatch, "Police Assessment Resource Center's New Report on Portland Police Shootings Calls For Stronger Investigations, Makes More Community Ties, But Still Lacks Some Details," Sept. 16, 2005, www.portlandcopwatch.org/parc2005analysis.html.

8. Andy Parker, "Sheriff's Duty to Fix Hiring Is Long Overdue," *The Oregonian*, May 26, 2004, at E1.

9. "NAACP Concerned About Possibility of Racial Profiling," KATU-2 News, March 16, 2006, available at www.katu.com/salem/story.asp?ID=84227.

10. Allison Tallmadge, "Eugene Groups See Racial Profiling," *The Oregonian*, Dec. 1, 2004, at E5.

11. The reports of the Law Enforcement Contacts Policy and Data Review Committee are available at http://159.121.112.123/Racial_Profiling/LECP-DRC.HTM.

12. See Floyd D. Weatherspoon, "Racial Profiling of African-American Males: Stopped, Searched, and Stripped of Constitutional Protection," 38 *J. Marshall L. Rev.* 439 (2004) ("The United States Supreme Court decision in *Whren v. United States* practically legitimizes the use of racial profiling by police officers.").

13. The Northwest Constitutional Rights Center conducted its own analysis of the traffic stops data released by the Portland Police Bureau in May. The Center's document is available by request from A. Queral (aqueral@nwrc.org).

14. Portland Police Bureau, *Stops Data Collection*, May 2006, www.portlandonline.com/shared/cfm/image.cfm?id=116691.