SPRING 2012

OREGON CONSTITUTIONAL LAW NEWSLETTER

PUBLISHED BY THE CONSTITUTIONAL LAW SECTION OF THE OREGON STATE BAR

IN THIS ISSUE

Alycia Sykora, editor

Constitutional Law Section's Annual CLE: November 30, 2012 with Dean Chemerinsky

Dean Erwin Chemerinsky returns to Portland on November 30, 2012, for the Constitutional Law Section's annual CLE. The UC-Irvine School of Law professor will present his 90-minute "Supreme Court Wrap-Up" from 8:30 to 10:00 a.m. He will then join a panel of speakers for a second morning session. The afternoon will include the Section's annual review of Oregon appellate cases.

Volunteer Opportunities

Help students own the Constitution! Be a classroom coach in the We the People program. You may know it as the "Con Team." What you may not know is that the curriculum is used in upper elementary, middle as well as high school classes. Teachers often need help and Classroom Law Project, www.classroomlaw.org, can connect you with a class. Get inspired: talk to Maureen Leonard about her work with students at Franklin High School! Contact Barbara Rost, Program Director, Classroom Law Project, telephone number: 503-224-4424, email: brost@classroomlaw.org.

Constitution in the Classroom

September 17 is Constitution Day. Several groups organize in-classroom presentations by lawyers to local schools for Constitution Day. Central Oregon has developed one of the strongest programs through the American Constitution Society.
See for example http://www.centraloregonian.com/archives/story.aspx/13262/constitution-in-the-classroom. Anyone interested in participating in the central or eastern Oregon areas can contact Alycia Sykora to join the existing program, or to start a new local program.

OSB Mentoring

Kateri Walsh

Last year, the Oregon Supreme Court made one of the more significant changes in recent years to the OSB regulatory system when it made one year of mentoring a requirement for all new lawyers in the state. The program officially launched with its first Mentor/New Lawyer pairings last June, and appears to be meeting a long-felt need among brand new lawyers.

Although the challenge of finding just the right formula for training and transitioning new lawyers into a competent and professional law practice has been discussed for decades, the timing seems particularly ripe now as economics see so many new lawyers going directly sole practices. Certainly this program has been envisioned as a source of help and guidance to these newest OSB members. But it is equally critical to the long-term health and professionalism of the bar, the judicial system and the public.

A key focus now will be to maintain a strong and energized group of seasoned lawyers to embrace this new role. The program will need between 500 & 700 mentors each year. The initial group of volunteers has been impressive. The OSB continues to recruit mentors to work with the 2012 group of admittees, beginning in May. Mentors are expected to invest roughly 90 minutes each month, likely with a once a month meeting to track progress on an individualized mentoring plan. They must have seven years of experience and clean recent disciplinary history. In addition to what many report thus far to be an engaging and rewarding project, they will also get eight MCLE credits for their substantive work on the project.

As we've gotten this program underway, we have noted the unique challenges, and occasionally fearful moments, that are encountered by almost every new lawyer as they take on their first clients or work through their first case. Some have referred to their mentors simply as their lifeline. The bar hopes and expects that this program will be just one way that Oregon preserves the collegial and professional culture that have given it a reputation nationally for being one of the most rewarding places in the country to practice. For information about the program, see the OSB web site or contact administrator Kateri Walsh at (503) 431-6406.

NEW OREGON CONSTITUTIONAL LAW BARBOOK

Chin See Ming

In early 2011, after OSB Director of Legal Publication Linda Kruske informed the Constitutional Law Section Executive Committee that the Bar would be interested in publishing an Oregon Constitutional Law BarBook, Section members Justice Jack Landau, Judge David Schuman, Bob Steringer, Alycia Sykora, Ed Trompke and the author of this note volunteered to edit the volume. At the threshold, the Editors decided that the book will not address topics that are already addressed in the existing Criminal Law volume, but will focus largely on civil law topics. To that end, the Editors' developed a list of seventeen chapters on the following topics:

- State Constitutionalism
- Religion
- Free Expression
- Equal Privileges and Immunities
- Remedy Clause
- Right to Jury Trial
- Right to Bear Arms
- Impairment of Contracts
- Initiative & Referendum
- Home Rule
- Standing and Related Concepts
- Separation of Powers
- Financing
- Limitation on Taxes
- Property Rights-Takings
- Litigating State Constitutional Law Issues
- Miscellaneous

Twenty-two Oregon lawyers agreed to write the chapters: Bob Atkinson; Harry Auerbach; Judge Steve Bushong; Greg Chaimov; Patrick Ebbett; Denise Fjordbeck; Charlie Hinkle; Jonathan Hoffman; Erin Lagesen; Maureen Leonard; Jerry Lidz; Jeff Matthews; Rita Molina; Jessica Osborne; Roy Pulvers; Erin Snyder; Bob Steringer; Stephanie Striffler; Les Swanson; Alycia Sykora; Ed Trompke; and Jim Westwood. The authors have already turned in first drafts of all but two and a half chapters and the editorial process is well underway. We will, hopefully, have the complete brand new volume published before the end of the year.

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CHARLIE HINKLE RECEIVES HANS A. LINDE AWARD OF THE AMERICAN CONSTITUTION SOCIETY – OREGON

Cody Hosely

On March 14, 2012, the Oregon Lawyer Chapter of the American Constitution Society hosted its annual dinner, this year featuring Oregon Secretary of State Kate Brown, who described her efforts to expand access to voting, and retired Stoel Rives partner Charlie Hinkle, who was presented with the Justice Hans A. Linde Award, bestowed by ACS Oregon upon those who dedicate their lives to promoting the values of individual rights and liberties, genuine equality, access to justice, democracy and the rule of law in Oregon. Justice Linde espoused those ideals in his 13 years on the Oregon Supreme Court and many years teaching at Oregon law schools. Approximately 70 ACS supporters, including judges and lawmakers, were in attendance.

American Constitution Society's Annual Meeting on March 14, 2012. Charlie Hinkle's remarks on receiving the Hans A. Linde Award are published on the next page.

REMARKS ON RECEIVING THE HANS LINDE AWARD AMERICAN CONSTITUTION SOCIETY, MARCH 14, 2012

Charles F. Hinkle

The only reason that awards like this have any justification, at least in my case, is that they remind us that our profession and the lawsuits we bring can make a difference in the battle against injustice. So I want to talk for a few minutes tonight about two lawyers from the last century whose names are pretty much forgotten, but who deserve to be remembered for the way they used litigation to make a difference.

Louis Marshall was one of the founders of the American Jewish Committee in 1906, and he argued more cases before the U.S. Supreme Court than any other private attorney of his generation. In 1923, he became a director of the NAACP, and four years later he argued one of his most important cases in the Supreme Court: *Nixon v. Herndon*.[1] Nixon was a black physician in El Paso who was prevented from voting in the Democratic primary because Texas had a statute that said "in no event shall a negro be eligible to participate in a Democratic party primary election." When Dr. Nixon sued for damages, the district court dismissed the case. Louis Marshall took his case to the Supreme Court in 1927, and won. Justice Holmes wrote that "it seems *** hard to imagine a more direct and obvious infringement of the Fourteenth [Amendment]."

The *Nixon* decision was important for its specific holding, but even more for the possibilities that it opened, because it had been only 31 years since the Court had held, in *Plessy v. Ferguson*,[2] that a Louisiana statute that required segregated railroad cars did not violate the constitution. *Plessy* had pretty much stopped in its tracks any hope of using the Equal Protection Clause to fight segregation. But the *Nixon* case pointed in a different direction, and suggested that there *were* ways in which litigation could be used to fight racial injustice. In the years that followed, the NAACP began a strategy of attacking segregation by chipping away at it, and in the next quarter century, it successfully challenged all-white juries, segregated law schools, restrictive covenants in real estate deeds, and segregation on interstate buses. These were all building blocks that led to the great victory in 1954 in the school desegregation case.[3] Louis Marshall helped get that ball rolling by using litigation to fight injustice in his 1927 voting rights case.

[1] 273 US 536 (1927).

[2] 163 US 537 (1896).

[3] *Brown v. Board of Education*, 347 US 483 (1954).

The second lawyer I want to mention is Hayden Covington. In 1939 he became General Counsel to the Jehovah's Witnesses and went on to argue 44 cases in the Supreme Court, including the flag salute case[4] in which he challenged a West Virginia regulation that not only required public school students to pledge allegiance to the flag, but to raise their right arms with palm turned up while doing so. Covington persuaded the Supreme Court to overrule a decision that it had issued just three years earlier, and to hold that the regulation violated the First Amendment rights of students not to salute the flag. Government cannot "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion," the Court said.

That opinion was issued in June 1943, when this country was deeply at war and victory was a long way off. It took courage for the Court in that year to remind Americans of the values they were fighting for, and to do it in a case involving Jehovah's Witnesses – a group of people who were the object of enormous public and official scorn, including here in Oregon. A year after the Supreme Court decided the flag salute case, the Oregon Supreme Court decided a case involving a Jehovah's Witness who had been convicted of violating a Portland child labor ordinance when she allowed her 10-year-old son to sell religious literature on the public streets.[5] The City Attorney for Portland filed an extraordinary brief that was one long diatribe against the Jehovah's Witnesses; "the patriotic American," he wrote, "must feel that [Jehovah's Witnesses] have forfeited all privileges under our Constitution and that firm action should be taken to stop their work of undermining our government."

It is amazing that public officials in Portland in 1944 could so openly and so proudly proclaim their prejudice in that manner – and it's equally amazing that in 2012, public officials still have to be reminded about the West Virginia flag salute case. Last fall, the ACLU learned that a grade school in Reedsport, Oregon, has for years been requiring its students to stand for the pledge of allegiance, in direct violation of the Supreme Court decision, and in direct violation of an Oregon statute, to boot.[6] Not until the ACLU sent a pointed letter to the school district a couple of months ago did the administration at Highland Elementary School begin to comply with the law.[7]

Louis Marshall's voting rights case and Hayden Covington's flag salute case illustrate that lawyers can make a

[4] *Board of Education v. Barnette*, 319 US 624 (1943).

[5] *City of Portland v. Thornton*, 174 Or 508, 149 P2d 972 (1944).

[6] ORS 339.875.

[7] Emily Garber, "Students Not Required to Participate in the Pledge of Allegiance," ACLU of Oregon, online at http://aclu-or.org/blog/students-not-required-participate-pledge-allegiance.

difference, but they also illustrate how much it matters who is on the Supreme Court. Judges are not blank slates when they come to the court; they bring with them the assumptions about what is good and just and true that they have accumulated because of where they were born and how they were educated and what books they read and who they associated with. So when the Court was asked in 1905 whether a state could prevent a business owner from requiring his employees to work more than 10 hours a day, the answer that those judges gave was, in effect, "Of course not – the Constitution protects a businessman's right to run his business as he wishes. A state can't force him to limit the hours his employees work."[8] The members of the Supreme Court in 1905 were men of property, and it was unthinkable to them that the Constitution would not protect the values that were important to men of property.

But when a similar group of justices, three decades earlier, was asked if a state could prevent a woman from practicing law, the answer they gave was, in effect, "Of course it can – the Constitution doesn't protect a woman's right to make a living."[9] Those justices were men of property, and it was unthinkable to them that the Constitution would protect a woman's right to do much of anything. The rights that were at stake in those two cases were very similar: the right to make a living, the right to run your own business; the right of economic liberty. But the judges who decided them – all men, all white, all privileged – were unwilling to extend to another group, a powerless group, the same right that they took for granted for themselves.

Turn the calendar ahead a few years, to two famous cases from the 1920s. In *Meyer v. Nebraska*,[10] the court struck down a statute that prohibited all grade schools from teaching subjects in any language other than English, and in *Pierce v. Society of Sisters*,[11] it struck down a statute that required students to attend public rather than private schools. The Constitution protects the parents' right to decide such matters, the Court said. Now, in fact, the Constitution says nothing at all about parents' rights to control the education of their children, but the justices who decided those cases were the kind of men who would themselves have studied foreign languages and attended private schools, so it came very naturally for them to assume that the Constitution protected a right to do such things.

There is perhaps nothing surprising about any of these decisions; we're all prisoners of our own experience, and our experience colors the way every one of

[8] *Lochner v. New York*, 198 US 45 (1905).

[9] *Bradwell v. State of Illinois*, 83 US 130 (1873).

[10] 262 US 390 (1923).

[11] 268 US 510 (1925).

us reads the Constitution. And that makes it all the more remarkable, perhaps, whenever any group of judges is able to break out of the prison of their own experience. But that's what began to happen in our country in the 1930s, when the judges who sat on the Supreme Court (or a good number of them, at any rate) began to be able to see beyond the values and interests of their own class and station in life, and to understand that maybe the Constitution should protect the rights of people who had other values and other interests: political dissenters, at first, back in the 1930s; then members of minority religions; then African-Americans; then criminal defendants; eventually, even women; eventually, even gays and lesbians. In its decisions affecting all these groups, the court was not creating any new rights; it was simply extending the same rights that had always been taken for granted by white upper class males to other groups who were not rich, and not white, and not male and privileged and comfortable.

In more recent times, unfortunately, echoes of the old pattern have reemerged. The appointment of William Rehnquist to the Court in January 1972 planted the seeds for the Court to begin to move away from the role it had played since the late 1930s: the role of protector of the powerless. As a law clerk to Justice Jackson in 1952, Rehnquist had written a memorandum in the school desegregations cases, contending that the Court was being asked "to read its own sociological views into the Constitution," that segregated schools did not constitute "one of those extreme cases which commands intervention from one of any conviction," and that "*Plessy v. Ferguson* was right and should be re-affirmed."[12] In that era, white males were routinely given preferred access to education, to jobs, and to the vote, and in that era, Rehnquist thought that racial classifications that gave preference to white males were perfectly constitutional. But after he joined the Supreme Court, when cases involving racial classifications that gave preference to African-Americans came before the Court, he suddenly discovered that classifications based on race were unconstitutional.[13] In his 33 years on the

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[12] The memorandum can be accessed through the Wikipedia article on William Rehnquist, http://en.wikipedia.org/wiki/William_Rehnquist (visited March 19, 2012), at footnote 12. *See also* "New Look at an Old Memo Casts More Doubt on Rehnquist," *The New York Times*, March 19, 2012, at http://www.nytimes.com/2012/03/20/us/new-look-at-an-old-memo-casts-more-doubt-on-rehnquist.html?hp (visited March 19, 2012).

[13] *See*, *e.g.*, *Regents of U. of California v. Bakke*, 438 US 265 (1978) (state university efforts to recruit minority students); *Metro Broadcasting v. FCC*, 497 US 547 (1990) (Federal Communications Commission attempt to help minorities compete for broadcast licenses); *Richmond v. J.A. Croson Co.*, 488 US 469 (1989)

Court, Rehnquist never voted in favor of minority-group parties in any kind of discrimination or affirmative action case.

When Ronald Reagan and the two George Bushes entered the White House, almost every one of their appointments pushed the court further and further toward the Rehnquist vision of a court whose role it is to protect the powerful at the expense of the powerless. In recent years, a majority of the justices have seemed to regard litigation not as a tool for righting wrongs and fighting injustice, but as a nuisance that puts unfair burdens on defendants.[14] These justices have abandoned longstanding criteria for dismissing federal court claims. They've raised burdens of proof. They've erected new barriers for proving discrimination claims. They've limited punitive damage awards. They've allowed businesses to require consumers and employees to waive their rights even to go to court. These changes have come at a real price for workers, consumers, and anyone else who tries to use litigation to protect their rights – and if you are a betting person, you will rarely lose money if you bet that in the next case involving a corporation that comes before the Roberts Court, whatever the subject might be, the corporation will win.

You may have heard that this year is an election year. Next year, Justice Ginsburg turns 80, and Justices Scalia and Kennedy both turn 77. It matters who gets appointed to the U.S. Supreme Court, and that is something I never forget when I mark my ballot for president of the United States.

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(city council setting aside a percentage of construction contracts for minorities).

[14] *See* Alliance for Justice, "The Corporate Court," http://www.afj.org/connect-with-the-issues/the-corporate-court/ (2012); Constitutional Accountability Center, "Big Wins for Big Business," http://www.theusconstitution.org/think-tank/issue-brief/big-wins-big-business-themes-and-statistics-supreme-courts-2010-2011-business (2011); and Constitutional Accountability Center, "The Roberts Court and Corporations: The Numbers Tell the Story," http://www.theusconstitution.org/think-tank/issue-brief/roberts-court-and-corporations-numbers-tell-story (June 2010).

MEASURE 49: HOLDING UP UNDER CONSTITUTIONAL CHALLENGES

Jona Maukonen

Measure 49 was the result of years of legislative changes. Oregon voters passed Measure 7 in 2000. Measure 7 would have amended Article I, section 18, of the Oregon Constitution to require governments to compensate real property owners for the cost of restrictive regulations that reduce the value of their property. Measure 7 never took effect. The Marion County circuit court held that Measure 7 violated the separate vote requirement of Article XVII, section 1, of the Oregon Constitution and the Oregon Supreme Court affirmed. *League of Oregon Cities v. State of Oregon*, 334 Or 645, 56 P3d 892 (2002).

Oregon voters then adopted Measure 37 in 2004. Measure 37 was similar to Measure 7, but was a statutory, not constitutional, change. Measure 37 required state and local governments to provide "just compensation" to a property owner when the governmental entity enacted or enforced a post-acquisition land use regulation that restricted the use of the property in ways that reduced its fair market value. If the claimant qualified for relief under Measure 37, the government was required to either pay the amount of the fair market reduction or "modify, remove, or not apply" the regulations to allow the owner to use the property in the manner the regulations would have been permitted at the time the owner acquired the property. This latter option became know as a "Measure 37 waiver."

Thousands of Measure 37 claims were filed statewide.

In 2007, the Oregon Legislative Assembly referred a substitute statute to the voters—Measure 49. The Oregon voters passed Measure 49 in a November 2007 special election. Measure 49 changed the claims process, approval standards, and the relief available under Measure 37. Measure 49 eliminated all Measure 37 waivers except where a claimant, prior to June 28, 2007 (the last day of the 2007 legislative session), obtained a waiver *and* a common law vested right to the described use in the waiver.

Disappointed landowners, who had obtained Measure 37 waivers, only to have those waivers eliminated by Measure 49, bombarded Measure 49 with state and federal constitutional challenges. Those cases teach that while Measure 37 waivers constitute protected property interests for procedural due process, Measure 49's retroactive elimination of Measure 37 waivers does not violate the state or federal constitution.

The Ninth Circuit recently and comprehensively rejected claimants'

argument that Measure 49's retroactive elimination of their Measure 37 waivers resulted in a taking of property without just compensation and violated claimants' substantive due process and equal protection rights. *Bowers v. Whitman*, ___ F3d ____ (9th Cir 2012) (amended February 28, 2012). *Bowers* involved twenty plaintiffs who sued the Oregon Department of Conservation and Development Commission and its director seeking damages and declaratory relief against enforcement of Measure 49.

The Ninth Circuit concluded that the Measure 37 claimants did not have a constitutionally protected property right sufficient for any of their three constitutional challenges. For a federal takings claim, a person must have a *vested* property right. The court considered and rejected each of claimants' efforts to characterize their Measure 37 waivers as a vested property right. First, the Ninth Circuit concluded that claimants had no vested property interest in an accrued cause of action under Measure 37 because the waivers were administrative decisions rather than final judgments. Second, the Ninth Circuit rejected the notion that the claimants had a vested property interest in a statutory entitlement to compensation because the entitlement was not express and unequivocal. The court compared the Measure 37 waivers to social security benefits as something that "the government voluntarily and benevolently provides, but that the government can stop providing at any time" assuming the government complied with procedural due process. Third, the Ninth Circuit concluded that the Measure 37 waivers did not create an inalienable right to use the land consistent with the waivers. The court compared the waivers to zoning permits, which the government may change without running afoul of the federal constitution unless the landowner sufficiently relied on the permit to the owner's detriment and thereby vested their interest in the use. The court also noted that the plaintiffs had not exhausted their available remedies under Measure 49, and in particular had not sought to have a court declare that their Measure 37 waivers had vested as provided in the statute. Because claimants had no *vested* property right in their Measure 37 waivers, the elimination of the waivers did not constitute a taking under the federal constitution.

The Ninth Circuit also rejected claimants' assertion that Measure 49 violated substantive due process and equal protection. Measure 37 waivers did not implicate a fundamental right and so the government's elimination of the waivers only needed to pass a rational basis test for both substantive due process and equal protection. The court held that the government's decision to curb the high financial and environmental costs of Measure 37 easily passed that test. It was also rational to distinguish between different Measure 37 claimants for different remedies.

Prior to *Bowers*, the Ninth Circuit issued a short memorandum opinion in *Citizens for Constitutional Fairness v. Jackson Co.*, reversing the district court's decision that Measure 37 waivers were contracts and Measure 49 violated the federal Contracts Clause. 388 Fed Appx 710 (9th Cir 2010). The Ninth Circuit held that Measure 37 waivers were not contracts with the local government and were also not evidence of a contract. The waivers do not establish that the county made any offer that the property owner accepted or that any consideration changed hands. The court also held that Measure 49 does not implicate the separation of powers doctrine because the waivers were administrative decisions, not judgments.

The Oregon Court of Appeals has rejected numerous state and federal constitutional challenges to Measure 49 along similar lines as the Ninth Circuit. The state appellate court held that Measure 49 is not a takings under the federal and state constitution in *Bruner v. Josephine County*, 240 Or App 276, 346 P3d 46 (2010), *Leuthe v. Multnomah Co.*, 240 Or App 263, 246 P3d 487 (2010), and *Curry v. Clackamas County*, 240 Or App 531, 248 P3d 1 (2011). The court explained that Measure 49 does not eliminate all economic value of claimants' property and, like the Ninth Circuit, concluded that Measure 37 claimants had no vested property interest in their Measure 37 waiver as a cause of action or as a right to develop their property consistent with their waivers.

The Oregon Court of Appeals held in *Smejkal v. DAS*, 239 Or App 533, 246 P3d 1140 (2010), that Measure 37 waivers are not contracts and therefore Measure 49 does not violate Article I, section 21, of the Oregon Constitution, which prohibits impairment of contracts. The court explained that Measure 37 waivers did not constitute a traditional contract and a statute only creates a contractual obligation for the government when that law clearly provides that the governmental duty is immune from statutory change. The court also held that Measure 49 does not violate the state's constitutional requirement of separation of power because Measure 37 waivers are not judgments. Therefore, the state did not impermissibly burden the judicial branch by eliminating the waivers.

The Oregon Court of Appeals held in *Leuthe* and in *Powell v. DLCD*, 238 Or App 678, 243 P3d 798 (2010), that Measure 49's retroactive application does not violate substantive due process under the federal constitution. Unlike the Ninth Circuit in *Bowers*, the Oregon Court of Appeals did not consider whether there was a vested property right but rather determined that Measure 49 need only have a legitimate legislative purpose furthered by a rational means in order to pass muster under substantive due process. The court concluded that the government had a legitimate purpose in enacting Measure 49 to address with the

high economic costs and environmental impacts of Measure 37.

In *Curry*, the court also held that Measure 49 does not violate a claimant's right to equal privileges under the state constitution because the statute itself created the class, which renders it not a "true class" for purposes of Article I, section 20, of the Oregon Constitution. The court also held that Measure 49 did not violate equal protection under the Fourteenth Amendment to the United States Constitution because the legislation had a rational basis. The Oregon Supreme Court has not accepted review of any constitutional challenges to Measure 49.[1]

The inclusion of the "common law vested right" exception to the elimination of Measure 37 waivers helped to ensure the constitutionality of Measure 49. If a landowner with a Measure 37 waiver took the significant steps necessary to vest a Measure 37 waiver under Oregon common law, the question of whether the landowner had a sufficient property interest for federal takings and for state and federal contracts clause purposes would have been much closer. The bottom line is that, under current Ninth Circuit and Oregon Court of Appeals cases, Measure 49's retroactive elimination of Measure 37 remedies does not violate the state or federal constitutions.

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[1] The Oregon Supreme Court did explain in *English v. Multnomah County*, 348 Or 417, 238 P3d 980 (2010)—a case that did not require the court to decide any constitutional challenge to Measure 49—that when a Measure 37 claimant obtained a final judgment for just compensation prior to enactment of Measure 49, Measure 49 does not extinguish that judgment.

(Updated January 2012)

HISTORY AND INTERPRETING THE OREGON CONSTITUTION: A GUIDE FOR THE PERPLEXED

Hon. Jack L. Landau

I. Why should you care about history?

Because history tends to make its way into a lot of Oregon appellate court decisions lately concerning the meaning of the state constitution. In some cases, it is invoked because the courts determine the meaning of a given constitutional provision by reference to the intentions of the framers. In other cases, the courts do not focus directly on ascertaining the meaning of a constitutional provision intended by its framers, but history remains at least relevant to the interpretive task. In some cases, it is true that history is not mentioned at all. But even then, recent decisions suggest that that may be subject to change.

Understanding the role of history in constitutional interpretation can make a difference. Don't believe me? Compare *Lloyd Corp. v. Whiffen*, 315 Or 500, 849 P2d 446 (1993) (recognizing, without any analysis of intentions of framers, a constitutional right to collect initiative petition signatures on private property), with *Stranahan v. Fred Meyer*, 331 Or 38, 65-66, 11 P3d 228 (2000) (overruling *Whiffen* because nothing in the text or history of adoption of constitution evinces intention to create the right). Or compare *State v. Jackson*, 224 Or 337, 346-48, 356 P2d 495 (1960) (the framers of the Oregon Constitution appear to have adopted Blackstone's view that only prior restraint of speech is prohibited), with *State v. Henry*, 302 Or 510, 514, 732 P2d 9 (1987) (rejecting *Jackson's* reading of the historical record as "inadequate"), and *State v. Ciancanelli*, 339 Or 282, 121 P3d 613 (2005) (confirming conclusion that *Jackson* was wrong). Even for the cynical who think that judicial opinions are merely justifications for--and not explanations of--the courts' decisions, it seems to me that understanding how the courts use history in their constitutional decisions provides an opportunity to be more persuasive in preparing briefs, memos, and draft opinions.

A. History is determinative, *i.e.*, cases in which the focus is on determining the meaning that the framers (or voters) intended.

There appear to be two classes of cases in which history is determinative, or at least directly relevant.

1. Provisions of the original constitution--*Priest v. Pearce*, 314 Or 411, 840 P2d 65 (1992).

Applies ostensibly (but not really) to all provisions of the original constitution. The purpose is "to understand the wording in the light of the way that wording would have been understood and used by those who created the provision." *Vannatta v. Keisling*, 324 Or 514, 530, 931 P2d 770 (1997). Sometimes, this approach sounds distinctly originalist. *E.g.*, *Lakin v. Senco Products*, 329 Or 62, 69, 987 P2d 463 (1999) ("[W]hatever the right to a jury trial in a civil case meant in 1857, it has the same meaning today."). More recently, the court has qualified its reliance on history with a statement that the object is to identify general "principles" that may be applied to modern circumstances. *See, e.g.*, *State v. Davis*, 350 Or 440, 446, ___ P3d ___ (2011) ("The purpose of [historical] analysis is not to freeze the meaning of the state constitution in the mid-nineteenth century. Rather, it is to identify, in light of the meaning understood by the framers, relevant underlying principles that may inform our application of the constitutional text to modern circumstances."); *State v. Hirsch*, 338 Or 622, 631, 114 P3d 1104 (2005) (after ascertaining the intended meaning of a given provision, the courts seek to "'apply faithfully the principles embodied in the Oregon Constitution to modern circumstances as those circumstances arise.'") (quoting *State v. Rogers*, 330 Or 282, 297, 4 P3d 1261 (2000)). At what level of generality will the courts describe those "principles"? I don't know. The Supreme Court has emphasized that, in describing those principles, we are not merely to indulge our own views as to what is good public policy. *Stranahan*, 331 Or at 66 n 19. Instead, we are to "respect the principles given the status of constitutional guarantees and limitations by the drafters[.]" *State v. Kessler*, 289 Or 359, 362, 614 P2d 94 (1980). Of course,

that leads us back to the question concerning the level of generality with which we should describe those principles.

In any event, the method involves three steps, which apparently are followed in no particular order. *See State v. Norris*, 188 Or App 318, 331, 72 P3d 103 (2003) (noting that the Supreme Court examines the three steps in a variety of orders). The three steps are:

a. Examine the wording of the constitutional provision. That "wording" includes the context of the provision. *Hirsch*, 338 Or at 634 (even when constitutional text is silent, "other constitutional provisions" may be "helpful"); *State v. Cavan*, 337 Or 433, 441, 98 P3d 381 (2004) (when construing text of original constitutional provision, court must consider relevant context of that provision). Included in the textual analysis of the constitution is the application of relevant rules of the construction of legal texts. *See, e.g.*, *Hirsch*, 338 Or at 635 (the inclusion of a term in one section implies that the omission of the term in another section was intentional); *Jory v. Martin*, 153 Or 278, 288, 56 P 2d 1093 (1936) (absence of wording that limited legislative action in provision at issue, in light of presence of limiting wording in other constitutional provisions, "indicates most strongly that it was not the intention of [the] framers" to limit legislature's authority respecting provision at issue).

b. Examine the case law interpreting it. This refers to case law before and after ratification of the constitution. *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 115-23, 23 P3d 333 (2001) (reviewing 100 years of case law construing state remedies clause).

c. Examine the historical circumstances that led to its creation to determine the original intended meaning. "Intended" by whom? The delegates to the convention? The people who ratified the constitution? I don't know that either. In theory, it seems that the intentions of the voters would be controlling. At

least sometimes, that is what the Supreme Court says. *E.g.*, *Monaghan v. School District No. 1*, 211 Or 360, 367, 315 P2d 797 (1957) ("The constitution derives its force and effect from the people who ratified it and not from the proceedings of the convention where it was framed[.]"); *Jory*, 153 Or at 289. More often, the Oregon courts focus on the intentions of the delegates to the Constitutional Convention of 1857. *E.g.*, *State v. Cookman*, 324 Or 19, 28, 920 P2d 1086 (1996) ("Article I, section 21 [*ex post facto* provision] was adopted by convention in 1857. The record of that convention does not indicate the convention's intent in adopting the provision."). In more recent cases, though, the court has taken to mentioning *both*. *E.g.*, *Ciancanelli*, 339 Or at 310-11 (referring to the "intent of the people who drafted and adopted" the state constitution); *Hirsch*, 338 Or at 643 ("[T]he historical evidence of the drafters' intent--or of the people's intent in adopting the Oregon Constitution of 1859--is limited."). Note that, in examining the "historical circumstances," the courts' analysis can range quite far back into history, including sometimes discussions of colonial American, early English, and even ancient Roman legal history. *E.g.*, *Cookman*, 324 Or at 29 (tracing constitutional *ex post facto* provisions back to Roman law).

2. Constitutional amendments adopted by initiative--*Ecumenical Ministries of Oregon v. Oregon State Lottery Commission*, 318 Or 551, 871 P2d 106 (1994).

The purpose is to determine what the voters intended the disputed provision to mean. *Kerr v. Bradbury*, 193 Or App 304, 325, 89 P3d 1227 (2004), *rev dismissed*, 340 Or 241, *adh'd to on recons*, 341 Or 200 (2006). Originally, this approach to constitutional interpretation was explicitly patterned after the three-step interpretive method that the courts apply in statutory construction cases under *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993). *See Oregon Telecommunications Association v. Oregon Department of Transportation*, 341 Or 418, 425-26, 144 P3d 935 (2006) (summarizing sequential, three-step analysis); *Urhausen v. City of Eugene*, 341 Or 246, 253, 142 P3d 1023 (2006) (same). More recently, however, the Oregon Supreme Court has modified its

statutory construction analysis so that it no longer adheres to the strict, three-step sequence that *PGE* required. *See generally State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). That raises the question whether the change in statutory construction analysis leads to a change in the analysis of constitutional amendments adopted by initiative. Stay tuned. There is also the question why there ever was a difference in method for original constitutional provisions and those adopted by initiative? I don't know that either. *Stranahan*, 331 Or at 56-58, attempts an explanation, but I confess that I don't follow its reasoning. In any event, the three steps are:

a. Examine the text in context to determine whether the constitutional provision is "ambiguous." If there is no ambiguity, stop. The Supreme Court has warned, however, that "caution is required in ending the analysis before considering the history of an initiated constitutional provision." *See, e.g.*, *Stranahan*, 331 Or at 64 (quoting *Ecumenical Ministries*, 318 Or at 559 n 7). That does not mean, however, that constitutional interpretation always requires resort to such history, however. *See, e.g.*, *Oregon Telecommunications Association*, 341 Or at 432 ("Because our review of the text and context of Article IX, section 3a, makes clear the intent of the voters in adopting that provision, we proceed no further."). Note that, in examining the text in context, the courts refer to prior judicial construction of the text or of related provisions; examination of case law is not its own step, as with the *Priest* approach. *See, e.g.*, *Stranahan*, 331 Or at 61-62; *Urhausen*, 341 Or at 254-55. Courts also refer to statutes in existence at the time of approval of the initiative measure as context. *Id.* at 257.

b. If there is ambiguity, examine the "legislative history" of the provision, defined as "sources of information that were available to the voters at the time the measure was adopted and that disclose the public's understanding of the measure." *Ecumenical Ministries*, 318 Or at 560 n 8; *Oregon Telecommunications Association*, 341 Or at 426. Usually that means reference to voters pamphlet materials and the like. If that analysis resolves the ambiguity, stop.

c. If the provision remains ambiguous, resort to relevant maxims of constitutional construction.

B. History is relevant but only indirectly determinative--*State v. Robertson*, 293 Or 402, 649 P2d 569 (1982).

Applies to Article I, section 8. The focus in each case is not whether the framers would have intended that a particular form of speech to be protected. *Ciancanelli*, 339 Or at 315. History is relevant, but in a different way. Regulation of the content of speech is unconstitutional unless it can be demonstrated that the framers intended a particular regulation *not* to be subject to the constitutional guarantee.

C. History is not relevant (or is not usually mentioned).

Notwithstanding *Priest*, there remain a number of classes of cases in which the courts appear disinterested in ascertaining the intended meaning of relevant constitutional provisions.

1. Equal privileges and immunities cases--Article I, section 20.

E.g., *Crocker and Crocker*, 332 Or 42, 22 P3d 759 (2001). Again, the focus is not on what the framers intended the provision to mean. *See Cox v. State of Oregon*, 191 Or App 1, 7-8, 80 P3d 514 (2003) (Schuman, J., concurring) ("[N]either this court nor the Supreme Court would say that whatever Article I, section 20, 'meant in 1857, it means precisely the same thing today.'" (quoting *Lakin v. Senco Products, Inc.*, 329 Or 62, 72, 987 P2d 463 (1999))). Instead, the focus is a doctrinal analysis of differential treatment based on different types of classification, triggering "rational basis" or some more demanding justification for the differential treatment. *Crocker*, 332 Or at 55.

2. Search and seizure cases--Article I, section 9.

Again, the courts have rarely focused on the intended meaning. *See generally* Jack L. Landau, *The Search for the Meaning of Oregon's Search and Seizure Clause*, 87 Or. L. Rev. 819 (2008). Instead, they have tended to follow the lead of early federal cases and assume that warrantless searches are presumptively unreasonable, although, at various points, the courts have departed from federal analysis. *E.g.*, *State v. Jones*, 332 Or 284, 289, 27 P3d 119 (2001) ("It is well established that the search of a private residence without a search warrant that has been issued by a neutral magistrate based on probable cause is presumed to be unreasonable.").

3. Cases in which the courts follow federal law.

Yes, even in the birthplace of state constitutionalism, we sometimes adopt federal law as state constitutional law without explanation and without reference to what the framers of the Oregon Constitution intended. *E.g.*, *State v. Mai*, 294 Or 269, 272, 656 P2d 315 (1982) ("[W]e construe the state compulsory process clause in the same way as the Supreme Court construed the virtually identical federal counterpart.").

Even so, the Supreme Court has changed its mind before and reversed course. In *State v. Rogers*, 313 Or 356, 379-80, 836 P2d 1308 (1992), the Supreme Court adopted the federal standard for Article I, section 16, cruel and unusual punishment. However, in *State v. Wheeler*, 343 Or 652, 654, 657, 175 P3d 438 (2007), the Supreme noted it had never engaged in the *Priest* analysis and then analyzed Article I, section 16 in that manner, departing from the federal analysis under the federal counterpart, the Eighth Amendment. Although the court referred to *Rogers*, it no longer relied solely upon federal law to determine the meaning of that constitutional provision. The mode of analysis became more schizophrenic, however, in 2009 when the court decided *State v. Rodriguez/Buck*, 347 Or 46, 58-59 & n 6, 217 P3d 659 (2009). In that case, the court acknowledged the decision in *Wheeler*, but then proceeded to set out the same *federal* three-part test to determine proportionality of a sentence. Therefore, if the Supreme

Court has followed federal law before, it may be worth while set out both a *Priest* analysis and the analysis under similar federal provisions.

II. What should you do?

Apply the correct method and apply the method correctly. Here are a number of suggestions and research materials that may help. In general, you must be ready to do your homework if you wish to be persuasive. The courts are getting more sophisticated in their use of history and will not easily be moved by a citation to a few cases or a quote from Blackstone. The Oregon courts are interested in reconstructing what the framers of the constitution and the people who ratified it probably thought its provisions meant.

A. Oregon historical materials.

1. Before the Constitutional Convention.

The prolific Charles H. Carey's *General History of Oregon* (3d ed 1971) (parts I & II) probably has more than you ever wanted to know about the early history of the state. J. Henry Brown, *Political History of Oregon* (1892) also has a lot of information about the provisional government years. Other sources include Hubert H. Bancroft, *History of Oregon* (1886), William H. Gray, *A History of Oregon*, (1870), and Donald C. Johnson, *Politics, Personalities, and Policies of the Oregon Territorial Supreme Court 1849-59*, 4 Envt'l L (yep, that's "Environmental Law") 11 (1973).

2. The Constitutional Convention of 1857.

For a good introduction to the creation of the constitution, see David Schuman, *The Creation of the Oregon Constitution*, 74 Or L Rev 611 (1995). For original sources of the convention, Carey is most often cited, but Professor Burton's excellent series of articles--which compile committee reports, amendments, engrossed articles, and contemporary newspaper accounts--soon will become another standard reference for the history of the 1857 constitution.

a. *Journal of the Constitutional Convention of the State of Oregon* (1882).

b. *The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857* (Charles Henry Carey ed. 1926).

c. Claudia Burton and Andrew Grade, *A Legislative History of the Oregon Constitution of 1857--Part I (Articles I & II)*, 37 Will L Rev 469 (2001).

d. Claudia Burton, *A Legislative History of the Oregon Constitution of 1857--Part II (Frame of Government: Articles III-VII)*, 39 Will L Rev 245 (2003).

e. Claudia Burton, *A Legislative History of the Oregon Constitution of 1857--Part III (Mostly Miscellaneous: Articles VIII-XVIII)*, 40 Will L Rev 225 (2004).

f. The Secretary of State's Office provides online access to scans of the original constitution as signed by the framers: http://bluebook.state.or.us/state/constitution/orig/const.htm.

3. Primary sources of early Oregon law:

a. Cases: Remember that *Priest* requires an examination of case law interpreting a disputed provision. Thus, you will frequently be required to examine early Oregon cases to determine how the courts have construed a given provision over the years, even after ratification. *E.g.*, *Smothers*, 332 Or at 115-23 (reviewing 100 years of case law construing state remedies clause). You may also want to examine early Oregon cases--for example, territorial cases--as evidence of what the framers would have understood about the state of the law at the time of ratification. Finding such cases has been made relatively easy

with the advent of Lexis and Westlaw/Premise, both of which now have databases that include the entire body of Oregon cases back to 1853.

b. Statutes: The courts have given somewhat conflicting signals about the relevance of nineteenth-century statutes in constitutional analysis. On the one hand, courts sometimes say that such statutes are not worth much, particularly when they are used as evidence of what the framers thought about the constitutionality of such enactments. *E.g.*, *Oregonian Pub. Co. v. Deiz*, 289 Or 277, 284, 613 P2d 23 (1980) ("[C]ontemporaneous legislative actions should not necessarily be given much weight when construing constitutional principles.").

On the other hand, courts sometimes rely on such statutes as evidence of what the framers understood about the state of the law at the time. *E.g.*, *State v. Moyle*, 299 Or 691, 696, 705 P2d 740 (1985) (examining extent to which states had enacted harassment statutes before 1859 in determining constitutionality of Oregon statute). Sometimes the courts even have consulted statutes enacted *after* ratification to determine the intended meaning of a constitutional provision. *E.g.*, *Jory* 153 Or at 293-95 (1936) (resorting to statutes enacted in 1860, 1862, 1864, 1893, 1895, 1905, and 1927 in construing provision of 1857 constitution). Go figure.

1.) Background: For background on early Oregon legislation, consider the following as good places to start.

a.) Arthus S. Beardsley, *Code Making in Early Oregon*, 23 Or L Rev 22 (1943).

b.) Robert N. Peters, *The "First" Oregon Code: Another Look at Deady's Role*, 82 Or Hist Q 383 (1981). Takes the position that Deady's

contributions to the first code were not all they have been cracked up to be.

c.) Lawrence T. Harris, *History of the Oregon Code*, 1 Or L Rev 129 (1922).

d.) F.I. Herriot, *Transplanting Iowa's Laws to Oregon*, 5 Or Hist Q 139 (1904). Good account of the "wolf meetings" and the adoption of the 1843 code, which was based on the Iowa code of 1838, apparently because the only copies of statutes of any sort in the territory at the time were from Iowa.

e.) The State of Oregon Law Library has put together a searchable PDF version of the Territorial Act and the 1854 Oregon Laws at http://oregon.gov/SOLL/index.shtml.

2.) Oregon statutes: Until 1953, Oregon statutes were only periodically "compiled" by various individuals or groups of individuals (usually led by a judge, as it turned out), who generally did no more than work from the original "Deady Code" by removing from a previous compilation any sections that were specifically repealed, substituting amended text, and inserting new enactments along with occasional annotations.

Deady himself did the first compilation in 1864, which he and Lafayette Lane updated (and added earlier materials to) in 1874. That effort was followed by William Lair Hill's compilations in 1887 and 1892. Charles Bollinger and William Cotton prepared a new compilation in 1902. In 1910, William Paine Lord and Richard Ward Montague prepared a compilation commonly known as "Lord's Oregon Laws" (poor Montague). Conrad Patrick Olson compiled a new version in 1920. In 1930, an

"Oregon Code Annotated" was "compiled under the supervision of the Supreme Court of Oregon." Apparently happy with the court's work, in 1939, the legislature directed the court to take continuing responsibility for compiling and annotating an Oregon Code. The Supreme Court contracted with Bancroft-Whitney and published the "Oregon Compiled Laws Annotated" (1940), also known as the OCLA.

In 1949, the legislature initiated a "revision program," which entailed a wholesale reexamination of the state's statutes, a collection of the statutes and parts of statutes into appropriate topical chapters, and the elimination of some 400-odd pages of inoperative or obsolete (by judicial decision or otherwise) laws. *See generally* Robert K. Cullen, *Revision of the Oregon Statutes*, 28 Or L Rev 120 (1949). The 1953 "Oregon Revised Statutes," or ORS, was the result. *See generally* Charles G. Howard, *Editorial: The Oregon Revised Statutes*, 33 Or L Rev 58 (1953).

4. Constitutional amendments.

Remember that, under *Ecumenical Ministries* and *Stranahan*, the focus is what the voters who approved an amendment intended it to mean. In addition to the usual textual sources (dictionaries, textual rules of interpretation, and the like), the courts most often resort to statements contained in relevant voters' pamphlets to reconstruct the intentions of the voters. *E.g., LaGrande/Astoria v. PERB*, 284 Or 173, 184 n 8, 586 P2d 765 (1978) (relying on proponents' statements as indicative of intended meaning). Both the Supreme Court and the Multnomah County law libraries have copies of old voters' pamphlets. Sometimes, the courts also resort to contemporaneous newspaper and magazine articles. *E.g.*, *Lipscomb v. State Bd. of Higher Ed.*, 305 Or 472, 480-83, 753 P2d 939 (1988); *State v. Allison*, 143 Or App 241, 252 n 4, 923 P2d 1224, *rev den*, 324 Or 487 (1996). An

especially useful resource regarding measures adopted in the earlier years of the twentieth century is the *Oregon Voter*, a weekly magazine devoted to state election issues. *See Lipscomb*, 305 Or at 482.

B. Other state law:

1. Borrowed constitutional provisions.

When a provision of the Oregon Constitution is based on another state's constitution, the courts often presume that the framers of the Oregon Constitution intended to adopt any *existing* interpretations of the other state's constitution. *E.g.*, *State v. Selness*, 334 Or 515, 527, 54 P3d 1025 (2002) (referring to pre-1857 Indiana cases construing former jeopardy provision of 1851 Indiana Constitution on which Article I, section 12, of the Oregon Constitution was based). Of course, it is debatable whether the framers of the Oregon Constitution even were aware of such interpretations, but that has not stopped us. Note that another state court's *post-1857* interpretation of that state's constitution is *not* subject to the same presumption. *Sherwood School Dist. 88J v. Washington Cty. Ed.*, 167 Or App 372, 381, 6 P3d 518, *rev den*, 331 Or 361 (2000). Courts also sometimes presume that the framers of the Oregon Constitution intended to adopt the intentions of the framers of the other state's constitution, as revealed in the other state's convention records. *E.g.*, *Armatta v. Kitzhaber*, 327 Or 250, 265, 959 P2d 49 (1998) ("[I]nformation that demonstrates the intent of the framers of the Indiana Constitution of 1851 can be instructive when interpreting a provision of the Oregon Constitution * * *.").

Because so much of the Oregon Constitution appears to have been based on the 1851 Indiana Constitution, the courts often refer to sources concerning the adoption and interpretation of the Indiana Constitution. *Cookman*, 324 Or at 28-29. But do not assume that everything in the Oregon Constitution traces to (and stops with) Indiana. Some clauses--the free expression and remedies clauses, to name two examples--trace back to revolutionary-era state constitutions. To determine where a constitutional provision originated, a good place to

start is W.C. Palmer, *The Sources of the Oregon Constitution*, 5 Or L Rev 200 (1926), although sometimes Palmer's conclusions are based solely on textual similarities and not on any more direct evidence that the drafters intended to borrow from Indiana.

a. Background materials on other state constitutions generally: For texts of eighteenth-and nineteenth-century constitutions, see generally *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the State, Territories, and Colonies Now or Heretofore Forming the United States of America* (Francis Netwon Thorpe ed. 1909), or *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States* (Benjamin Perley Poore ed. 1877). For a bibliography concerning other state constitutional conventions, see Cynthia E. Browne, *State Constitutional Conventions from Independence to the Completion of the Present Union 1776-1959* (1973). Other helpful sources include:

1.) Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* (expanded ed. 2001). This work by a German historian has become pretty much the classic work on revolutionary-era state constitutions.

2.) Laura J. Scalia (no relation to Justice Scalia, I'm told), *America's Jeffersonian Experiment: Remaking State Constitutions 1820-1850* (1999).

3.) G. Alan Tarr, *Understanding State Constitutions* (1998). A good historical overview of the development of state constitutions, with separate chapters discussing the main features of eighteenth-, nineteenth-, and twentieth-century state constitutionalism.

4.) Yale University's Avalon Project: An excellent resource with full text versions of many important eighteenth- and nineteenth-century documents, including online texts of revolutionary-era state constitutions. *See* http://avalon.law.yale.edu/default.asp.

5.) Amasa M. Eaton, *Recent State Constitutions*, 6 Harv L Rev 109 (1892) (good background material on issues of distrust of legislative authority as source of many mid-nineteenth-century constitutional provisions).

6.) Fletcher M. Green, *Constitutional Development in the South Atlantic States, 1776-1860* (1930) (although the focus is on a small group of states, this text includes a lot of interesting observations about the concerns of early nineteenth-century constitution makers).

b. Background materials on the Indiana Constitution:

1.) Charles Kettleborough, *Constitution Making in Indiana* (1916).

2.) William P. McLauchlan, *The Indiana State Constitution: A Reference Guide* (1996).

3.) Indiana Historical Bureau, *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana* (1850).

4.) Copies of the Indiana Constitutions of 1851 and 1816 may be found in "the vault" at the Oregon Supreme Court library. The 1851 version also may be found in West's Code at the Multnomah County Law Library. Ask the library staff for help.

2. Other state law more generally:

Sometimes, reference to eighteenth- and nineteenth-century law in other jurisdictions is relevant to establishing more generally the state of the law as the framers would have understood it in 1857. *E.g.*, *Yancy v. Shatzer*, 337 Or 345, 362, 97 P3d 1161 (2004) ("[T]he prevailing view throughout the American legal landscape in 1857 was that the constitutional grant of judicial power did not include the power to decide cases that had become moot * * *."). Finding the law can be a trick, though.

a. Cases: Note that, when you dive into early state case law research, you will find yourself awash in obscure early reporters and even more obscure abbreviations. (*E.g.*, where do you find "2 Serg & Rawle 91 (1815)"?) For help, try Mary Miles Prince, *Bieber's Dictionary of Legal Abbreviations* (5th ed. 2010) or *The Bluebook: A Uniform System of Citation* (19th ed 2010). Getting your hands on the old books also may present a challenge. The Supreme Court library in Salem has a fairly extensive collection of nineteenth century case books from other states, but they are located up in "the attic." Ask the library staff for help.

1.) State and regional digests: In particular, the old *Century Edition of the American Digest 1658-1896* (1900) or the *Cyclopedia of Law and Procedure* (William Mack ed1907) can be a useful tools for finding your way into the relevant case law.

2.) Lexis and Westlaw: Depending on the state, the databases go back pretty far and make research much easier.

3.) Footnotes in secondary sources: A great way at least to get started, particularly when you use older treatises.

4.) Annotated cases: In the late-nineteenth and early twentieth centuries, annotated case compilations such as the *Lawyer's Reports Annotated*--the precursor to the more familiar ALR's--were popular case-finding tools. They still work.

b. Statutes: Unfortunately, there are no statutory counterparts to the state and regional digests for old statutes. That means you often have to go to the library and look for old statutes the hard way, state by state. Often, there are tables at the back of modern editions of state statutes that refer to older repealed or renumbered statutes.

1.) State archives: A number of state archives maintain web sites that provide access and finding aids to a wide variety of legislative and court records.

2.) State libraries: I have found that, in a pinch, it pays simply to call the staff at a state supreme court library and ask "can you help me find whether your state had on the books a pre-Civil War statute on the subject of [fill in the blank]?" In nearly every case, the librarian--after asking me "why in the world do you want *that*?"--enthusiastically provided just what I asked for. It's apparently their idea of a good time.

C. Dictionaries:

The Oregon courts seem to like dictionaries. In statutory construction cases, the courts are particularly fond of citing *Webster's Third New International Dictionary* (unabridged ed. 2002). In constitutional cases, the key is to cite an edition that was in print at the time the pertinent provision was adopted. *Vannatta*, 324 Or at 530 (citing 1828 dictionary because "the constitutional provision that we construe here was proposed in 1857, not in 1996"); *see also MacPherson v. Dept. Admin. Services*, 340 Or 117, 132, 130 P3d 308 (2006) (same); *Rico-Villalobos v. Guisto [sic]*, 339 Or 197,

206-07, 118 P3d 246 (2005) (same); *Bobo v. Kulongoski*, 338 Or 111, 120, 107 P3d 18 (2005) (same). Of course, the reliability of dictionaries--particularly very old dictionaries--as evidence of the "ordinary meaning" of terms is debatable. *See generally* Jonathon Green, *Chasing the Sun: Dictionary Makers and the Dictionaries They Made* (1996) (an engaging history of lexicography); Rickie Sonpal, Note, *Old Dictionaries and New Textualists*, 71 Fordham L Rev 2177, 2202-15 (2003) (critique of judicial use of old dictionaries to determine meaning of old statutes, including lack of lexicographical methods for selecting definitions, the use of acontextual definitions, wholesale piracy of definitions from other dictionaries, and the tendency of early lexicographers to be prescriptive, rather than descriptive, in their definitions). For cases involving the 1857 constitution, you may want to consider the following:

1. **General usage dictionaries:**

   a. Noah Webster, *An American Dictionary of the English Language* (1828). Webster--by all accounts a "severe, correct, humorless, religious, temperate man who was not easy to like, even by other severe, religious, temperate, humorless people," Bill Bryson, *The Mother Tongue: English and How It Got That Way* 154 (1990)--authored a dictionary that was riddled with errors (his etymologies are especially amusing) but nevertheless was hugely popular in the nineteenth century. In fact, its popularity continues to this day and may be found online at any number of sites, including those of a number of religious organizations who like the idea that it frequently quotes the King James Bible. *E.g.*, www.cbtministries.org/resources/webster1828.htm. The 1828 version seems to be the dictionary of first resort for Oregon courts construing provisions of the original constitution. *E.g.*, *Rico-Villalobos*, 339 Or at 206-07; *Vannatta*, 324 Or at 530; *City of Keizer v. Lake Labish Water Control Dist.*, 185 Or App 425, 434, 60 P3d 557 (2002), *rev den*, 336 Or 60 (2003).

   b. *Webster's Third New International Dictionary* (unabridged ed 2002). When Webster died in 1843, Charles and George

Merriam purchased the publishing rights to his dictionary. They published a new version of the dictionary in 1847, which was the first Merriam-Webster unabridged dictionary. *Webster's International Dictionary* followed in 1890, and a *Webster's New International Dictionary* was published in 1909. *Webster's New International Dictionary, Second Edition* was published in 1934. The third edition (which is actually the eighth, depending on how you count them) of the *New International* was published in 1961. That is the *Webster's Third New International* that gets cited so much by the courts. (Subsequent editions of *Webster's Third* are identical to the 1961 version--even the pagination is exactly the same--except for an "Addenda Section" that appears at the *beginning*, consisting of a growing list of new words and definitions that have come into common usage since 1961; presumably, the Addenda Section someday will get long enough that the publishers will produce a *Webster's Fourth*.) *Webster's Third* was very controversial when it was first published, mostly because, unlike its predecessors, it set out to be descriptive in its approach, that is, it defined words in terms of actual usage, not in terms of what the words are supposed to mean. The literary world was aghast. The *New York Times* even refused to call it a "dictionary." *See generally Dictionaries and That Dictionary* (James Sledd & Wilma Ebbit eds 1962) (collecting reviews and critiques of *Webster's Third*).

2. Law dictionaries:

English-language law dictionaries actually appeared on the scene quite a bit earlier than English general usage dictionaries. John Rastell is credited with publishing the first. His *Expositiones Terminorum Legum Anglorum* (1527), has an English preface, but its 208 entries are mostly in Latin and French. It was, however, translated into English some 40 years later. In 1607, John Cowell's *The Interpreter* was published, but--as often is the case in publishing--timing is everything, and in Cowell's case, the timing was bad. Cowell was trained in the civil law tradition, and he ran afoul of Sir Edward Coke and the shift

from civil to common law traditions. His dictionary ended up being suppressed by King James (yes, that King James). In the late-1600's and early 1700's, several other legal dictionaries appeared in what was becoming an increasingly competitive market. These dictionaries were not so much dictionaries as elementary encyclopedias, and they proved very influential in America in the late-eighteenth and early-nineteenth centuries. For background on the history of English-language law dictionaries, see David Mellinkoff, *The Myth of Precision and the Law Dictionary*, 31 UCLA L Rev 423 (1983), and Gary L. McDowell, *The Politics of Meaning: Law Dictionaries and the Liberal Tradition of Interpretation*, 44 Am J Leg Hist 257 (2000). The law dictionaries that tend to get cited by the Oregon courts include the following.

a. John Bouvier, *A Law Dictionary, Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union* (1839). Bouvier was a French-born Philadelphia lawyer who published the first American law dictionary because of his dissatisfaction with existing English law dictionaries ("What, for example, have we to do with those laws of Great Britain which relate to the person of the king, their nobility, their clergy, their navy, their army, their game laws, . . . their beer and ale houses and a variety of similar subjects?"). The full text of this, too, can be found online at a variety of sites. *E,g.*, www.constitution.org/bouv/bouvier.html. It is also available on CD-ROM and is downloadable for Blackberry. Bouvier's dictionary appears to be undergoing something of a resurgence in popularity with the courts. It has been cited some five dozen times. *E.g.*, *Rico-Villalobos*, 339 Or at 206.

b. Alexander M. Burrill, *A New Law Dictionary and Glossary* (1850-51). Apparently less popular with the courts than Webster or Bouvier, Burrill has been cited a total of 12 times, but some of them quite recent. *E.g.*, *State v. Werdell*, 202 Or App 413, 425, 122 P3d 86 (2005).

c. Giles Jacob, *A New Law Dictionary: Explaining the Rise, Progress, and Present State of the English Law* (5th ed 1744). This is one of the English law dictionaries that proved influential in early nineteenth-century America. Interestingly, although at least one early Oregon case cited this dictionary, *Norton v. Winter*, 1 Or 47, 48 (1853), modern courts seem to have ignored it as evidence of the meaning of legal terms in the mid-nineteenth century.

d. *Black's Law Dictionary* (various editions). First published in 1891, *Black's* has become more or less the standard law dictionary in America, and it has been cited countless times. The original edition purported to be comprehensive, with definitions based on existing dictionaries (Black borrowed heavily from Bouvier, for example), commentaries (lots of Blackstone and Kent), judicial decisions, and textbooks. As a work of lexicography, *Black's* rests on rather dubious foundation. Black simply made up a number of the definitions, without reference to any source. There were no real standards for determining whether any of the citations that served as the bases for definitions were representative of actual usage. And, at least until recently, later editions did not evaluate whether existing definitions remained current, resulting in a "hodgepodge of old and new, current and obsolete." *See generally* Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 Ariz St LJ 275, 305-09 (1998). *Black's* was given a lexicographical overhaul by Bryan Garner and a host of contributing editors with the publication of the seventh edition in 1999. An eighth edition was published in 2004. Although it get's cited a lot, courts tend to resort to *Black's* infrequently in constitutional cases.

e. Benjamin Vaughan Abbott, *Dictionary of Terms and Phrases Used in American or English Jurisprudence* (1879). Although this dictionary was not published until after Oregon's statehood, the courts occasionally cite it. *E.g.*, *Rico-Villalobos*, 339 Or at 207 n 6.

D. Early treatises and commentaries:

The courts have cited a number of nineteenth-century American treatises in an effort to reconstruct the state of the law as it was commonly understood by the framers. Note that there is a difference between citing these sources as evidence of the general state of the law at the time and citing them for the proposition that the framers in Oregon intended to adopt specific statements contained in them. Usually, the courts refer to the early treatises for the former purpose. If you wish to cite them for the latter purpose, you probably want to be sure to nail down whether a copy of the particular source even was available in Oregon before the 1857 convention. (How do you do that? Among other things, you can check territorial cases to see what the judges at the time had at their disposal. Chancellor Kent, for example, gets cited as early as 1853. *Parrish v. Stephens*, 1 Or 59, 63 (1853).) Among the more popular early treatises--both then and now--are the following:

1. James Kent, *Commentaries on American Law* (1826).

Full text available online at www.constitution.org/jk/jk_000.html. Doesn't seem to get cited as much as, say, Story or Sedgwick, but still an important figure in early nineteenth-century law. *E.g.*, *Smothers*, 332 Or at 101, 108, 112; *Hruby and Hruby*, 304 Or 500, 505-06, 748 P2d 57 (1987).

2. Joseph Story, Commentaries on the Constitution of the United States (1833).

Full text available online at www.constitution.org/js/js_000.html. Gets cited quite a bit. *E.g.*, *Boboi*, 338 Or at 120-21.

3. Theodore Sedgwick, A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law (1857).

Often cited by the Oregon courts in the late 1800s, it also has been cited quite a bit more recently on various questions relating to

constitutional and statutory interpretation. *E.g., Smothers*, 332 Or at 109. Sedgwick's other treatise, *On the Measure of Damages* (4th ed 1868), has been even more popular with the courts, having been cited in more than 50 reported cases. *E.g., DeMendoza v. Huffman*, 334 Or 425, 437-40, 51 P3d 1232 (2002).

4. Simon Greenleaf, Treatise on the Law of Evidence (1842).

5. Other treatises:

In the 1880s, there was a virtual explosion in the publication of law treatises. The Oregon Supreme Court Library has an extensive collection up on the balcony, including everything from John Norton Pomeroy's classic *A Treatise on Equity Jurisprudence* (1881) to more odd and obscure titles such as William F. Rehfuss, *A Treatise on Dental Jurisprudence* (1892) (something to sink your teeth into?) (sorry).

E. English law.

Occasionally, reconstructing the framers' intentions may lead you to an examination of early English law. This is pretty dangerous terrain, as most of us do not know how to find--much less how properly to use--sources of English legal history.

1. Introductory and background texts

a. J.H. Baker, *An Introduction to English Legal History* (4th ed. 2002). This has become the standard university textbook on English legal history, tracing the development of English law from Anglo-Saxon times to the present.

b. Paul Brand, *The Making of the Common Law* (1992).

c. *GlanvilleWilliams: Learning the Law* (14th ed. 2010).

d. Websites:

1.) Duke University website on English legal history: http://www.law.duke.edu/lib/researchguides/englishlegal.html. Great site.

2.) "The American Colonist's Library": An excellent resource, this site collects links to full text versions of the original source materials--mostly English--that were likely available to the American colonists, from the time of William the Conqueror up to around 1800. There's also an interesting assortment of colonial-era documents, including Daniel Boone's journal and the last will and testament of George Washington. *See* http://www.freerepublic.com/focus/news/1294965/posts.

3.) The Avalon Project: In addition to its links to full text versions of eighteenth- and nineteenth-century American legal documents, this site also has links to a number of important English historical sources. See http://avalon.law.yale.edu.

4.) Adams & Stephens', Select Documents of English Constitutional History: Available online at http://home.freeuk.net/don-aitken/ast/astintro.html.

5.) Liberty Fund's "Online Library of Liberty:" Online texts of over 1300 titles, including such things as the Selected Writings of Sir Edward Coke, located at http://oll.libertyfund.org.

e. James Oldham, *English Common Law in the Age of Mansfield* (2004). In addition to being a nice introduction to the workings of the King's Bench in the eighteenth century, this abridgment of the author's two-volume work includes a great collection of topical chapters that summarize English law concerning

crimes, torts, insurance, contract, labor, and employment. Lots of pictures, too.

2. The classics:

a. William S. Holdsworth, *A History of English Law* (7th ed. 1956-66).

b. T.F.T. Plucknett, *A Concise History of the Common Law* (5th ed. 1956).

c. Frederick Pollock & Frederic W. Maitland, *The History of English Law Before the Time of Edward I* (2d ed 1898).

3. The commentaries:

a. William Blackstone, *Commentaries on the Laws of England* (1765-69). It would be hard to overestimate the influence of Blackstone on the development of American law. *See, e.g.*, Daniel J. Boorstin, *The Mysterious Science of the Law: An Essay on Blackstone's Commentaries* (1969) ("In view of the scarcity of lawbooks during the earliest years of the Republic, and the limitations of life on the frontier, it is not surprising that Blackstone's convenient work became the bible of American lawyers."). For a full-text online Blackstone, see http://avalon.law.yale.edu/subject_menus/blackstone.asp.

Note that there are different editions of Blackstone. Interestingly, there are several "American" versions, including one edited by St. George Tucker in 1803. The five-volume set--known as "Tucker's Blackstone"--includes substantial commentary designed to "adapt" the original from its monarchical context to American republican needs. For an online text, see www.constitution.org/tb/tb-0000.html. The Oregon courts love to cite Blackstone. A recent Premise check revealed that he has been cited in over 84 reported cases.

b. Edward Coke, *Institutes of the Laws of England* (1628). Coke's (it's pronounced "cook," by the way) *Institutes* started out as a modest commentary on Littleton, "a drab fifteenth-century textbook on land tenure," but his "uncontrollable urge to lay out great gobs of learning," got the better of him. Norman F. Cantor, *Imagining the Law: Common Law and the Foundations of the American Legal System* 302 (1997). If you're really interested in Coke and his time, the first volume of a new biography has recently appeared. Allen D. Boyer, *Sir Edward Coke and the Elizabethan Age* (2003). Coke gets cited a lot, especially for his commentary on Magna Carta. *E.g.*, *Smothers*, 332 Or at 94-98; *State v. Harberts*, 331 Or 72, 82, 11 P3d 641 (2000).

c. Henry de Bracton, *On the Laws and Customs of England (De legibus et consuetudinbus Angliae)*. Bracton was an ecclesiastical lawyer and judge who studied in Paris (and was a contemporary of Thomas Aquinas). Not surprisingly, his description of English law (or the description that he compiled from the work of others--no one is quite sure), written around 1250, tends to follow the format of Justinian's *Institutes*. There is an English translation by Harvard historian Samuel Thorne online at http://hlsl5.law.harvard.edu/bracton/. Bracton still gets cited. *E.g.*, *Heino v. Harper*, 306 Or 347, 365, 759 P2d 253 (1988).

4. Magna Carta:

As Coke remarked, this is the "roote" out of which "many fruitful branches of the law of England have sprung." Edward Coke, *The Second Part of the Institutes of the Laws of England* 45 (1795 ed). Discussed at some length in *Smothers*, 332 Or at 94-98. The leading work on the influence of Magna Carta on the development of American law is A.E. Dick Howard, *The Road from Runnymede: Magna Carta and Constitutionalism in America* (1968). A much-abbreviated introduction

by the same author is A.E. Dick Howard, *Magna Carta: Text and Commentary* (revised ed 1998). Other useful sources include J.C. Holt, *Magna Carta* (2d ed 1992) (Howard refers to this as "[t]he most authoritative account of the events of 1215 and of Magna Carta itself"), Faith Thompson, *Magna Carta: Its Role in the Making of the English Constitution, 1300-1629* (1948), and William McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* (2d ed 1914) (which may be found online at http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=338&Itemid=27). Note that historians usually refer to the document as "Magna Carta," with no "the."

F. Roman law.

If you find yourself resorting to Roman law, you're probably trying too hard. *But see State v. Couch*, 196 Or App 665, 673-75, 103 P3d 671 (2004), *aff'd* 341 Or 610 (2006) (Roman law provides context for modern wildlife statutes). Still, you may want to make a point about the sheer antiquity of a particular principle of law. *E.g.*, *Cookman*, 324 Or at 29 (noting that the history of the *ex post facto* clause may be traced back to Roman law).

1. Introductory and background texts:

a. Barry Nicholas, *An Introduction to Roman Law* (1962). This is, I am told by several who teach the subject, the standard text for law American students.

b. Alan Watson, *Roman Law and Comparative Law* (1991). This is actually Watson's reworking of two separate books into one; the first is a description of Roman law, while the second is an explanation of the influence of Roman law on the development of English and continental legal systems. Especially interesting is the chapter on the influence of Justinian's Institutes on Blackstone.

c. University of Aberdeen website: http://iuscivile.com. What's on your list today? If it's about Roman law, you'll find it at iuscivile.com.

d. Peter Stein, *Roman Law in European History* (1999). As the title suggests, this book is about the influence of Roman law, but the first two chapters provide a easy-to-read introduction to Roman law itself.

2. The *Corpus Juris Civilis*:

Before West Publishing there was Justinian and the original *Corpus Juris Civilis*. (Haven't you wondered why West publishes the *Corpus Juris* ***Secundum***?) A truly remarkable compilation, the *CJC* actually comprises four different works. First, there is the *Codex* or Code, of which there were two editions, only the latter of which survived. They were collections of imperial edicts drawn principally from three previous codes. Second, there is the *Fifty Decisions*, a collection of juristic writings, which has not survived. Third, there is the *Digest*, a huge collection of excerpts from the writing of ancient jurists organized by topic into 50 books and various titles within each book. It survived. Finally, there is the *Institutes*, an introductory text book. It survived, too, and--probably because it is more accessible than the *Digest*--was exceedingly influential in the development of both English and continental law. The courts still occasionally cite Justinian. *E.g.*, *Bancorp Leasing v. Stadeli Pump*, 303 Or 545, 552, 739 P2d 548 (1987) (noting that the common-law doctrine of accession was taken from Roman law).

a. *The Digest of Justinian* (2 vols.) (Alan Watson trans. and ed. 1998).

b. *Justinian's Institutes* (Peter Birks & Grant McLeod trans. and ed. 1987).

c. *A Companion to Justinian's Institutes* (Ernest Metzger ed. 1998). Justinian-lite, but with a superb set of bibliographies.

G. Modern secondary sources.

There is an awful lot of stuff out there, and, chances are, you'll be able to find a publication that says whatever you want. Just because something finds its way into print, however, does not necessarily make it persuasive. *E.g.*, *Oregon State Shooting Assn. v. Multnomah County*, 122 Or App 540, 544 n 3, 858 P2d 1315 (1993) (observing occasional judicial resort to less than scholarly sources). And just because a source is written by a professional historian does not mean that its contents are gospel. *See, e.g.*, James Lindgren, *Fall from Grace: "Arming America" and the Bellesiles Scandal*, 111 Yale LJ 2195 (2002) (detailing controversy following publication of award-winning study of the ownership and use of arms in antebellum America and recounting the fact that some researchers could not replicate the author's findings). For a helpful start, try Kermit Hall, *A Comprehensive Bibliography of American Constitutional and Legal History, 1896-1979* (1984), and the supplement for 1980-87, published in 1991.

1. Periodicals:

a. *American Journal of Legal History*: For an online index through 2007, see http://www.aallnet.org/sis/lhrb/AJLH/index07.pdf.

b. *Law and History Review*: Website at http://journals.cambridge.org/action/displayJournal?jid=LHR.

2. Texts (in no particular order):

a. Lawrence M. Friedman, *A History of American Law* (2d ed 1985). The groundbreaking one-volume standard. Dry as cardboard, but chock-full of interesting and useful stuff.

b. Kermit L. Hall, The Magic Mirror: Law in American History (1989). O.W. Holmes buffs will get the title. This is not so

much a history of substantive law as social history of how law operated during different times in American history.

c. Morton J. Horowitz, *The Transformation of American Law, 1870-1960* (1992). Often characterized as advancing an "economic" interpretation of American legal history, this book definitely has a point of view.

d. *The Legal Mind in America: From Independence to the Civil War* (Perry Miller ed. 1969).

e. James Willard Hurst, *The Growth of American Law: The Lawmakers* (1950).

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Chapter 1

THE OREGON CONSTITUTION AND CASES IN 2011

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THE OREGON CONSTITUTION AND CASES IN 2011

"The mutations which history presents have been long characterized . . . as an advance to something better, more perfect. . . . . This peculiarity in the world of mind has indicated in the case of man . . . . . a real capacity for change, and that for the better, -- an impulse of perfectibility." Hegel, *Introduction to the Philosophy of History*, CLASSICS IN POLITICAL PHILOSOPHY, 3d ed, Jene M. Porter, editor 477 (2000).

* * * * *

Immediately after Oregon was organized as a territory it began to aspire to statehood. The Oregon constitutional convention met in the courthouse at Salem on August 17, 1857 and concluded with the adoption of the state constitution on September 18, 1857. Charles Henry Carey, THE OREGON CONSTITUTION (1926), 5, 27, 57, 401.

Government had evolved in the Oregon colony because the Americans had no protection for their persons and property. In land under United States sovereignty, protection would have been provided by Congress. But under the terms of the conventions of 1818 and 1827, the Oregon colonists were in a political vacuum, and they had taken steps to fill it.

Albert Gallatin, who negotiated for the U.S. in its continued joint occupation of Oregon with Great Britain, had pointed out to the British in 1826 that American settlers were in the habit of "'carrying laws, courts, justices of the peace' with them. There was an 'absolute necessity on our part to have some species of Government.' Americans were capable both of great lawlessness and great discipline. Discipline prevailed in Oregon." Dorothy O. Johansen, EMPIRE OF THE COLUMBIA, (2d ed 1967) at 195.

I. DISTRIBUTION OF POWER

"The powers of the Government shall be divided into three seperate [sic] departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided." -- Article III, section 1, Or Const

In "its early years, the [Oregon Supreme] court most often invoked the Oregon Constitution in the course of interpreting constitutional provisions involving the operation of various branches of government." Balmer, *The First Decades of the Oregon Supreme Court*, 46 Will L Rev 517, 531 (2010).

A. Separation of Powers

> "Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well." *Bond v United States*, 131 S Ct 2355, 2365 (2011) (on the Tenth Amendment); *Stern v Marshall*, 131 S Ct 2594, 2609 (2011) (on Article III powers).

State v Speedis, 350 Or 424 (6/30/11) (Kistler) A jury convicted defendant of three crimes: first-degree burglary, second-degree assault, and third-degree assault. The jury also had been asked to determine if 4 aggravating factors were present: (1) defendant was on supervision when he committed the crimes; (2) prior criminal justice sanctions had failed to deter him; (3) defendant committed the crimes while on release status while other charges were pending; and (4) defendant demonstrated a disregard for laws. Each of those factors is a nonenumerated aggravating factor (factors outside those in the sentencing guidelines; they allow courts to consider whether case-specific factors exist that warrant imposing a sentence that either departs down or up from the presumptive range). Jury found that the state proved beyond a reasonable doubt that each of those 4 aggravating factors applied to defendant. Trial court sentenced defendant to 72 months rather than the presumptive 37-38 months for the second-degree assault and 72 months for the first-degree burglary to run consecutively, and merged the third-degree assault with the second-degree assault.

At trial, on appeal, and on review, defendant argued that relying on nonenumerated aggravating factors to impose an enhanced sentence violates the separation of powers provision of the Oregon Constitution (Article III, section 1) and also Article I, sections 20 and 21 of the Oregon Constitution, and the Due Process Clause. Trial court disagreed and the Court of Appeals AWOP'd.

The Supreme Court affirmed. The Court noted that under *MacPherson v DAS*, 340 Or 117, 134 (2006), a "separation of powers claim" under Article III, section 1, "may turn on one of two issues." First, has one department of government "unduly burdened" the actions of another department. Second, has one department "performed functions that the constitution commits to another department." Defendant's argument is under the second category: the judiciary exercises a power that the constitution entrusts to the legislature by determining whether nonenumerated aggravating factors provide substantial and compelling reasons for imposing an enhanced sentence. The Court recited its own precedent, explaining that determining the range of possible sentences for particular crimes historically has been a legislative, rather than a judicial, function and determining where within a legislatively prescribed range a defendant's sentence falls historically has been a judicial function. The legislature did not intend that presumptive sentences would mark the outer limits of a trial court's sentencing authority: the sentencing guidelines expressly authorize trial courts to decide whether nonenumerated aggravating and mitigating factors warrant imposing a greater or lesser sentence than the presumptive sentence. The Court footnoted that under *Blakely*, a presumptive sentence is a maximum sentence for Sixth and Fourteenth Amendment purposes, but a presumptive sentence is not a maximum sentence under state law, or specifically under state constitutional separation of powers analysis.

See page 119 for the discussion of "vagueness" in this case.

Smejkal v State of Oregon, 239 Or App 553 (12/15/10) (Sercombe, Landau, Ortega) Measure 37 was codified in 2005. It required state and local governments to provide "just compensation" to a property owner when a governmental entity enacted or enforced a land use regulation that restricted the use of property so that its fair market value was reduced. The property owner could demand just compensation, and the government could either pay the owner the reduced value or exempt the property from the land use regulation in what was known as a "waiver." Plaintiff received Measure 37 waivers for his properties. Measure 37 was revised in 2007 by Measure 49, which changed the adjudicatory process, approval standards, and the extent of relief for Measure 37 claimants. After Measure 49 was adopted, the state and county did not recognize plaintiff's Measure 37 waivers, and confined him to Measure 49 procedures.

Plaintiff claimed that Measure 37 contains a contractual commitment to not regulate his properties in the way that Measure 49 does. In other words, he claimed that the state and county formed agreements with him not to regulate his properties in the future except under regulations in place at the time he purchased his properties. He claimed that the state and county breached those agreements and that is unconstitutional under Article I, section 21, of the Oregon Constitution. Plaintiff also claimed that his Measure 37 waiver decisions were akin to judicial judgments and thus were protected from subsequent legislation, which would violate separation of powers principles under Article III, section 1, of the Oregon Constitution. The trial court concluded that plaintiff had failed to state a claim.

The Court of Appeals concluded that plaintiff is not entitled to relief. (See Contracts, *post*, for discussion of Article I, section 21). As to separation of powers, plaintiff contended that Measure 49's repeal of his waivers violated Article III, section 1, "because the legislation nullified matters adjudicated by judicial officers of the state." The Court of Appeals disagreed, first noting that the legislature has constitutional authority to alter the relief that counties and agencies provided under Measure 37. Then, to determine if there is a separation of powers violation, the court cited the test in *Rooney v Kulongoski*, 322 Or 15, 28 (1995), which provides that

> the first inquiry is "whether one department of government has 'unduly burdened' the actions of another department in an area of responsibility or authority committed to that other department. . . . The second inquiry is whether one department is performing the functions committed to another department."

Here plaintiff argued that the legislature unduly burdened the judicial department by extinguishing waivers that a judicial officer issued. But a board of county commissioners, or a state agency director, is not a circuit judge, and is not sitting in courts established under Article VII (Amended), section 1, of the Oregon Constitution. In short: "Measure 49 does not burden the actions of the judicial department."

B. Judicial Power and Justiciability

"**The judicial power of the state shall be vested in one supreme court and in other such courts as may from time to time be created * * *.**" – Article VII (Amended), section 1, Or Const

See ***Smejkal v State of Oregon***, 239 Or App 553 (12/15/10) (Sercombe, Landau, Ortega), discussed at page 3.

1. Subject Matter Jurisdiction

> "**All judicial power, authority, and jurisdiction not vested by this Constitution, or by laws consistent therewith, exclusively in some other Court shall belong to the Circuit Courts**" – Article VII (Original), section 9, Or Const

> "**The courts, jurisdiction, and judicial system of Oregon, except so far as expressly changed by this amendment, shall remain as at present constituted until otherwise provided by law. But the supreme court may, in its own discretion, take original jurisdiction in mandamus, quo warranto and habeas corpus proceedings.**" – Article VII (Amended), section 2, Or Const

Bechdoldt v Loveland, 2011 WL 867858, Case No. 10-1041-AA (D. Or 3/10/11) This is a parenting-time dispute involving federal constitutional issues. The district court held that *Younger* abstention is appropriate and stayed the federal court case until completion of state judicial proceedings. In reasoning that the state proceedings provide plaintiff with an adequate opportunity to raise federal claims, the district court noted: "State courts of general jurisdiction have inherent authority and are presumed competent to adjudicate claims invoking federal statutes. *Nevada v Hicks*, 533 US 353, 366 (2001). Similarly, pursuant to the Oregon Constitution, 'circuit courts have subject matter jurisdiction over all actions unless some statute or other source of law divests them of jurisdiction.' *Longstreet v Liberty Northwest Ins Corp*, 238 Or App 396 (2010) (citing *State v Terry*, 333 Or 163, 186 (2001), *cert denied*, 536 US 910 (2002))."

2. Inherent Authority

Cox v M.A.L., 239 Or App 350 (12/08/10) (Armstrong, Haselton, Rosenblum) (This case did not cite any part of the Oregon Constitution except to dismiss the father's argument). In this case, a mother sought – and was denied – a permanent Stalking Protective Order against her child's father. The trial court concluded that mother had initiated the SPO proceeding for an improper purpose (child custody). The father moved to seal the court's file, contending that the trial court had "inherent authority" to seal the records. Mother did not oppose that motion. The trial court denied that motion.

The Court of Appeals affirmed: "Courts have inherent power to do certain things that are necessary for them to be able to do in order to perform their judicial functions, when the legislature has not otherwise given them authority to do those things. *Ortwein v Schwab*, 262 Or 375, 385 (1972), *aff'd*, 410 US 656 (1973). . . . . However, by its nature, inherent power is a limited source of judicial power. *See Ortwein*, 262 Or at 385." The legislature has not given courts authority to seal records after a case has been adjudicated, even if it was brought for an improper purpose or based on false accusations. The pivotal question here "is whether court authority to seal records in such cases is necessary to enable courts to perform their judicial function." Because father "has not given us any basis to conclude that courts have inherent power" to seal the court file, and the "legislature has not given courts authority to seal records" in these circumstances, the Court of Appeals affirmed.

State v Johnson, 242 Or App 279 (4/20/11) (Rosenblum, Ortega, Sercombe) (This case did not cite any part of the Oregon Constitution). Defendant agreed to plead guilty to manslaughter and another charge, and the state agreed to dismiss a third charge. The state and defendant each were represented by two attorneys. The documentation all states that the parties stipulated to a 120-month sentence plus a consecutive 45-month sentence. No documents contained anything about either of those two sentences running consecutively to any other sentence. Defendant had had a prior assault conviction – these two sentences were supposed to be consecutive with that prior assault conviction, but the DA apparently "forgot to mark" the judgment here as consecutive to that prior assault conviction. The DAs moved to correct the judgment, defendant did not file a response to that motion, no hearing was held, and the trial court filed an amended judgment to add the sentence for the prior assault charge. Defendant appealed, assigning error to the entry of the amended judgment, on grounds that it did not correct any math or clerical errors as the statute (ORS 138.083) permits, and the trial court lacked any inherent authority to do so.

The Court of Appeals reversed. The judgment did not contain any math or clerical errors, so it did not meet the statutory requirements for amending a judgment. Also, the trial court lacked inherent authority to modify the judgment: "Oregon subscribes to the common-law rule that, once a valid sentence is executed – that is, once a defendant begins serving it – the trial court loses jurisdiction over the case, and thus power to modify the sentence. *State ex rel O'Leary v Jacobs*, 295 Or 632, 636 (1983). The common law rule includes an exception: If the sentence is invalid because it is contrary to law in some respect, the court is deemed to have failed to pronounce any sentence, and thus it has not yet exhausted its jurisdiction and can substitute a valid sentence for the one that is void. *State v Nelson*, 246 Or 321, 324, *cert denied* 389 US 964 (1967). That appears to be the only exception recognized in the common law." Here, "that statute did not did not furnish authority for modification in this case." Trial court lacked authority to modify the judgment in this case, so the original judgment is to be reentered.

Cf. State v Coleman, __ Or App __, 2011 WL 4954033 (10/19/11) (Brewer, Gillette SJ) (This case did not address any constitutional provision). The Court of Appeals dismissed this appeal for lack of jurisdiction, reiterating that "a trial court lacks the authority to simply re-enter an earlier, appealable judgment in order to artificially extend a party's time to appeal," citing *Far West Landscaping v Modern Merchandising*, 287 Or 653, 658 (1979) (a trial court lacks both statutory and inherent authority to vacate or amend an earlier, appealable judgment for the purpose of lengthening the statutory time for appeal) and *State v Ainsworth*, 346 Or 524, 536 (2009) (the "legislature is free to fashion a remedy for a party who misses the deadline for filing an appeal * * *. As yet, however, the legislature has not done so.").

3. Standing

A controversy is not justiciable if the party bringing the claim has only an abstract interest in the correct application of the law. "A party must demonstrate that a decision in the case will have a practical effect on its rights." *Utsey v Coos County*, 176 Or App 524, 542 (2001), *rev dismissed*, 335 Or 217 (2003).

Unlike the concepts of ripeness and mootness, which inquire about "when" litigation has occurred (too soon or too late), standing asks "who." Standing is an

answer to the question: "What's it to you?" *Kellas v Dept of Corrections*, 341 Or 471, 477 n 3 (2006) (quoting Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U L REV 881, 882 (1983)).

Morgan v Sisters School District #6, 241 Or App 483 (3/16/11), *rev allowed* 350 Or 573 (8/11/11) (Schuman, Wollheim, Rosenblum) Plaintiff is a registered voter, a property owner, and a resident of the Sisters School District in Deschutes County. He sued defendant School District alleging that the School District's board's authorization of Certificates of Participation was an unlawful means of financing capital improvements. The School District moved for summary judgment, contending that plaintiff lacked standing. Plaintiff also moved for summary judgment. Trial court concluded that plaintiff lacked standing but issued an advisory opinion on the merits, stating that the School District's financing agreement was statutorily authorized and did not require voter approval.

The Court of Appeals affirmed, concluding that plaintiff lacked standing. The right to have one's claim adjudicated on the merits "depends on the first instance on the requirements imposed by the statute under which a plaintiff seeks relief." Here, that statute is ORS 28.020, which confers standing on a person who is injured in some special sense beyond that of a member of the general public. Plaintiff claims that as a taxpayer and a voter, he has standing. The Court of Appeals noted, however: "In no case has an Oregon court held that a person who, along with all other electors, has not had the opportunity to vote for or against an enactment, had standing to challenge the enactment." And his "voter standing" argument merges into his "taxpayer standing" argument. Citing *Gruber v Lincoln Hospital District*, 285 Or 3 (1979), the court here concluded that a plaintiff must allege a connection between the challenged enactment and the asserted financial harm – not hypothetically or speculatively but "actual harm." Plaintiff here has not done so. "In sum, we acknowledge that the difference between a potential injury, which can support standing, and a speculative one, that cannot, is not self-evident. Sorting one from the other is as much art as science. . . . . [In this case, there] are too many events that may or may not occur."

4. Ripeness

"The judicial department may not exercise any of the functions of one of the other departments [legislative and executive], unless the constitution expressly authorizes it to do so." *Yancy v Shatzer*, 337 Or 345, 352 (2004).

The judicial power under Article VII, section 1, is limited to resolving existing judiciable controversies. It does not extend to advisory opinions. *Kerr v Bradbury*, 340 Or 241, 244 (2006).

To be ripe, a controversy must involve present facts as opposed to a dispute which is based on hypothetical future events. *McIntire v Forbes*, 322 Or 426, 434 (1996) (quoting *Brown v Oregon State Bar*, 293 Or 446, 449 (1982)).

5. Mootness

A case is not justiciable if it becomes moot during judicial proceedings. *Yancy v Shatzer*, 337 Or 345, 349 (2004). A case is moot when the court's decision will no longer have a practical effect on the rights or obligations of a party. *Brumnett v PSRB*, 315 Or 402, 405 (1993).

In federal courts, there is an "established exception to mootness for disputes that are 'capable of repetition, yet evading review.'" *United States v Juvenile Male*, 131 S Ct 2860, 2865 (2011). "This exception, however, applies only where '(1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again.'" *Ibid*. (citations omitted).

In contrast with the mootness exception in federal courts, in Oregon, mootness is a constitutional matter, not just prudential, thus:

> "The judicial power under [Article VI (Amended), section 1 of] the Oregon Constitution does not extend to moot cases that are 'capable of repetition, yet evading review.'"

Yancy v Shatzer, 337 Or 345, 363 (2004) (overruling *Perry v Oregon Liquor Comm'n*, 180 Or 495, 498-99 (1947)). But see the concurrence: The "majority's decision that Oregon courts are barred by the Oregon Constitution from deciding [cases that became moot 'simply by the passage of time'] significantly diminishes the 'judicial power' of Oregon courts and ensures that important issues . . . will remain undecided." *Yancy*, 337 Or at 372 (Balmer, J., specially concurring).

In other words, mootness "is a species of justiciability, and a court of law exercising the judicial power of the state has authority to decide only justiciable controversies." *First Commerce v Nimbus Ctr Assoc*, 329 Or 199, 206 (1999).

But where attorney fees or declaratory judgment is sought, the matter may not be moot. For example: "It is at least arguable that the constitutionality of [an administrative search policy] . . . is a moot question, given that it no longer exists. The voluntary cessation of an action or policy challenged in a declaratory judgment proceeding, however, does not necessarily moot the action." *Weber v Oakridge School District 76*, 184 Or App 415, 441 n 5 (2002) (citing *Tanner v OHSU*, 157 Or App 502 (1988)).

Oregon School Activities Ass'n v State Bd of Ed, 244 Or App 506 (7/27/11) (Schuman, Brewer, Duncan) An OSAA rule provides that no student 19 years or older may participate in certain high school activities. Student asked for a waiver. OSAA denied the request. Student appealed. The State Board of Education concluded that applying the OSAA's age restriction to Student violated the McKinney-Vento Homeless Assistance Act (a federal law that requires each homeless youth to be provided with services comparable to those provided to other students). The board issued a final order mandating that OSAA and the school must allow Student to participate in high school activities until he graduated. Student participated in school activities under the board's order allowing him to do so. Student graduated. OSAA appealed to the Court of Appeals from the Board's order.

The Court of Appeals held that the appeal is moot. Student did not participate in any OSAA-governed activities during the time the OSAA's order was operative; that order was superseded by the board's order, which allowed Student to participate until he graduated. Appeal dismissed.

6. *Stare decisis*: Constitution, Common law, and Statutory Interpretation

Farmers Insurance Co. v Mowry, 350 Or 686 (9/09/11) (Balmer, with Durham, DeMuniz, and Walters concurring) This case arose as a dispute over insurance coverage after a motor vehicle accident. The insurance company (plaintiff) sought a declaration that the injured person (defendant) had only $25K available in coverage under her policy, rather than the $100K stated on the dec page of her policy. Both sides moved for summary judgment. The trial court granted the insurance company's motion and denied the injured party's motion.

The Court of Appeals affirmed, per curiam, citing *Collins v Farmers Ins. Co.*, 312 Or 337 (1991) as binding precedent. On review, the injured person argued that the Oregon Supreme Court should overrule *Collins* because it was wrongly decided and a subsequent case calls *Collins* into question. The insurance company countered that *stare decisis* prohibits the Court from overruling precedent without sufficient justification and there is insufficient justification.

The Court reviewed the doctrine of *stare decisis* at length, as it applies to statutes, the common law, and the Constitution: "In the area of constitutional interpretation, our cases emphasize that decisions 'should be stable and reliable,' because the Oregon Constitution is 'the fundamental document of this state.'" But "there is a 'similarly important need to be able to correct past errors' because 'this court is the body with the ultimate responsibility for construing our constitution, and if we err no other reviewing body can remedy that error.'" (Quoting *Strahanan v Fred Meyer, Inc.*, 331 Or 38 (2000)).

Again the Court stated: "*Strahanan* makes the point that this court is the ultimate interpreter of state constitutional provisions – subject only to constitutional amendment by the people – and if we have erred in interpreting a constitutional provision, there is no one else to correct the error. That is not true in the interpretation of statutes. Our responsibility in statutory interpretation is to 'pursue the intention of the legislature, if possible.' ORS 174.020(1)(a). After we have interpreted a statute, the legislature's constitutional role allows it to make any change or adjustment in the statutory scheme that it deems appropriate, given this court's construction of the statute (and, of course, subject to constitutional limitations)."

The Court then "disavow[ed] the inflexible rule of prior interpretation as set out in cases such as [*State v King*, 316 Or 437 (1993) and *State v Elliott*, 204 Or 460 (1955)] in statutory interpretation." "In applying *stare decisis* to decisions construing statutes, we will rely upon the same considerations we do in constitutional and common-law cases," although "the weight given to particular considerations will not necessarily be the same."

The Court will "begin with the assumption that issues considered in our prior cases are correctly decided, and 'the party seeking to change a precedent must assume responsibility for affirmatively persuading us that we should abandon that precedent.' [*State v Ciancanelli*, 339 Or 282, 290 (2005)]." Here, because the "proponent of overturning precedent bears the burden of demonstrating why prior case law should be abandoned," and *Collins* and its subsequent case "are not directly in conflict," and the proponent "advanced no argument that this court has not previously considered for reaching a different result," the proponent – the person injured in the car accident – has "failed to carry the burden." Affirmed.

C. Legislative Power

"**The legislative power of the state, except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly, consisting of a Senate and a House of Representatives.**" -- Article IV, section 1(1), Or Const

"**[N]or shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution.**" – Article I, section 21, Or Const

See ***State v Speedis***, 350 Or 424 (6/30/11) (Kistler) (Article I, section 21, cited), discussed under Article I, section 20, *post*.

Hazell v Brown, 238 Or App 487 (11/10/10) (Haselton, Armstrong, Duncan) Measure 47 limits the amount a person or political committee may contribute to a candidate, committee, or political party, limits candidates' contributions to their own committees, prohibits candidates from making loans to their own committees, and bans corporations, labor unions, and some individuals from making contributions. It also imposes mandatory limits on political expenditures and contains disclosure and reporting requirements. At issue was a "savings provision" in Measure 47 that stated: "If, on the effective date of this Act, the Oregon Constitution does not allow limitations on political campaign contributions or expenditures, this Act shall nevertheless be codified and shall become effective at the time that the Oregon Constitution is found to allow, or is amended to allow, such limitations." The Secretary of State announced that after the election, Measure 47 is in no part enforceable and "will remain dormant." The Governor proclaimed Measure 47 to be in full force and effect under Article IV, section 1, of the Oregon Constitution. Plaintiffs brought suit for declaratory and injunctive relief, seeking implementation and enforcement of Measure 37. Intervenors contended that Measure 47 is void in its entirety because it makes the "effective" date of the act contingent on conditions prohibited by Article I, section 21. Trial court entered summary judgment concluding, *inter alia*, that Measure 47 is not unconstitutional under Article I, section 21.

The Court of Appeals affirmed: "The constraints of Article I, section 21, apply only to the delegation of the legislative authority to enact laws – that is, 'the constitutional function of the legislature to declare whether there is to be a law; and, if so, what are its terms.' *Marr v Fisher* et al, 182 Or 383, 388 (1947). Accordingly, although consistently with Article I, section 21, 'the legislature cannot delegate it power to make a law, it is well settled that it may make a law to become operative on the happening of a certain contingency or future event.' *Id*." As in *State v Hecker*, 109 Or 520, 546-47 (1923), the "shall become effective" aspect of Measure 47 "refers not to the measure's enactment, but to its operation" and thus the provision does not violate Article I, section 21.

The Court of Appeals also held that there was no constitutional violation under Article IV, section 1(4)(d). The plaintiffs argued that statutes held unconstitutional may not be revived by a subsequent constitutional amendment unless that amendment clearly manifests an intent to revive the earlier, unconstitutional statute. That principle does not apply to this case: Measure 47 is not operative and thus was not void for want of constitutionality on the date of its enactment.

The Court of Appeals also held that "unless or until Article I, section 8, is amended to permit compulsory limitations on campaign contributions and expenditures or the Oregon Supreme Court overrules critical aspects of [*Vannatta v Keisling*, 324 Or 514 (1997)], the substantive provisions in Measure 47 remain dormant."

D. Home Rule

"The Legislative Assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon . . ." -- Article XI, section 2, Or Const

"The initiative and referendum powers reserved to the people . . . are further reserved to the qualified voters of each municipality and district as to all local, special and municipal legislation of every character in or for their municipality or district. . . ." -- Article IV, section 1(5), Or Const

E. Initiative and Referendum

See ***Hazell v Brown***, 238 Or App 487 (11/10/10), discussed, *ante*, under Legislative Power.

Day and Hunnicutt v Elections Division, __ Or App __ (10/19/11), 2011 WL 4954003 (Sercombe, Ortega, Rosenblum) Article IV, section 1b, of the Oregon Constitution provides:

> "It shall be unlawful to pay or receive money or other thing of value based on the number of signatures obtained on an initiative or referendum petition. Nothing herein prohibits payment for signature gathering which is not based, either directly or indirectly, on the number of signatures obtained."

In OAR 165-014-0260, the Elections Division interpreted that constitutional provision: "This means that payment cannot be made on a per signature basis." And "the chief petitioners who are responsible for the circulation and submission of the initiative or referendum petition . . . cannot contract or delegate to another person or entity to obtain signatures and allow the third party to pay circulators on the basis of the number of signatures obtained." And the "chief petitioners are responsible for insuring that agents of the chief petitioner (anyone who is delegated the task of obtaining signatures on the initiative or referendum petition) do not violate Section 1b."

Petitioners here contracted with "Democracy Direct Inc." to gather signatures for Initiative Petition 57. Mr. Trickey, president of DDI, orally assured petitioners that his companies were compliant with Article I, section 1b. Petitioners relied on those assurances, making no requests for documents and without reviewing any records. DDI subcontracted with another company to gather signatures.

After receiving a formal complaint, the Elections Division charged petitioners with "violating the pay-per-signature ban" in the rule and in the constitution. The Division proposed a civil penalty. A contested case hearing was held in which the hearings officer found that two employees gathering signatures had been paid per signature while circulating petitions, and that petitioners

had failed to insure that the subcontractor had complied with the pay-per-signature ban in the constitution and in the rule. Petitioners were fined $250 each. The Secretary of State entered a final order. Petitioners appealed, arguing that the final order was not based on substantial evidence.

The Court of Appeals affirmed, applying the rule that "hearsay evidence may be admitted and considered in an administrative proceeding . . . and may by itself amount to substantial evidence," citing *Reguero v Teacher Standards and Practices*, 312 Or 402, 417 (1991). Here, petitioners failed to exercise their rights to ask the agency to subpoena witnesses on its behalf and they offered only marginal countervailing evidence at their hearing. In sum: "Petitioners, according to their own testimony, merely relied on the oral assurances of Trickey that [subcontractor] was complying with Article IV, section 1b. They made no independent effort to insure that [subcontractor] was not paying petition circulators by the signature. Consequently, there is substantial evidence to support the secretary's finding that petitioners violated [the rule]."

II. FREE EXPRESSION

"**No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.**" – Article I, section 8, Or Const

Article I, section 8, of the Oregon Constitution is identical to Article I, section 9, of the Indiana Constitution of 1851. Palmer, *The Sources of the Oregon Constitution*, 5 Or L Rev 200, 201 (1926).

The "Bill of Rights of the Oregon Constitution is drawn immediately from that of Indiana, see Carey, ed., THE OREGON CONSTITUTION (1926) p 28 [but] the prototype of all state freedom of speech provisions on the Oregon model appears to be that of the Pennsylvania Constitution of 1790. . . . Earlier state constitutions, dating from the Revolutionary period, contained more general guarantees of free speech comparable to that of the First Amendment." *State v Jackson*, 224 Or 337, 348-49 (1960).

Article I, section 8, forecloses the enactment of any law written in terms directed to the substance of any "opinion" or any "subject" of communication, unless the scope of the restraining is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach. Examples are perjury, solicitation or verbal assistance in crime, some forms of theft, forgery and fraud and their contemporary variants. Only if a law passes that test is it open to a narrowing construction to avoid "overbreadth" or to scrutiny of its application to particular facts. *State v Robertson*, 293 Or 402, 412 (1982).

Robertson identified three categories of cases that may implicate Article I, section 8: (1) cases involving laws that focus on the content of speech and writing; (2) cases involving laws that focus on proscribing the pursuit or accomplishment of forbidden results by expressly prohibiting expression to achieved those results; and (3) cases involving laws that focus on proscribing the pursuit or accomplishment of forbidden results without referencing expression at all, but where a person is accused of causing such results by language or gestures. *See Robertson*, 293 Or at 416-18.

A. Politicking, Campaigning, and Lobbying

1. Campaign Contributions, Expenditures, and Reporting

Article I, section 8:

"[B]oth campaign contributions and expenditures are forms of expression for the purposes of Article I, section 8." *Vannatta v Keisling*, 324 Or 514, 524 (1997).

First Amendment:

In *Buckley v Valeo*, the US Supreme Court upheld campaign contribution limitations and also struck down campaign expenditure limitations, reasoning that expenditure limitations "represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech," while contribution limitations entail "only a marginal restriction upon the contributor's ability to engage in free communication." *Buckley*, 424 US 1, 19-21 (1976) (*per curiam*).

"Speech has the power to inspire volunteers to perform a multitude of tasks on a campaign trail, on a battleground, or even on a football field. Money, meanwhile, has the power to pay hired laborers to perform the same tasks. It does not follow, however, that the First Amendment provides the same measure of protection to the use of money to accomplish such goals as it provides to the use of ideas to achieve the same results. . . . . The right to use one's own money to hire gladiators, or to fund 'speech by proxy,' certainly merits significant constitutional protection. These property rights, however, are not entitled to the same protection as the right to say what one pleases." *Nixon v Shrink Missouri Government PAC*, 528 US 377, 398-99 (2000) (Stevens, J., concurring).

A "decision to contribute money to a campaign is a matter of First Amendment concern – not because money *is* speech (it is not); but because it *enables* speech. . . . . *Buckley v Valeo*, 424 US 1, 24-25 (1976) (per curiam). Both political association and political communication are at stake." *Nixon v Shrink Missouri Government PAC*, 528 US 377, 400 (1976) (Breyer, J., concurring) (emphasis in original).

In *Buckley*, the US Supreme Court "told us, in effect, that money is speech. This, in my view, misconceives the First Amendment." J. Skelly Wright, "*Politics and the Constitution: Is Money Speech?*", 85 YALE LJ 1001, 1005 (1976).

See ***Hazell v Brown***, 238 Or App 487 (11/10/10), discussed at page 9 ("unless or until Article I, section 8, is amended to permit compulsory limitations on campaign contributions and expenditures or the Oregon Supreme Court overrules critical aspects of [*Vannatta v Keisling*, 324 Or 514 (1997)], the substantive provisions in Measure 47 remain dormant.").

2. **Lobbying and Gifts to Public Officials**

"**No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.**" – Article I, section 8, Or Const

"**No law shall be passed restraining any of the inhabitants of the State from assembling together in a peaceable manner to consult for their common good; nor from instructing their Representatives; nor from applying to the Legislature for redress of greviances** [sic]."– Article I, section 26, Or Const

3. **Petition Circulation**

Petition circulation involves direct interactive communication concerning political change. *Meyer v Grant*, 486 US 414, 422 (1988). Limitations on political expression are subject to exacting scrutiny under the First Amendment. *Id*. at 420 (citing *Buckley v Valeo*, 424 US 1, 45 (1976)).

"The First Amendment protects [paid petition circulators'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer*, 486 US at 424.

"Petition circulation . . . is 'core political speech,' because it involves 'interactive communication concerning political change.'" *Buckely v American Constitutional Law Foundation, Inc*., 525 US 182, 186-86 (1999) (quoting *Meyer*, 486 US at 422).

B. Unwanted Contacts/Stalking

"A person may obtain a stalking protective order in two ways. One method involves filing a complaint with law enforcement. See ORS 163.7335 to 163.744. The other method . . . does not require law enforcement involvement. The victim instead directly petitions the circuit court to issue a civil stalking protective order. ORS 30.866." *State v Ryan*, 350 Or 670 (2011).

To obtain a Stalking Protective Order (an SPO), the petitioner must meet the statutory requirements and "if the contact involves speech, Article I, section 8, of the Oregon Constitution requires proof that the contact constitutes a threat. A threat 'is a communication that instills in the addressee a fear of imminent and serious personal violence from the speaker, is unequivocal, and is objectively likely to be followed by unlawful acts.' *State v Rangel*, 328 Or 294, 303 (1999). But a threat does not include 'the kind of hyperbole, rhetorical excesses, and impotent expressions of anger or frustration that in some contexts can be privileged even if they alarm the addressee.' *State v Moyle*, 299 Or 691, 705 (1985)." *Swarringim v Olson*, 234 Or App 309, 311-12 (2010).

> A "claim for civil stalking is not 'of like nature' to the common-law claims of assault or battery" thus there is no constitutional right to a trial by jury in stalking cases. *Foster v Miramontes*, 236 Or App 381 (2010).
>
> In contrast to proving the crime of stalking at issue in *Rangel*, to prove the crime of violating an existing SPO, Article I, section 8, does not require the state to prove that defendant made an unequivocal threat that caused the victim to fear imminent and serious personal violence. *State v Ryan*, 350 Or 670 (2011).

Cox v M.A.L., 239 Or App 350 (12/08/10), discussed at page 4.

Johnson v McNamara, 240 Or App 347 (01/05/11) (Brewer, Ortega, Sercombe) A man sent petitioner several annoying letters. None contained any threats. Once, the man tried to talk to petitioner in a classroom, and he placed his hand on the door. Petitioner pushed past him, left the classroom, and obtained an *ex parte* permanent stalking protective order. The Court of Appeals reversed: because the letters did not contain any threats, they are not "contacts" under the stalking statute. The only potential "contact" that could conceivably be alarming or a threat was the classroom incident. But that was only one contact. "It takes two. We therefore reverse."

Gunther v Robinson, 240 Or App 525 (02/02/11) (Ortega, Sercombe, Landau) The parties in this case are neighbors. Over the past 15 years, threats and physical incidents between the neighbors had occurred. In the few months before the SPO petition was filed, the respondent swept garbage into petitioner's driveway and yelled, "Shut up, you son of a bitch. Sieg heil, heil Hitler!" as she marched up and down the sidewalk. A month later, without any apparent reason, at 2:00 a.m., respondent woke petitioner's daughter by driving by her window, honking, screaming at the daughter to "stay out of my f-ing life!" and entered their yard to scream obscenities and throw rocks at the daughter's window. Trial court issued a permanent SPO.

The Court of Appeals reversed. The SPO petition must be filed within 2 years of the conduct giving rise to the claim, thus all of respondent's conduct before that 2-year period cannot be the basis for the SPO order. The only two incidents that occurred within 2 years were the "Sieg heil" and the rock-throwing. The Court of Appeals concluded without explanation that the "Sieg heil" incident "was not a contact that can support the issuance of an SPO" – it was offensive "but those words did not constitute a threat and thus cannot support the issuance of an SPO." As for the rock-throwing, that "was the sort of contact that can support issuance of an SPO" but two contacts were required, and that is only one.

State v Nguyen, 238 Or App 715 (11/17/10) (Ortega, Landau, Schuman) Victim obtained an SPO that prohibited defendant from having any contact with her, including sending written or electronic messages. Despite that order, over a 4-day period, defendant sent the victim text messages, such as these:

> "U want me 2 pay child support? Fuk u! So u can use my muny 2 fuk sum one else! Fuk u! I giv u something bitch!"
>
> "And u want 2 better myself? But u want to fuk me? Ok! C u soon!"

The state charged defendant with violating the SPO. Defendant moved for a judgment of acquittal on grounds that the messages were protected speech. Trial court denied that motion. Jury convicted defendant. Court of Appeals reversed: Although the last sentences of each of those text messages "could be viewed as veiled threats, the statements do not express an *unequivocal* intent to carry out such threats." (Emphasis by court). The trial transcript and exhibits, as context to those statements, show that the violations do not "constitute an unequivocal threat of imminent and serious personal violence" as Article I, section 8, through *Rangel,* requires.

State v Ko, 245 Or App 403 (9/08/11) , *withdrawn and modified on recons*., __ Or App __ (11/02/11) (Ortega, Sercombe, Rosenblum SJ) (Note: the constitution is not mentioned in this opinion although it involves speech). A Stalking Protective Order (SPO) prohibited defendant from having contact with his uncle and cousin. He was charged with violating the SPO for "speaking with" his cousin and additional counts. He represented himself in a two-day trial. His uncle and cousin were witnesses against him. On the second day of that trial, his uncle, cousin, and a police officer were outside the courtroom waiting to go in. Defendant and his brother entered the hallway and said to them, "It's time for grill session number two" from about 40 feet away. Defendant walked past his uncle, cousin, and the officer, and about five feet from his cousin, he turned and pointed at his cousin and with "a harsh, angry tone and very stiff body language," said: "You're going down today" and said he would prove that his uncle and cousin were the real criminals. The officer was afraid defendant was going to attack the uncle and cousin, and another police officer believed that a fight was imminent. The cousin thought defendant might become physically violent. As a result, defendant was charged with additional counts of violating the SPO.

He moved for a judgment of acquittal on grounds that his words did not meet the requisite "unequivocal threat" that "instills a reasonable fear of imminent and serious personal violence" that was "objectively likely to be followed by unlawful acts." He noted that he was charged with violating the SPO as to his cousin for "speaking with" his cousin – there was no allegation regarding his nonverbal conduct. The trial court denied his motion for a judgment of acquittal and he was convicted.

The Court of Appeals reversed: the question "is whether defendant violated the SPO 'by speaking,' not whether some other aspect of defendant's conduct in conjunction with his speech, was sufficient to violate the SPO." And the court concluded that "the words spoken by defendant were not the sort of unequivocal threat required to support a conviction for violating an SPO" and reiterated that "defendant's statements did not constitute an 'unequivocal threat of the sort that makes it objectively reasonable for the victim to believe that he or she is being threatened with imminent and serious physical harm.'" The court cited *State v Ryan*, 237 Or App 317 (2010), *rev allowed*, 350 Or 130 (2011) [see immediately, *post*] and *State v Nguyen*, 238 Or App 715 (2010).

State v Ryan, 350 Or 670 (9/09/11) (De Muniz; with Kistler concurring) The victim in this stalking case is a newspaper reporter who obtained a Stalking Protective Order (SPO) against defendant. The SPO ordered defendant "to stop any contact with the person protected by this order, and any attempt to make contact with the person protected by this order." The SPO defined "contact" as including "communicating with the other person by any means, including through a third person." Defendant received notice of that order. He kept trying to contact the victim, however, such as by sending letters, packages, and gifts to the victim's father. Defendant's correspondence did not

include any unequivocal threats that would cause the victim to fear imminent and serious personal violence, but his communications included statements such as: "Indications are that [the victim] would like a love so strong, so realistic and grounded that it will grow in splendor and last until we die. I would like this as well and believe I am uniquely suited to the task."

The state charged defendant with three counts of violating an SPO. Defendant moved for a judgment of acquittal on each charge, arguing that Article I, section 8, required the state to prove that he had made an unequivocal threat that caused the victim to fear imminent and serious personal violence, based on *State v Rangel*, 328 Or 294, 303 (1999), which imposed that requirement on the crime of stalking where communications formed the basis for that crime. The trial court denied his motion and denied his request for a jury instruction that would have required the jury to find the unequivocal-threat element. The jury convicted him of two counts of violating the SPO.

A divided Court of Appeals panel reversed, concluding that Article I, section 8, required the state to prove that his communications involved an "unequivocal threat that created fear of imminent and serious personal violence . . . and is objectively likely to be followed by unlawful acts."

Defendant petitioned for review on what the Supreme Court called "a hybrid overbreadth challenge" that required the Court to decide "the extent to which the free speech rights analysis of *Rangel* may apply to the crime of violating a stalking protective order." The Oregon Supreme Court held: "because defendant's communications with the victim were already prohibited by the stalking protective order, the state was not required by Article I, section 8, to prove under ORS 163.750 that defendant had communicated an unequivocal threat to the victim."

Significantly, defendant here did not challenge the underlying SPO. The victim had obtained the SPO not by filing a complaint with the police (see ORS 163.735 *et seq* for that process) but instead by directly petitioning the circuit court for an SPO (see ORS 30.866 for that process). The standard is the same either way. An SPO prohibiting communications under the statutes "in theory could implicate Article I, section 8." That is what defendant here argued – that the statute in this case is overbroad, the courts must judicially narrow it so that it applies only to the "unequivocal threats" described in *Rangel*, and here the state offered no proof that he had made any "unequivocal threats," thus his motion for a judgment of acquittal should have been granted. The state responded that he was making an impermissible collateral attack on the SPO, and he could be held in contempt of it even if the SPO was erroneous or exceeded its authority, unless/until it was set aside, under *SER Mix v Newland*, 277 Or 191 (1977).

The Court reasoned that the crime here applies only to those communications already prohibited by the SPO. The statute does not apply to any communications not already prohibited by the SPO. "Therefore, a defendant who seeks to challenge a conviction under ORS 163.750 on free speech grounds first must successfully attack the underlying stalking protective order. Because defendant conceded the validity of the stalking protective order in this criminal proceeding, his communications to the victim in violation of the order were not protected by Article I, section 8." The Court "express[ed] no opinion on the proper mechanism or procedure for challenging the constitutional validity of a previously entered stalking protective order in the context of a subsequent criminal prosecution."

Kistler concurred, noting that the crime of violating an SPO and the crime of stalking are "worded similarly" but "serve different functions." The elements of a crime of stalking (as in *Rangel*) were judicially narrowed to avoid overbreadth under Article I, section 8. In contrast, the statute criminalizing the violation of an SPO "narrows the class of prohibited conduct that will result in criminal liability." Article I, section 8, "permits the state to punish defendant for any conduct that violates the SPO in this case," and thus Article I, section 8, "does not prohibit the state from punishing defendant for only some of that conduct" (ie. conduct that causes reasonable apprehension regarding the personal safety of persons protected by the SPO). The state cannot prohibit communications based on the content or viewpoint of the communications, see *R A.V. v St. Paul*, 505 US 377, 391 (1992) (note: *R.A.V.* addresses the First Amendment, which was not at issue in this case], but the statute at issue here does not distinguish among prohibited contacts based on content or viewpoint, thus it is a permissible restriction on speech.

C. Profanity in Public or Fighting Words

> "One man's vulgarity is another's lyric." *Cohen v California*, 403 US 15, 25 (1971).
>
> "Unlike der Führer, government officials in America occasionally must tolerate offensive or irritating speech. *See Cohen v California*." *Norse v Santa Cruz*, 629 F3d 966 (9th Cir 12/15/10) (en banc) *cert denied*, 79 USLW 3712 (10/03/11) (Kozinski, CJ, concurring) (First Amendment).

Cf. United States v Urena, __ F3d __ (9th Cir 2011), 2011 WL 4840665 (This is a First Amendment case outside of Oregon.) An inmate in a federal prison called defendant-prisoner a "bitch." Later, defendant and a colleague attacked the speaker with a shank, kicked him in the head, and punched him at least 14 times. Defendant confessed that the shank was his, but argued self-defense: he "had to attack . . . so that no one would think he really was a bitch." The Ninth Circuit panel patiently explained:

When "a person receives harsh words from another, insulting words, demeaning words, or even fighting words, there is no privilege to assault the speaker with deadly force. Stated another way, a person insulted by a personal slur cannot stab the offending speaker in the neck, bash their skull with a baseball bat, send a bullet to their heart, or otherwise deploy deadly force in response to the insult."

D. Advertising

Clear Channel Outdoor, Inc. v City of Portland, 243 Or App 133 (5/25/11) (Sercombe, Wollheim, Riggs SJ) Plaintiff is a sign company that sells ad space on billboards and walls. Plaintiff obtained a declaration from the trial court that parts of the City's sign code were unconstitutional under Article I, section 8, of the Oregon Constitution, because the sign code favored one type of speech over another and distinguished between signs and decorations on the basis of content. But the trial court also concluded that the City had denied plaintiff's applications for sign permits based on the sign sizes, and the code's 200-square-foot size limit was a reasonable time, place, and manner restriction, thus plaintiff was not entitled to injunctive relief or damages. The trial court reasoned: "I cannot award damages based on the notion that but for the unconstitutionality of the sign code, plaintiff *would have had its signs*. In that sense, then, the unconstitutionality of the sign code was not a proximate cause of damages to the plaintiff, and actual damages are unavailable." (Emphasis by trial court). The trial court entered a general judgment awarding plaintiff a limited declaration: "the Portland sign code definitions in existence prior to November 18, 1998, based on the presence of text, numbers, registered

trademarks, or registered logos, imposed regulations based on the content of speech and was therefore a violation of Article I, section 8." The remainder of the sign code implicitly was left intact, after severance of those unconstitutional provisions.

The Court of Appeals affirmed: the "trial court did not err in denying plaintiff its requested injunction, damages, or attorney fees. Plaintiff has obtained all the relief to which it is entitled: a declaration that 'the Portland sign code definitions in existence prior to November 18, 1998, based on the presence of text, numbers, registered trademarks, or registered logos, imposed regulation based on the content of speech and was therefore a violation of Article I, section 8, of the Oregon Constitution."

The Court of Appeals outlined its reasons for severing parts of the sign code, rather than voiding the entire sign code: "Oregon courts have long recognized the principle that an unconstitutional part of a statute or ordinance may be excised without destroying a separable part," citing *City of Portland v Dollarhide*, 3000 Or 490 (1986), *City of Portland v Roth*, 130 Or App 179 (1994), *rev den* 320 Or 507 (1995), *Outdoor Media Dimensions v Dep't of Transportation*, 340 Or 275 (2006), ORS 174.040. The City has a long-standing and nationally recognized interest in zoning and land use regulation, set out in its code. Evidence in this record demonstrates that, compared to "the situation in *Outdoor Media Dimensions*," here "a comparably small number of signs – the murals – would be affected by severing the exemption" for painted wall decorations. Because that part is severable from the city's sign code, the sign code is not void in its entirety. "As a result, the city is not culpable in applying other parts of the sign code to deny plaintiff's requested sign permits, unless those particular parts of the sign code are themselves unconstitutional in their promulgation or application."

The city code's 200-square-foot limit on the size of signs is a reasonable time, place, and manner restriction under *State v Robertson*, 293 Or 402 (1982), *State v Moyer*, 348 Or 220, 229, *cert denied*, 131 S Ct 326 (2010), and *Outdoor Media Dimensions*, 340 Or 275 (2006). It also is reasonable under the First Amendment, because the restrictions "are justified without reference to the content of the regulated speech" and are "narrowly tailored to serve a significant governmental interest," and they "leave open ample alternative channels for communication of the information," as stated in *Ward v Rock Against Racism*, 491 US 781 (1989) and *Clark v Community for Creative Non-Violence*, 468 US 288 (1984). The city's interest in public and traffic safety, avoiding nuisance, and preventing signs from dominating areas is a sufficient interest. Moreover, ample alternative channels of communication were present, based on specific evidence in the record of the number of structures, plus smaller signs, radio, television, etc.

As to the statute's variances available for otherwise impermissible signs ("adjustment criteria"), the Court of Appeals concluded that "to the extent that the adjustment criteria" in the code "have the effect of prohibiting expression, that prohibition is legitimate so long as it is based on content-neutral considerations." The court then avoided overbreadth by interpreting "the adjustment criteria to require consideration only of the proposed sign's objective, nonexpressive physical features, to exclude any consideration whatever of the subjective content of the sign's message. The adjustment criteria are not fatally overbroad under Article I, section 8" or the First Amendment.

The Court of Appeals also rejected plaintiff's claim that the adjustment criteria are prior restraints on speech under the First Amendment, tracing through recent US Supreme Court and Ninth Circuit case law. The court concluded that "the sign adjustment criteria, having been given a binding narrowing construction above, are sufficiently objective and specific in their limitations so as to sufficiently constrain the discretion of city officials."

Karuk Tribe* et al *v Tri-County Metro Transit District, 241 Or App 537 (3/16/11) (Sercombe, Wollheim, Brewer) The Tribe offered to pay TriMet to advertise a message on their vehicles about the Tribe's salmon-restoration work. The ad is viewable at http://www.publications.ojd.state.or.us/A139375.tif. TriMet refused to allow the ad, based on its policy to accept only certain types of commercial ads and public-service ads. Certain ads are not allowed, such as "political" and "campaign speech."

The Tribe petitioned the trial court for a writ of review, alleging that TriMet's refusal violated the Tribe's Article I, section 8, and First Amendment free-speech rights. Both sides moved for summary judgment. The trial court granted the Tribe's motion: the content of the Tribe's communication was the basis for the denial; that violates Article I, section 8. Also, TriMet's decision was not viewpont-neutral; that violates the First Amendment.

TriMet argued, at the trial level and on appeal, that Oregon courts should – as the Court of Appeals put it – "ignore binding precedent" (*State v Robertson*, 293 Or 402 (1982)) – and instead construe Article I, section 8, consistently with the First Amendment, which allows the government to draw distinctions in the content of expression when the government acts in its "proprietary capacity."

The Court of Appeals affirmed: "For nearly 30 years, the *Robertson* framework has been the guiding rubric by which Oregon appellate courts have resolved Article I, section 8, challenges to various laws regulating constitutionally protected expression." The court adhered to *Robertson*'s framework. Here, "TriMet's decision to reject petitioners' display because it was not an advertisement was based on the application of a policy that explicitly regulated expression on its content. Under the first category of *Robertson*, such regulation is impermissible under Article I, section 8, unless the restraint is wholly confined to some historical exception."

As to the "historical exception" in the first category of *Robertson*, in a footnote in its reply brief, TriMet contended that "there is a government-as-proprietor historical exception to the reach of Article I, section 8." The court here did not reach that argument because, it declared, TriMet had not preserved the argument below and raised it on appeal only in a reply brief, which wasn't sufficient to preserve the issue.

The court noted that its usual method of interpreting an original provision of the Oregon Constitution -- examining the wording, historical circumstances, and case law, per *Priest v Pearce*, 314 Or 411, 415-16 (1992), *Vannatta v Keisling*, 324 Or 514, 530 (1997), *State v Rogers*, 330 Or 282, 297 (2000), and *State v Hirsch/Friend*, 338 Or 622, 631 (2005) – postdates *Robertson* and is compatible with *Robertson*'s method of interpreting and applying Article I, section 8, but is not identical to it. In other words: *Robertson*'s framework applies to Article I, section 8.

The court did not reach the First Amendment challenge.

III. RELIGION

"**All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences."** -- Article I, section 2, Or Const

"**No law shall in any case whatever control the free exercise, and enjoyment of religious [sic] opinions, or interfere with the rights of conscience**." -- Article I, section 3, Or Const

"**No religious test shall be required as a qualification for any office of trust or profit**." -- Article I, section 4, Or Const

"**No money shall be drawn from the Treasury for the benefit of any religious [sic], or theological institution, nor shall any money be appropriated for the payment of any religious [sic] services in either house of the Legislative Assembly**." -- Article I, section 5, Or Const

"**No person shall be rendered incompetent as a witness, or juror in consequence of his opinions on matters of religion [sic]; nor be questioned in any Court of Justice touching his religious [sic] belief to affect the weight of his testimony**." -- Article I, section 6, Or Const

"**The mode of administering an oath, or affirmation shall be such as may be most consistent with, and binding upon the conscience of the person to whom such oath or affirmation may be administered**." -- Article I, section 7, Or Const.

Each of Articles 1 through 7 of the Oregon Constitution are either similar or identical to corresponding articles of the Indiana Constitution of 1851. Palmer, *The Sources of the Oregon Constitution*, 5 Or L Rev 200, 201 (1926).

From testimony at the Oregon Constitutional Convention: "The two leading states of the Union – Virginia and Massachusetts – when they adopted their constitution, recognized the right of the state to interfere with and control matters of religion. . . . . But, at this time, not a state in the Union approves or recognizes in their constitutions [a provision for public payment for religious worship and Protestant teachers]. Massachusetts, following the more liberal example of her offspring, since 1820 have gradually disregarded it themselves. The late constitutions of the western states have, step by step, tended to a more distinct separation of church and state, until the great state of Indiana, whose new constitution has been most recently framed, embraced very nearly the principle contained in this section, as reported, now under consideration. . . . . Let us take the step farther, and declare a complete divorce of church and state." Lafayette Grover, Chair of the Committee on Bill of Rights, quoted in Charles Henry Carey, THE OREGON CONSTITUTION [], p 302-03 (1926) and Burton, *A Legislative History of the Oregon*

Constitution of 1857 - Part I, 37 Will L Rev 469, 502 (2001). (But then: "Mr. Grover moved to exclude Chinamen from voting. Adopted." Carey, at 324.)

One commentator describes the Oregon framers evidencing a "secularizing impulse" in the religion clauses of the Oregon Constitution. Hinkle, *Article I, section 5: A Remnant of Prerevolutionary Constitutional Law*, 85 Or Law Rev 541, 553 (2006). The history, including Grover's desire for a "complete divorce of church and state," "shows that a majority of the members of the constitutional convention favored a more explicit separation of church and state than could be found in any other state constitution of the time." *Id*. at 559.

"The religion clauses of Oregon's Bill of Rights, Article I, sections 2, 3, 4, 5, 6 and 7, are more than a code. They are specifications of a larger vision of freedom for a diversity of religious beliefs and modes of worship and freedom from state-supported official faiths or modes of worship. The cumulation of guarantees, more numerous and more concrete than the opening clause of the First Amendment, reinforces the significance of the separate guarantees." *Cooper v Eugene School District 4J*, 301 Or 358, 371 (1986).

State v Brumwell, 350 Or 93 (3/25/11) (Kistler) Defendant was an 18 year old high school dropout. He smoked dope and listened to death metal music, especially the satanist band "Deicide" that advocated violence, mutilation, and cannibalism. He used a hot knife blade to burn an upside-down cross on his body. Defendant and his friends each had copies of Deicide's self-titled album. One day they wanted money so they planned to knock off a Eugene Dari Mart and inscribe satanist symbols on its wall. They staked out the Dari Mart from a church parking lot, listening to Deicide for two hours. They decided to kill people in homage to Deicide's vocalist/bassist. Just before the market closed, they went in, and one of defendant's friends bludgeoned a clerk in the head 12-15 times, caving in her skull. She eventually died. A second clerk was stocking shelves. Defendant growled at her (imitating Deicide's guttural vocals), said he was just kidding, took $40, then took her to the back of the store. With a section of rebar, he began beating the woman in the head and body, repeatedly saying "die bitch die," chased her into a bathroom when she attempted to escape despite having crushed arms, then beat her in the head over a toilet, and jammed the bar into her mouth, breaking her teeth, attempting to shove the bar out the back of her head. A customer came in and called 911 when he saw someone covered in blood, holding a knife, walking out. The clerk survived most "severe beating" the trauma surgeon had ever seen in his career that included working in Baltimore's ER. Defendant was sentenced to death for aggravated murder. His guilt-phase verdict was affirmed in an earlier case.

On automatic and direct review to the Oregon Supreme, defendant argued that the evidence of his satanism and death-metal music preferences was irrelevant and also violated his state and federal rights to freedom of religion and expression. Defendant argued that the satanism and death music was not relevant to the Dari Mart crimes and even if it was it was relevant only to guilt, not sentencing.

The Supreme Court reiterated the evidence (recited in the preceding paragraphs) regarding satanism and violence from which a reasonable juror could find that defendant's interest in satanism and death metal music was not merely coincidental but rather was a motive for the crimes. As to defendant's argument that the satanism was not relevant to sentencing, the Supreme Court found that evidence relevant because his motivation goes to future dangerousness, the reasons bear on his culpability, and it shows his character: a person who butchers one person and participates in another to show homage to a bass player in a band places an exceedingly small value on human life or lacks empathy which goes to future dangerousness.

Witnesses countered that by testifying that satanism was more of a way to express anger. The Supreme Court found no evidentiary error.

As to the defendant's constitutional claims, defendant argued that Article I, sections 2 and 3, of the state constitution protect "nontraditional religious beliefs as well as traditional ones." The state did not challenge that proposition, so the Court "assume[d], for the purpose of analyzing defendant's state constitutional challenge, that Article I, section 3, extends protection to nontraditional religious practices, such as satanism," citing *Cooper v Eugene Sch Dist No. 4J*, 301 Or 358, 371 (1986).

Defendant contended that admitting evidence of satanism, even as evidence of his motive for killing, violated his right to freedom of religion under the state and federal constitutions, and his right to freedom of association under the federal constitution (as to the latter, the Court noted that freedom to listen to death-metal music is more akin to a person's right to read, listen to, or view expressive activity rather than to associate).

As to the state constitution, under *Cooper*, the Court distinguishes between (a) neutral rules applied to religiously motivated conduct and (b) rules that expressly target religion. A rule that is "neutral toward religion on its face and in its policy" to religiously motivated conduct is evaluated only to determine if there is "statutory authority" to make the rule and "an individual claim to exemption on religious grounds." In contrast, a rule that expressly targets religious activity is evaluated under a more exacting standard. Here, the trial court admitted the evidence of satanism to show motive, regardless whether the motive was pecuniary, religious, or anything else. "Put differently, the trial court applied a neutral rule of evidence – that evidence of motive is generally admissible – to what we assume was religiously motivated conduct." Thus, the trial court's ruling "was subject to attack only on the ground that the trial court lacked authority to make the ruling, or on the ground that defendant was entitled to 'an individual claim to exemption on religious grounds" under *Cooper*. Defendant's only argument is that the satanism evidence was admitted to prove that he was an adherent of a disfavored religion, but given "the trial court's religion-neutral ruling," his state constitutional argument fails.

As to the First Amendment, the US Supreme Court explained in *Dawson v Delaware*, 503 US 159, 165 (1992), "the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment." A court may consider defendant's reasons for committing a criminal act in imposing a sentence, even though the expression of those reasons would be constitutionally protected, if unrelated to a criminal act, such as membership in Aryan groups or racial animus. In contrast, the First Amendment prohibits the admission of evidence of constitutionally protected expressive or associational activity to prove nothing more than "abstract beliefs." Here, the evidence was not admitted to prove "abstract beliefs" but rather evidence of defendant's interest in satanism and preference for death metal music was relevant to prove defendant's motive for participating in murder and attempted murder, and the reason why he did so was relevant to his future dangerousness and culpability.

Cf. McCollum v CDCR, 647 F3d 870 (9th Cir 6/01/11) (Not an Oregon case) California prisons accommodate prisoners' religious needs through a paid chaplaincy program. Five religions are served by clergy: Protestant, Catholic, Jewish, Muslim, and Native American. A Wiccan volunteer chaplain and several inmates challenged that paid program. The trial court dismissed the claims. The Ninth Circuit affirmed, concluding that the Wiccan chaplain was trying to transform his employment discrimination action into an effort to vindicate inmates' First Amendment rights and the inmate-plaintiffs hadn't exhausted their administrative remedies.

The Ninth Circuit panel observed that "Wiccan" includes Goddess worshipers, Pagans, Druids, Shamans, Asatrus, Faery, Celtic, Khemetic, Gardnerian, Reclaiming, Dianic, Alexandrian, Iseum of Isis, Odinist, Youruban, Earth Religionists, Old Religionists, and others. In California, in 2007, there were about 42,666 Protestant inmates, 23,160 Catholics, 28,884 Muslims, 8,296 Native Americans, 3,296 Jews, 2,678 "other," and 183 Wiccans.

IV. SEARCH, OR SEIZURE AND WARRANTS

"**The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.**" – Fourth Amendment, US Const

The wording of Article I, section 9, is similar with its counterpart in the Indiana Constitution of 1851. Palmer, *The Sources of the Oregon Constitution*, 5 Or L Rev 200, 201 (1926). "If Oregon's provision was patterned after Indiana's, however, it is clear that both were patterned after the Fourth Amendment, which was the common practice in mid-nineteenth-century constitutional drafting." Landau, *The Search for the Meaning of Oregon's Search and Seizure Clause*, 87 Or L Rev 819, 837 (2009) (noting several variations from the Fourth Amendment and that "the framers of article I, section 9 seem to have had in mind an independently enforceable provision" between the reasonableness and the warrant clauses).

Judge Deady, who actively participated in the Oregon Constitutional Convention, wrote that Article I, section 9, of Oregon's Constitution "is copied from the fourth amendment to the constitution of the United States, and was placed there on account of a well-known controversy concerning the legality of general warrants in England, shortly before the revolution, not so much to introduce new principles as to guard private rights already recognized by the common law. 2 Story, Const. 1902; Conk. Treat. 615. . . . . The law . . . was put beyond controversy, as to the government of the Union, by this fourth amendment, and from there transferred to the constitution of the states." *Sprigg v Stump*, 8 F 207, 213 (1881) (Deady, J.).

"Reflect, for a moment, on the fact that the Fourth Amendment actually contains two different commands. First, all government searches and seizures must be reasonable. Second, no warrants shall issue without probable cause. The modern Supreme Court has intentionally collapsed the two requirements, treating all unwarranted searches and seizures – with various exceptions, such as exigent circumstances – as per se unreasonable." Akhil Amar, THE BILL OF RIGHTS at 68 (1998).

It is "at least debatable whether the framers [of Oregon's Constitution] would have regarded all warrantless searches to be presumptively unreasonable, even in criminal cases. Historians and legal scholars of the Fourth Amendment – after which Article I, section 9, was patterned – debate whether the meaning of the first clause, which requires that searches and seizures be reasonable, is dependent upon the second clause, which requires that warrants be issued only upon probable cause." *Weber v Oakridge School District 76*, 184 Or App 415, 429 n 3 (2002).

Nevertheless, in Oregon, the reasoning remains this: "The constitutional text itself ties the phrase 'probable cause' to warrants. It seems never to become superfluous to repeat that the requirement of a judicial warrant for a search or seizure is the rule and that authority to act on an officer's own assessment of probable cause without a warrant is justified only by one or another exception." *State v Lowry*, 295 Or 338, 346 (1983).

A. State Action Requirement

A privacy or possessory interest under Article I, section 9, is an interest against the state; it is not an interest against private parties. *State v Tanner*, 304 Or 312, 321 (1987).

B. Protected Interests

1. Privacy Rights – Searches

The government conducts a "search" for Article I, section 9, purposes, when it invades a protected privacy interest. *State v Brown*, 348 Or 293 (2010). A protected privacy interest "is not the privacy that one reasonably expects but the privacy to which one has a right." *Id*. (quoting *State v Campbell*, 306 Or 419, 426 (1988)). A "privacy interest" is an interest in "freedom from particular forms of scrutiny." *Campbell*, 306 Or at 170.

"[S]ocietal expectations do not necessarily translate into a protected privacy interest under Article I, section 9. . . . . Nonetheless . . . societal norms are enmeshed with the determination whether a privacy interest exists under Article I, section 9." *State v Cromb*, 220 Or App 315, 320-27 (2008), *rev denied* 345 Or 381 (2009).

If government conduct did not invade a privacy interest, then no search occurred and Article I, section 9, is not implicated, and the inquiry ends. *State v Meredith*, 337 Or 299, 303 (2004).

2. Possessory Rights – Seizures

(a). Seizure of Property

Article I, section 9:

"Property is seized for purposes of Article I, section 9, when there is a significant interference, even a temporary one, with a person's possessory or ownership interests in the property." *State v Juarez-Godinez*, 326 Or 1, 6 (1997); *State v Whitlow*, 241 Or App 59 (2011).

A person has a possessory right to the contents of his body. "The extraction of human bodily fluids generally is a search of the person and a seizure of the fluid itself." *Weber v Oakdridge School District*, 184 Or App 415, 426 (2002).

Fourth Amendment:

Under the Fourth Amendment, a "seizure" of property occurs when there is some meaningful interference with an individual's possessory interests in that property. *United States v Jacobsen*, 466 US 109, 113 (1984). "Stopping a vehicle and detaining its occupants is a 'seizure' of the person within the meaning of the Fourth Amendment to the Constitution of the United States, 'even though the purpose of the stop is limited and the resulting detention quite brief.' *Delaware v Prouse* 440 US 648, 653, 59 L Ed 2d 660, 667 (1979)." *State v Tucker*, 286 Or 485, 492 (1979).

(b). Seizure of Persons

"A 'seizure' of a person occurs under Article I, section 9, of the Oregon Constitution: (a) if a law enforcement officer intentionally and significantly restricts, interferes with, or otherwise deprives an individual of that individual's liberty or freedom of movement; or (b) if a reasonable person under the totality of the circumstances *would* believe that (a) above has occurred." *State v Ashbaugh*, 349 Or 297, 316 (2010). The guiding principle is whether the officer has made a "show of authority" that restricts and individual's "freedom of movement." *Id.* at 317.

Under *State v Hall*, 339 Or 7, 16-17 (2005), *State v Amaya*, 336 Or 616, 627 (2004), and *State v Holmes*, 311 Or 400, 410 (1991), there are three general categories of "encounters" that may implicate Article I, section 9:

(1). Mere conversations, a public place, between an officer and a citizen, that are free from coercion or interference with liberty, are not "seizures" and thus do not require any justification (reasonable suspicion of anything is not necessary).

(2). "Temporary restraints" of a person's liberty for investigatory purposes ("**stops**") are seizures under Article I, section 9, that must be justified by a reasonable suspicion of criminal activity. *State v Alexander*, 238 Or App 604 n 1 (2010), *rev den* 349 Or 654 (2011) (citing *Holmes* and ORS 131.605(6) (defining "stop")).

During the course of a nontraffic stop that is supported by reasonable suspicion, an officer may inquire whether the stopped person is carrying weapons or contraband. *State v Simcox*, 231 Or App 399, 403 (2009) (stop in a city park). See also ORS 131.615(1) ("A peace officer who reasonably suspects that a person has committed or about to commit a crime may stop the person and, after informing the person that the peace officer is a peace officer, make a reasonable inquiry."). See also *State v Hemenway*, 232 Or App 407 (2009) (state must prove that deputies had "reasonable suspicion of criminal activities" to block defendant's truck with their cars).

(3). Arrests – placing a person under actual or constructive restraint – requires probable cause to believe the person has committed a crime. *State v Alexander*, 238 Or App 597, 604 n 1 (2010) *rev den* 349 Or 654 (2011) (citing *Holmes* and ORS 133.005(1) (defining "arrest")); *cf. Papachristou v City of Jacksonville*, 405 US 156, 169 (1972) ("We allow our police to make arrests only on 'probable cause'" under the Fourth and Fourteenth Amendments); *Cook v Sheldon*, 41 F3d 73, 78 (2d Cir

1994) ("It is now far too late in our constitutional history to deny that a person has a clearly established right not to be arrested without probable cause.").

C. Context of Search or Seizure

1. Public Roadways

(a). Traffic Stops

What is a traffic stop?

A traffic stop is a temporary seizure that occurs when an officer restrains an individual's liberty or freedom of movement. *State v Hendon*, 222 Or App 97, 102 (2008).

A traffic stop is not an ordinary police-citizen encounter because, in contrast to a person on the street who can end the encounter at any time, a motorist stopped for an infraction is not free to end the encounter when he chooses. *State v Rodgers/Kirkeby*, 347 Or 610, 623 (2010). Police inquiries during a traffic stop are neither searches nor seizures, thus police inquiries in and of themselves require no justification and do not necessarily implicate Article I, section 9. *Id*. at 624. (Note: the analysis depends on who the police talk to in the car, and what they talk about.).

The Supreme Court extended *State v Hall*, 339 Or 7, 37 (2005) into the arena of traffic stops in *State v Rodgers/Kirkeby*, 347 Or 610, 631 (2010).

What level of suspicion is required for a traffic stop? Oregon case law is inconsistent between reasonable suspicion and probable cause.

Reasonable suspicion required in some cases. In some recent cases, it appears that an officer may traffic-stop a vehicle/driver on reasonable suspicion of a traffic infraction, but may "stop" a passenger (not the driver) only on reasonable suspicion of criminal activity. An officer may "stop" the person sitting in the driver's seat of a parked car only on reasonable suspicion of criminal activity, see *State v Jones*, 245 Or App 186 (2011).

To be reasonable, traffic stops must be supported by reasonable suspicion that the individual stopped has committed a traffic infraction. *State v Amaya*, 176 Or App 35, 43 (2001), *aff'd on other grounds*, 336 Or 616 (2004). Questioning during a lawful stop on a matter unrelated to the basis for that stop does not require independent reasonable suspicion regarding the unrelated matter. *Id*. at 44. Questioning that detains a defendant beyond a completed traffic stop must be supported by reasonable suspicion that the defendant is engaged in criminal activity. *Id*. *Amaya* is not limited to traffic stops. *State v Hendon*, 222 Or App 97, 102 (2008).

"Traffic stops must be supported by reasonable suspicion that the person stopped has committed a traffic infraction." *State v Broughton*, 221 Or App 580, 587 (2008); *State v Ayles*, 348 Or 622, 628 (2010) (defendant, a passenger in a car stopped for speeding, "was seized in violation of Article I, section 9, . . . when [the officer] took and retained defendant's identification without reasonable

suspicion of criminal activity."); *State v Lay*, 242 Or App 38 (2011) ("To be lawful, a warrantless stop must be supported by a reasonable suspicion of criminal activity.").

But **probable cause** is required to stop in other cases, and probable cause is required to search or seize, regardless if the stopped person is a driver or passenger:

"In the course of a valid traffic stop of a vehicle or a permissible frisk incident to a stop or an arrest, officers sometimes may come upon other suspicious items. But these may not be seized on suspicion alone; probable cause is required." *State v Lowry*, 295 Or 338, 345 (1983).

An "officer who stops and detains a person for a traffic infraction must have probable cause to do so, *i.e.*, the officer must believe that the infraction occurred, and that belief must be objectively reasonable under the circumstances." *State v. Matthews*, 320 Or 398, 403 (1994) (*held*: ORS 810.410(3)(b) requires that "a traffic stop must be based on probable cause" which has been defined in cases interpreting Article I, section 9).

More recent cases also require probable cause:

- *State v Nguyen*, 223 Or App 286, 289 (2008) ("In order to stop and detain a person for a traffic violation, an officer must have probable cause to believe that the person committed a violation. ORS 810.410; *State v. Matthews*, 320 Or 398, 403, 884 P2d 1224 (1994).") (statutory decision)
- *State v Isley*, 182 Or App 186, 190 (2002) (to stop and detain a person lawfully for a traffic infraction, an officer must have probable cause to believe that an infraction has been committed. *State v Matthews*, 320 Or 398, 403 (1994).")
- *State v Tiffin*, 202 Or App 199, 203 (2005) ("An officer may lawfully stop and detain a person for a traffic infraction if the officer has 'probable cause to believe that an infraction has been committed.' *State v Isley*")
- *State v Rosa*, 228 Or App 666, 671 (2009) ("Article I, section 9, requires that an officer who stops a person for a traffic infraction have probable cause to believe that the person has committed the infraction. *State v. Matthews*, 320 Or 398, 403, 884 P2d 1224 (1994).")
- *State v McBroom*, 179 Or App 120, 123 (2002) ("Oregon statutes require probable cause to stop a person for a traffic infraction. *State v Matthews*");
- *State v Hall*, 238 Or App 75 (2010) ("Police can conduct a stop for violation of a traffic offense if they have probable cause to believe that the offense has occurred and that belief is reasonable. *State v Matthews*, 320 Or 398, 402 (1984).")

State v Foster, 350 Or 161 (4/07/11) (Linder) (See the companion case, *State v Helzer*, 350 Or 153 (2011), discussed on page 28). An officer saw defendant in a car talking to a meth user, and suspected that defendant was dealing meth. Officer pulled him over for not wearing a seat belt. A drug-detection dog, Benny, was brought on site, as the officer finished writing the seatbelt ticket, and Benny "alerted" at a door handle. Defendant said that he didn't have drugs but Benny might have alerted because a relative had smoked marijuana in the car earlier. Defendant refused to consent to a search. Officer searched anyway and found meth residue on a pipe in a fanny pack. Defendant moved to suppress the pipe, on grounds that the officer lacked probable cause to search his car because Benny's alert was not reliable. The state put on detailed evidence from Benny's

handler, describing his training, certification, field performance, and recertification. The state put on detailed evidence of an officer who is a master dog trainer who tests and certifies drug-detection dogs, using the "play-reward" method. That certification is purely private, no statutes set standards for certification. The intermediate appellate court discussed this method in great detail, and the supreme court reprinted it. Benny's history and test scores were in evidence and were discussed in great detail. The routine that Benny's handler (and Benny) use to inspect vehicles is part of the record. In short, 66% of Benny's alerts resulted in searches that led police to seizable evidence of a drug-related crime. The trial court denied defendant's motion to suppress. The Court of Appeals affirmed.

The Supreme Court affirmed, holding that "probable cause to search may arise from the alert of a trained drug-detection dog despite the *possibility* that the alert is to a residual odor of an illegal drug rather than an odor emanating from the actual drug." (Emphasis by court). Probable cause "does not require certainty" or "that officers limit the place that they search to whatever location may offer the most promising of several possible results." "Probable cause depends on whether an incriminating explanation remains a probable one, when all of the pertinent facts are considered." The "familiar and settled" principles for a search are that an "officer may lawfully search a stopped vehicle and its contents without a warrant or consent if the vehicle was mobile when it was stopped and if the officer had probable cause to believe that seizable items would be found. *State v Brown*, 301 Or 268, 274-76 (1986). . . . The probable cause analysis for a warrantless search is the same as for a warranted one. *Id*." (The Court footnoted that the parties did not address the automobile exception in this case). "The standard is one of probability, not certainty." The state has the burden to demonstrate that the dog's alert was sufficiently reliable to provide probable cause to search.

The Supreme Court rejected all of defendant's arguments, such as that "a dog trained to alert to drugs based on their odor, rather than the actual presence of drugs, is inherently too unreliable," and that the "play-reward" method is too unreliable, and that Benny himself was too unreliable. The court did note that, although Benny's handler testified that Benny had never been injured or on any medications, it "would be relevant to the probable cause analysis" if a dog has been injured or on medications.

State v Helzer, 350 Or 153 (4/07/11) (Linder) (See the companion case, *State v Foster*, 350 Or 161 (2011), discussed on the previous page). The Oregon Supreme Court here reiterated its decision in *Foster*: "an alert by a properly trained drug-detection dog can provide probable cause to search. Whether such an alert does so in a particular case will depend on an individualized assessment of the totality of the circumstances known to police that bear on the dog's reliability in detecting drugs. Those circumstances usually will include, but are not limited to, the dog's and its handler's training, certification, and performance in the field. The state has the burden, upon a proper challenge by the defendant, to demonstrate that the dog's alert was sufficiently reliable to provide probable cause to search."

Here, that proof is wanting. Defendant was traffic-stopped and denied consent to search his car. Babe, the officer's drug-detection dog, sniffed and alerted. Officer found two bags where Babe alerted, opened the bags, and found meth and scales. Defendant moved to suppress. The state did not provide as much detail as in the *Foster* case (see, immediately *ante*), although it provided some details. The officer testified to Babe's private training and certification (which he had not conducted) but he "described his ongoing training with Babe in general terms only" and the officer did not keep any records of her failure rates. The trial court denied the motion to suppress and the Court

of Appeals affirmed. The Supreme Court reversed: "To assess the dog's and handler's abilities based on their training and certification . . . more is needed than the fact that the two have received certification by a private organization." In this case, the state "established little beyond the bare fact that Babe and [officer] had been certified." The state did not carry its burden to show that Babe's alert in this case was sufficiently reliable to provide [officer] with probable cause to search." (The court footnoted that the automobile exception was not raised as to the application or scope of that exception here).

State v Ashbaugh, 349 Or 297 (12/09/10) (Gillette for majority; with Kistler and Linder concurring; Durham concurring; Walters dissenting) (Note: This case is in the context of a public park. Appellate courts subsequently apply this case in other contexts, such as traffic stops and searches of people in homes).

Defendant and her husband were sitting under a tree in a public park on a summer afternoon. Officers biking through thought it was unusual that a middle-aged couple would be in that park, which mostly kids and elderly people used, but otherwise suspected the couple of nothing. Officers asked them in a relaxed tone, "Hey, you're not in any trouble, but do you have ID we can see?" Both produced ID. During a two-minute wait, officers learned that, per a court order, husband was not allowed to have contact with defendant, so they told her they were arresting her husband, then handcuffed and arrested him. Defendant remained under the tree for about five minutes, while officers put her husband in the patrol car, before officers returned and reinitiated contact with her, to take husband's belongings. Something "inside" the officer enticed him to asked defendant if she had anything illegal in her purse. She said no. Officer asked if he could search her purse. She said "yeah, sure." The purse contained baggies of meth, a mirror, and short straws; defendant admitted it was meth and made other incriminating statements. Trial court denied her motion to suppress, concluding that the request for consent to search was not a seizure but "mere conversation" and the consent was independent of the initial stop. Defendant did not argue that her consent was involuntary. A divided Court of Appeals remanded, disagreeing in part with the "reasonableness" aspects under *State v Toevs*, 327 Or 525 (1998) and *State v Holmes*, 311 Or 400 (1991). The state and defendant petitioned for review.

In this case, the Supreme Court "abandoned forthrightly" the part of *State v Holmes*, 311 Or 400 (1991) that had a subjective test to determine if a "stop" occurred. The Court also dismissed the subjective-belief aspect in *State v Toevs*, 327 Or 525 (1998) as a "regrettable misstatement" and a single "anomaly" that bucked its "trend" of determining seizures based solely on an objective reasonable-person standard.

The new legal test under *Ashbaugh* for differentiating "mere conversation" (no justification required) from a "seizure" (triggering the reasonable suspicion requirement in Article I, section 9) is this: "A 'seizure' of a person occurs under Article I, section 9, of the Oregon Constitution: (a) if a law enforcement officer intentionally and significantly restricts, interferes with, or otherwise deprives an individual of that individual's liberty or freedom of movement; or (b) if a reasonable person under the totality of the circumstances *would* believe that (a) above has occurred." (Emphasis in original). Here, the Court concluded that defendant was not seized: the officer's words, manner, or actions did not make a show of authority that restricted her freedom of movement.

The Supreme Court also cited *State v Rodriguez*, 317 Or 27 (1993) and restated that "in criminal prosecutions in Oregon, evidence is subject to suppression if it is obtained in violation of the defendant's personal right under Article I, section 9, to be free from

unlawful searches and seizures. . . . . [U]nlawful police conduct . . . provides a basis for suppression of evidence seized during a search performed with the consent of that individual in one of two ways: (1) the unlawful police conduct affected the supposed voluntariness of the individual's consent; or (2) the consent actually derived from, or was obtained through 'exploitation' of the prior violation of the individual's constitutional rights." This case is about exploitation only. Defendant was free to leave, and the unlawful initial stop was over, when police returned her ID to her and told her they were arresting her husband, the Court concluded.

Walters dissented: "When the majority declares . . . that a reasonable person in defendant's circumstances would not believe that the police had restrained her liberty . . . it ignores not only the legal authority that the police exhibited, but also social science research that demonstrates that people subjected to such authority believe that they are required to cooperate with the police and are not free to leave when subjected to questioning." (Citations omitted). "If a citizen refuses to cooperate and is incorrect in doing so, the encounter may escalate and the citizen may violate the law. The law does not encourage a citizen to challenge police authority; it expects the citizen to recognize that authority and behave in accordance. When the citizen remains and submits to police investigation, believing that he or she must do so, he or she acts reasonably."

Note: This case illustrates a problem of relying on federal constitutional standards. The *Ashbaugh* Court recognized that when it defined a "seizure" in *Holmes* 20 years ago,

> "it was attempting to define Article I, section 9, seizures primarily in terms of the perceptions of ordinary citizens. That is not surprising: the United States Supreme Court had, at that time, settled on a definition of 'seizure,' for the purpose of the Fourth Amendment to the United States Constitution," citing *United States v Mendenhall*, 446 US 544, 554 (1980) (plurality) and *Florida v Royer*, 460 US 491, 502 (1983).

But then, rather than explain whether and why it should continue following federal case law, the *Ashbaugh* Court dropped the subjective part of the test on grounds that, on self-reflection, it has "seemed disinclined to use it":

> "[H]aving announced in *Holmes* part (b) that the existence of a seizure might depend on the subjective impressions of the citizen involved, this court has seemed disinclined to use that aspect of the part (b) formulation in its decisions. . . . . we believe it is time to abandon forthrightly . . . the part that is concerned with a person's subject belief that he or she has been seized – and instead to direct the focus on that part of the definition entirely to an objective standard."

The Court cited only its own 20-year failure to follow its own decision, rather than any other reason, as its basis to "abandon" its state constitutional analysis it had lifted from a federal case.

State v Braukman, __ Or App __ (10/19/11), 2011 WL 4954009 (Wollheim, Schuman, Nakamoto) (Note: no constitutional provision was mentioned in this opinion.) Defendant cut off another driver, narrowly avoiding a collision, then he made another infraction. Officer stopped defendant, who during the encounter, kept his dark sunglasses on, kept his dog on his lap, and kept eating a hamburger. Officer asked for defendant's license, insurance, and registration; defendant produced the insurance and license but could not find his registration. Defendant's movements were slow, lethargic,

and unfocused; he also had flushed cheeks and neck. He spoke in a low voice. Officer wrote a citation, handed him the citation, and asked if he'd been drinking that day. Defendant said one beer. Officer asked if defendant would perform field sobriety tests. Defendant agreed, removing his sunglasses and revealing bloodshot, watery eyes. He failed the FSTs and admitted drinking a six pack and said he probably shouldn't have been driving. He was charged with DUII and moved to suppress all evidence on grounds that the officer's questioning was outside the scope of the traffic stop.

The officer stated that he did not have suspicion that defendant was drunk when he first stopped him, but formed a suspicion that defendant was intoxicated when defendant could not find his registration, moved slowly, and had flushed skin. A second officer testified that defendant's skin did not appear to be from sunburn. The trial court concluded that the officer did not have reasonable suspicion to extend the traffic stop by asking if defendant had been drinking alcohol. The state appealed.

The Court of Appeals reversed, implying that reasonable suspicion is all that is required to extend a traffic stop, but citing to part of ORS 810.410(3)(b): "Reasonable suspicion is a relatively low barrier" and the "possibility that there may be a non-criminal explanation for the facts observed or that the officer's suspicion will turn out to be wrong does not defeat the reasonableness of the suspicion." The court stated that there are "many ways" that a driver may indicate his impairment, and those ways need not be unlawful to support a "reasonable inference that a crime is being committed." Here, the officer observed defendant commit two traffic violations, he wore dark glasses, kept a dog on his lap, and kept eating a hamburger while a police officer talked to him. The absence of the odor of alcohol is not dispositive. And in *State v Clark*, 286 Or 33, 59 (1979), the Court took judicial notice that that a flushed appearance is an observable symptom of alcohol intoxication. In short, the officer had reasonable suspicion to ask defendant if he had been drinking that day.

State v Jones, 241 Or App 597 (3/23/11), *rev denied* 350 Or 230 (4/07/11) (Schuman, Wollheim, Rosenblum) Defendant was in the back seat of a car that police pulled over. Officer asked everyone in the car for ID. Driver gave officer ID and the passengers just gave the officer their names and birthdates. Officer told the passengers (including defendant) they were free to leave, but they remained in the car. Driver did not have a valid license, so the car was to be towed. Two other officers arrived, one of whom asked defendant to step out of the car, and defendant did so. That officer asked if he had any drugs or weapons, defendant said no, officer asked to search him, and he turned around and placed a dollar bill and a rock of cocaine on the trunk. Defendant did not speak, but spread his feet apart, placed his hands behind his head, interlaced his fingers, in what the officer said is "the standard search position." Officer found another rock of cocaine in defendant's pocket. Five minutes passed between officer telling defendant he was free to leave and officer's interaction. Defendant was given *Miranda* warnings. He admitted he had smoked cocaine earlier and the rocks were left over. A "pre-tow inventory search of the vehicle" revealed two more rocks of cocaine where defendant had been sitting. An officer asked defendant about the rocks, and defendant said they must've fallen out of his pocket. Defendant moved to suppress the four rocks as the product of unlawful seizures. Trial court denied his motion, ruling that he was not "seized" when officer asked to search him and his nonverbal act of assuming the search position was voluntary consent.

The Court of Appeals affirmed, following *Ashbaugh* (see, *ante*) which occurred in a public park as a defendant waited around while her husband was being arrested. "As in *Ashbaugh*, defendant here challenges a police officer's request to search that followed the

lawful seizure of a companion. In *Ashbaugh*, the defendant's husband was arrested and the defendant remained in a public park for about 5 minutes before the officers returned and reinitiated contact with her. Here, the driver . . . was lawfully pulled over . . . . . the officer told defendant that he was free to leave. Defendant remained in the car and was there for about 5 minutes before a second officer contacted defendant. Also, in *Ashbaugh* as here, the police officer's request for consent to search occurred after the defendant had denied possessing contraband." There was no "show of authority" here (one-on-one questioning, no weapons drawn, normal tone of voice). Thus the officer did not "intentionally and significantly" interfere with defendant's liberty or freedom of movement. Affirmed for the same reasons under the Fourth Amendment, citing *United States v Drayton*, 536 US 194, 200-01 (2002).

State v Courtney, 242 Or App 321 (4/20/11) (Sercombe, Ortega, Landau pro tem) Police officer pulled over a car for a missing tail light. Three people were inside, defendant was in the front passenger side. Driver's license was revoked. Officer prepared to tow the car per police bureau policy. Defendant and the other passenger were in the car while the driver was being cited; officer told them "nonchalantly" to "stay there" that he would "be with them in a minute" or "in a second." Defendant testified that he did not feel free to leave. Officer asked to pat down the backseat passenger for weapons; he consented. Officer asked to pat down defendant, while still seated, for weapons; he consented and put laced his fingers behind his head as the officer asked. Officer opened the side door so defendant could get out, so the car could be towed, and two glass pipes clinked out. Officer read defendant his *Miranda* rights, defendant said he understood, officer asked about the pipes, defendant said he smoked the "stems" earlier (the tube part of the pipes). Defendant said he didn't have meth on him. Officer took defendant into custody 18 minutes after stopping the car. 14 minutes had been spent with the driver, 4 minutes were spent with the backseat passenger. When officer was taking defendant to jail, defendant admitted having "stuff" in his shoe, which was meth inside a plastic bag.

Defendant moved to suppress on grounds that he'd been detained without reasonable suspicion. Trial court denied that motion and defendant was convicted.

The Court of Appeals affirmed, despite finding that during the traffic stop, defendant had been seized in violation of Article I, section 9. The state did not argue that the officer had either reasonable suspicion or probable cause to believe defendant had committed a crime before the meth pipes were found, but instead that the officer engaged in mere conversation – not a seizure. Court of Appeals disagreed. Under *State v Ashbaugh*, 349 Or 297 (2010), the defendant's subjective believe is not determinative: the test is entirely objective. Here, a reasonable person would have believed that his freedom of movement had been restricted because the officer told the passengers to stay where they were (nonchalantly or otherwise), there were 2 officers at the scene, the reason that the officer asked defendant to step out of the car (so it could be towed) may not have been expressed to defendant, and most significantly, the officer told defendant to put his hands on top his head with his fingers laced. Under *Ashbaugh*, before that car door was opened, a reasonable person would believe his freedom of movement was restricted. Defendant was seized. But the only factual connection between the seizure and the discovery of meth pipes is that one occurred after the other. Thus the Court of Appeals reasoned as follows:

> "That police conduct, however, neither effectuated defendant's unlawful seizure, nor was investigatory in nature. Instead, defendant was removed from the car so that it could be towed. That removal was unrelated to defendant's seizure." So,

> given "the absence of additional evidence in the record, we conclude that defendant has railed to meet his burden to demonstrate the existence of a minimal factual nexus between the discovery of the methamphetamine pipes and the unlawful police conduct; it was not error for the trial court to deny defendant's motion to suppress as to the pipes."

State v Lantzsch, 244 Or App 330 (7/20/11), *rev den* 350 Or 297 (5/05/11) (Brewer, Sercombe, Nakamoto) Defendant was a passenger in a car that officer pulled over. Officer asked him for ID, he did not have ID, but gave his name and birth date. Officer told defendant and another passenger they were free to leave, but defendant remained in the car. The car needed to be towed, officer asked defendant to get out, and once defendant was out, officer asked if he had any drugs or weapons. Defendant said no, officer asked to search him, and found drugs. Five minutes passed between the time the officer told defendant he was free to leave and the search. Defendant moved to suppress evidence, the trial court denied that motion, the Court of Appeals affirmed, and the Supreme Court vacated after *Ashbaugh*.

On remand, the Court of Appeals affirmed, comparing this case to *State v Jones*, 241 Or App 597 (2011) and *State v Courtney*, 242 Or App 321 (2011). Here, although the officer did not tell defendant he was free to leave, the officer did not draw a weapon and did not raise his voice when he asked defendant to step out of the car. Also, although another officer was just a few feet away, there is no evidence that the second officer made a show of authority or had any interaction with defendant. The officer did not direct defendant to take any action other than stepping out of the car and walking to the back of the car. In short, the mere presence of a second officer and merely asking defendant to get out of a car is not the kind of "show of authority" that "intentionally and significantly" interferes with a defendant's liberty or freedom of movement.

State v Dudley, 245 Or App 301 (9/08/11) (Brewer, Haselton, Armstrong) Defendant was a passenger in a car that had been stopped. As the driver looked for ID, the officer asked defendant for her ID, which she gave to him. Officer wrote down her ID number and handed the ID back, having held the ID for 15 seconds. Officer ran a warrants check on both. Driver was asked to perform field sobriety tests, which he apparently failed, because he was arrested and taken to jail while defendant sat in the passenger seat. Defendant asked the officer for permission to walk home, and he said "sure." Officer asked her to get out of the car so he could inventory it. She did, then the officer asked if she had drugs or weapons. She said no, then the officer asked for consent to search her. She consented and the officer found drugs in her purse.

Defendant moved to suppress the drug evidence on grounds that she was unlawfully seized when the officer asked her if she had drugs or weapons after she stepped out of the car. The trial court denied her motion, concluding that it was a consent search.

The Court of Appeals affirmed, citing *State v Lantzsch*, 244 Or App 330 (2011) [discussed on page 33], for its analysis that "the officer's actions toward defendant did not amount to a 'show of authority' that restricted her movement such that she was 'stopped' when she consented to the officer's search of her purse. As in *Lantzsch*, the officer's question whether defendant possessed any drugs or weapons was not a constitutionally significant 'show of authority,' and neither was his request that she step out of the car." The court also contrasted this case with *State v Courtney*, 242 Or App 321 (2011), where

the officer asked that defendant to step out of the car and commanded him to "place his hands on top of his head and interlace his fingers."

State v Lay, 242 Or App 38 (4/06/11) (Schuman, Wollheim, Rosenblum) Defendant was a passenger in a minivan stopped for a traffic infraction. Driver seemed intoxicated, officer asked driver if she'd taken anything, and she said Vicodin. Officer took her driver's license and asked for defendant's as well. Defendant gave officer his license. Officer radioed dispatch with both license numbers while standing a few steps from the van. Less than a minute later, before receiving any response from dispatch, the officer thanked them, returned the licenses, and asked driver to step out of the van. He asked driver if she'd taken any drugs besides Vicodin, and she said that she and defendant had smoked meth. She said there was a pipe in the van and allowed the officer to search the entire van. Defendant appeared jittery. Another officer testified that he believed there would be drugs in the van or on defendant. Defendant stepped out of the van when asked, and responded also that he had a knife. He raised his arms so that an officer could remove a five-inch double-edged dagger from the jacket pocket. Officer asked if he had been arrested for a felony, defendant said he had been, and officer believed that he was a felon in possession of a concealed weapon. Defendant consented to a search of his person and belongings and officer found nothing illegal. Officer searched the vehicle and found a flower-print toiletry bag with a pipe and a bag of meth inside. Defendant immediately and spontaneously said that the drugs were his, not the driver's. That statement was made 30 minutes after the officer initially took his ID. Officer informed defendant of his *Miranda* rights and defendant again stated that the meth was his. Driver was allowed to leave, but defendant was arrested and charged with meth possession. Trial court denied his motion to suppress his statements acknowledging ownership of the meth, on grounds that he was seized without reasonable suspicion.

The Court of Appeals affirmed. Defendant was stopped when the officer took his driver's license and ordered a warrant check. Officer did not tell defendant the warrant check had come back clear; a reasonable person would conclude that he remained under a criminal investigation. "The most important circumstance [under Supreme Court cases] appears to be whether, upon returning the identification, the officer indicates that the investigation has ended." Officer also did not have reasonable suspicion that defendant was involved in criminal activity when he stopped defendant, (the stop occurred when the officer asked defendant to step out of the van). "To be lawful, a warrantless stop must be supported by a reasonable suspicion of criminal activity. *State v Hall*, 339 Or 7, 17 (2005)." Reasonable suspicion has a subjective and an objective component. The state bears the burden of proving that the officer can point to specific and articulable facts that gave rise to the officer's suspicion. To establish the requisite connection between the unlawful seizure and the disputed evidence, the defendant must establish a minimal factual nexus ("but for") between the conduct and the evidence. Here, defendant did not establish that nexus – his statement that the drugs were his occurred 30 minutes after the officer ran his license, the discovery of those drugs was lawful and independent of him (consent of driver), and defendant volunteered the statement that the drugs were his. The evidence at issue was sufficiently attenuated. Affirmed.

State v Levias, 242 Or App 264 (4/20/11) (Ortega, Schuman, Rosenblum) Defendant was a passenger in a car that officers pulled over. Defendant attempted to walk away as an officer walked to the stopped car, with overhead lights flashing. Defendant agreed to

talk to the officer, the officer "called for cover," and asked defendant if he had a crack pipe. Defendant said he did not. Officer asked if defendant had anything illegal on him, defendant did not reply, and officer asked if he could search him. Defendant said yes. Officer did not search defendant immediately but went to talk to the driver while defendant sat on the curb. Another officer asked defendant if he had anything the officer should be concerned about, and defendant said no. The other officer asked for consent to search, and defendant said "sure." At that point, three patrol cars were present and at least two had overhead lights flashing. Two officers asked defendant about possible unlawful conduct.

On the state's petition for reconsideration after *State v Ashbaugh*, 349 Or 297 (2010), the Court of Appeals here concluded that, "By that time, a reasonable person in defendant's position would be aware that he was the subject of a police investigation." Further, the court concluded that with the two inquiries and three patrol cars, a reasonable person would believe his liberty or freedom of movement had been intentionally and significantly restricted. Reconsideration allowed, reversed and remanded.

State v Parker, 242 Or App 387 (4/27/11) (Haselton, Brewer, Armstrong) Defendant was a passenger in a truck stopped for an infraction. Officer asked driver and another passenger for their ID. Another officer asked defendant if he had any outstanding warrants, defendant said he did not, officer asked for his information (name and birth date), wrote down defendant's information, returned "the" ID, then returned to the police car. Driver was cited for driving while suspended, the other passenger was arrested on an outstanding warrant, and then an officer asked defendant to get out of the truck. Officer asked if he had any weapons, defendant denied having any, officer asked for permission to search defendant, and he consented. Defendant had a switchblade in his pocket, was arrested and charged with carrying a concealed weapon. The state did not dispute that the officer acted without reasonable suspicion. Trial court denied defendant's motion to suppress, on grounds that defendant consented. Court of Appeals vacated and remanded, and the Supreme Court vacated and remanded in light of *State v Ashbaugh*, 349 Or 297 (2010).

On remand, the Court of Appeals reversed and remanded, comparing this case to *State v Highley*, 219 Or App 100 (2008), *rev allowed*, 350 Or 130 (2011) and *State v Radtke*, 242 Or App 234 (2011) [discussed on page 43], and highlighting defendant's status as a passenger rather than a driver who was the subject of the traffic violation investigation. After an officer, without suspicion, has just inquired about a defendant's probation status or whether he was involved in criminal activity, then asks for a name and date of birth, asks if the person is carrying anything illegal, then asks for consent to search, under the totality of the circumstances, a reasonable person would believe that the officer is running some type of records check and he is not free to leave. Specifically, here, "the officer (1) asked defendant, a passenger in a stopped vehicle if he had any warrants; (2) requested defendant's identification; (3) wrote down defendant's name and date of birth; and (4) then immediately returned to his vehicle and ran a check to determine whether defendant was the subject of any warrants. At no point did the officer indicate that defendant was free to leave. Under those circumstances, [as in *Highley* and *Radtke*], a reasonable person would conclude that he or she was the subject of an investigation and not free to leave."

State v Rutledge, 243 Or App 603 (6/22/11) (Nakamoto, Schuman, Wollheim) Defendant was a passenger in a car stopped for a traffic violation. He asked the driver for ID and asked defendant for her name and birth date. He did not use that information to check whether there were any outstanding warrants and he did not write down the information

she gave. Officer asked driver for consent to search the car and driver gave consent. Officer asked defendant to step out so he could search the car. A purse was on the passenger side, officer picked it up and held it, asked defendant if the purse was hers, and she asked why he needed to know and that he could not look in it. Officer became suspicious and told defendant he would not take her to jail for whatever was in the purse and asked if she was only concerned about a marijuana pipe or meth pipe. She said she had a meth pipe. Officer asked her to remove the pipe from the purse and she did. Officers did not tell her she had to stay or was free to go. Trial court denied her motion to suppress, concluding that she was not stopped.

The Court of Appeals reversed. The court noted that "mere conversation" between police and citizens has "no constitutional significance" in contrast with a "seizure" under Article I, section 9, which "involves the imposition, by physical force or some show of authority, of some restraint on the individual's liberty" under *State v Ashbaugh*, 349 Or 297 (2010), which is an objective test. Here, the officer stopped defendant when he questioned her about the contents of the purse while exercising control over it and he did not have reasonable suspicion to justify the stop. The officer "had defendant's purse in his possession when he asked the crucial question, after defendant had asserted her authority over the purse by telling [officer] that he could not look in it. [Officer's] control over the purse substantially limited defendant's freedom to come or go. [Officer] acted because defendant's response to his question about the ownership of the purse raised his suspicions about its contents. Those suspicions were why he told defendant that he would only give her a citation if the purse contained a marijuana or meth pipe, and his statement led to the production of the evidence at issue."

State v Singer, 245 Or App 568 (9/21/11) (Armstrong, Brewer, Haselton) Defendant was a passenger in a car stopped for an infraction. Officer left his overhead lights on during this entire encounter. When taking the driver's license, officer noticed that defendant was nervous. Officer asked for her name and date of birth, but did not tell defendant why. Defendant gave her name and birthdate. Officer went back to his car to run a warrant check, while another officer acted as a cover officer. The warrant check showed that defendant was on probation for a drug crime but she had no outstanding warrants. The officer did not then process the driver's traffic violation, but instead asked defendant to step out of the car. She did, and placed her purse under the seat. Officer asked her to remove her sunglasses, and that he knew she was on probation for drugs. She removed her sunglasses and the officer saw that her pupils were constricted. Officer asked to search her for drugs. She agreed. Officer searched her pockets and wallet – no drugs. Officer asked to search her purse. Defendant hesitated but officer asked her if she had a "search clause" as a term of her probation. She handed her purse to the officer, and said there was a "rig" in it, meaning a needle for injecting drugs. In her sunglasses case, the officer found a syringe with brown liquid in it, and a compact with a brown-residue-covered spoon, and a piece of cotton covered with a brown substance. Defendant admitted the liquid was heroin and the spoon was used to prepare and inject heroin.

The trial court denied her motion to suppress all evidence. The Court of Appeals reversed: the officer's actions after he completed his warrant check "would reasonably lead defendant to believe that she was the subject of an investigation. Rather than returning from the warrant check to speak with the driver . . . [the officer] went to the passenger side of the stopped car and asked defendant to get out of the car, which she did. [The officer] then told her that he knew that she was on probation for a drug offense and asked her to remove her sunglasses, which she also did. Those actions by [the officer] constituted a show of authority that would lead a reasonable person in

defendant's position to believe that [the officer] had significantly restricted her freedom of movement" as the test is articulated under *Ashbaugh*.

State v Zaccone, 245 Or App 560 (9/21/11) (Armstrong, Haselton, Brewer) Defendant was a passenger in a car stopped for a traffic violation. The officer asked the three people in the car for ID. Driver gave her ID to the officer. Defendant said he didn't have any ID on him. Officer asked defendant if he "minded giving her his name." Defendant, in a "barely audible" voice, said something like "Andy." Officer asked, "Andy, what's your last name?" Defendant said, "It's Anthony . . . uh, Brady." Defendant asked for defendant's birth date. Officer believed defendant was giving her a false name. The entire encounter lasted one minute. Officer went back to her patrol car to run warrant checks; she did not tell them what she was doing nor could they see or hear her. The driver's license was suspended, so the officer decided to impound the car. No record came back on the name defendant gave to the officer. Another officer came. The stopping officer told the new officer that defendant probably had given a false name. When the new officer approached the car, he could see defendant hiding a wallet under the seat. The new officer asked defendant if the wallet contained ID and if defendant would show it to him. Defendant then said that he had given a false name because he had an arrest warrant out. The officer ran defendant's correct name: there was no arrest warrant but defendant was on probation for identity theft. Officer questioned defendant about why he thought he had an arrest warrant and he said he had failed to check in with his probation officer. Officer then asked him to step out of the car and stand in front of the patrol car so she could inventory the car. During the inventory, the officer found a back pack and a fanny pack that the driver said belonged to defendant. Defendant consented to opening the backpack; inside were burglary tools and a folder with personal information about other people. Defendant consented to opening the fanny pack; inside was ID for "Anthony Brady" and numerous pieces of other people's ID, such as social security numbers and account numbers, plus meth and a meth pipe. Officer arrested defendant. Defendant moved to suppress. The trial court denied defendant's motion.

This case is on remand from the Oregon Supreme Court after *Ashbaugh*. On remand, the Court of Appeals here considered "the totality of the circumstances at the time that [the officer] asked defendant for consent to search defendant's backpack and fanny pack." The court focused on the officer's choice not to tell defendant that he was free to leave but rather told him to step out and stand in front of the patrol car. The court concluded that defendant was seized by the officer's show of authority: "A reasonable inference from that sequence of events is that defendant was the subject of a continuing investigation, and, hence, a reasonable person in the circumstances presented in this case would believe that his or her freedom of movement had been significantly restricted by [the officer's] show of authority." Here, the warrant check ended when the officer told defendant that he had no outstanding warrants.

State v Wiseman, 245 Or App 136 (8/17/11) (Nakamoto, Schuman, Wollheim) (Note: it is unclear if this case was argued on the state or federal constitution or instead on the statutes involving "the objective component of the reasonable suspicion standard"). Defendant was a passenger in a vehicle stopped on suspicion of burglary. Police had received a call around 2:00 am from a named homeowner who reported that a suspicious pickup truck was parked in front of her house for a while. A person (defendant) had ridden up to the truck on a bike, then had thrown the bike in the back of the pickup, and climbed into the passenger side of the pickup, then the pickup truck had driven off. The homeowner reported the license plate and description of the pickup. The responding

officer had investigated over 500 burglary cases in over 10 years and was familiar with techniques. This neighborhood was a 'high risk burglary" area and he was aware that people committing burglary or theft park a car away from the theft site and are picked up by an accomplice. Officer drove to the homeowner's area, and he saw the pickup with the license plate the homeowner had reported. He turned around, followed the truck, saw a bicycle in back, and saw a "slouching" person in the passenger seat area. He stopped the truck with his overhead lights on, believing the driver and defendant were involved in the bike theft. Officer asked for defendant's names, then ran warrant checks and found that defendant had an outstanding arrest warrant. Defendant said he did not know anything about the bike in the pickup. The driver gave the officer permission to search the pickup, and the officer found meth, scales, and packing supplies. Defendant, charged with burglary, theft, and possession and delivery of drugs, moved to suppress the evidence, arguing that the officer lacked objective probable cause, even though he had subjective probable cause. The trial court granted the motion. (The Court of Appeals opinion does not state whether that trial court granted it on a statutory or constitutional basis.)

The Court of Appeals reversed and remanded, first citing ORS 131.615(1), which gives police officers authority to stop a person if the officer reasonably believes the person has, or is about to, commit a crime. Under ORS 131.605(4), a person is "about to commit" a crime if a person engages in "unusual conduct that leads a peace officer reasonably to conclude in light of the officer's training and experience that criminal activity may be afoot." Under ORS 131.605(5), "reasonable suspicion" exists when an officer holds a belief "that is reasonable under the totality of the circumstances existing at the time and place" that s/he acts. "Thus," the court here stated, "reasonable suspicion involves both a subjective and objective component," citing *State v Belt*, 325 Or 6, 11 (1997) ("subjective belief must be objectively reasonable under the totality of the circumstances"). The court here then digressed into the state and constitutional standards:

> "The statutory standard represents a codification of both state and federal constitutional standards. *State v Valdez*, 277 Or 621, 625-26 (1977)."

The court then identified *State v Ehly*. 317 Or 66, 80 (1993) and *Belt* for the state constitutional standard and *United States v Sokolow*, 490 US 1, 7 (1989) and *United States v Arvizu*, 534 US 266, 273 (2002) for the Fourth Amendment standards. Here, the named homeowner's report of defendant's activity is part of the totality of the circumstances to determine whether there was reasonable suspicion to stop defendant, see *State v Mitchele*, 240 Or App 86 (2010) ("casing" a neighborhood in a high-crime area plus furtive movements). Defendant's slouching and his presence in a high-crime area late at night are factors. Just because "there are innocent reasons why a person would be in possession of a bicycle at 1:50 a.m. and load it into the back of a pickup truck does not mean that the conduct cannot also give rise to a reasonable suspicion of criminal activity," see *State v Kolendar*, 100 Or App 319, 323 (1990). An officer's training and experience also matters. That experience, together with the homeowner's report, the late hour, the high-crime neighborhood, and the defendant's furtive behavior when the officer's patrol car passed, is "sufficient to provide objective reasonable suspicion under ORS 131.605 and the state and federal constitutions that defendant was engaged in criminal activity."

State v Simpson, 245 Or App 152 (8/17/11) (Rosenblum, Ortega, Sercombe) (Note: this case did not mention the constitution). Someone called 911 to report that: a traffic accident occurred at a specific location, one car was a yellow Corvette with a specific

license plate number, the driver of the Corvette seemed intoxicated, and the caller would remain at the accident scene. An officer approached that location, saw a yellow Corvette with the specific license plate number about a block from the reported scene. He did not see any damage to the Corvette or see any traffic violations occur. He stopped the car, defendant was the driver, and he arrested defendant because defendant seemed intoxicated. Defendant moved to suppress the evidence. The officer testified that he could not recall if the 911 caller had been identified. Another person also testified that he was another driver who had been involved in the accident, but he had not been the 911 caller, and that a woman had called 911. The trial court concluded that the substance of the caller's report was sufficiently detailed and specific to be reliable, and thus the officer had the requisite reasonable suspicion to believe that defendant was drunk driving.

The Court of Appeals affirmed, following its criteria for citizen informants in *State v Bybee*, 131 Or App 492 (1994): (1) "whether the informant is exposed to criminal and civil prosecution if the report is false" (satisfied if the informant gives his name or gives the report in person); (2) "whether the report is based on the personal observations of the informant"; and (3) "whether the officer's own observations corroborated the informant's information. The court compared the facts of this case with those in several prior cases and concluded that this report was sufficiently reliable to justify reasonable suspicion that defendant was driving under the influence. The stop was lawful.

State v Whitlow, 241 Or App 59 (02/23/11) (Brewer, Gillette SJ) Defendant's truck was pulled over by police for about 60 to 90 seconds. The Court of Appeals held that the officer's brief questions of its occupants did not curtail defendant's possessory interest in his truck – whatever interest that may have been – because his right to "transfer possession of, and direct the movements of, the car" were not significantly restricted, citing *State v Juarez-Godinez*, 326 Or 1 (1997). His truck remained under the control of the occupants whom defendant had allowed to use the truck. The Court of Appeals affirmed the trial court's denial of defendant's motion to suppress statements (that he had been driving while suspended).

(b). Parked Vehicles

See also Mobile Automobiles Exception to the warrant preference, page 67.

State v Jones, 245 Or App 186 (8/31/11) (Schuman, Wollheim, Nakamoto) Police officer saw defendant parked legally in a bar's parking lot with the lights off. Officer parked nearby, shined his car's spotlight and his flashlight into the car, and approached defendant. He saw defendant talking on a cell phone. Defendant looked up but ignored the officer. Officer knocked on the window, defendant opened the door, and officer asked him to hang up. Defendant eventually did. He said he was about to go in to the bar. Officer asked if he was on parole or probation. Defendant said he was on parole. Officer suspected that defendant was violating his parole conditions because based on his "experience," those conditions usually prohibit parolees from entering establishments that serve alcohol. Officer asked defendant for ID, defendant handed him a penitentiary ID card. Officer stayed by the car window, called in dispatch, confirmed that defendant's parole terms required him not to enter bars or drink alcohol, and his license was suspended. Officer arrested defendant for driving while suspended, and then inventoried his car which turned up drug evidence. Defendant moved to suppress the evidence on grounds that he was seized without reasonable suspicion. Trial court denied the motion.

The Court of Appeals affirmed. The first issue is whether defendant was "stopped" as defined *Ashbaugh*, and the second is whether at the time he was "stopped" the officer had reasonable suspicion of criminal activity. First, under *Ashbaugh*, the critical distinction between "mere encounters" (requiring no suspicion) and a "stop" (requiring reasonable suspicion) is "whether, by word or deed, a law enforcement officer has manifested a 'show of authority' that restricts a person's 'freedom of movement."

The court observed that at least since *Ashbaugh*, "questions from a police officer to a citizen – even questions an ordinary citizen would regard as offensive, such as, 'Are you on probation?' or 'May I search your purse?' – do not amount to a stop if the officer's words are conversational in tone and there is no accompanying nonverbal show of authority such as the presence of multiple officers, drawn weapons, or the like." While on the other hand "an officer effects a stop by asking a person for identification and then contacting dispatch to 'run' the information . . . or by asking and retaining identification for investigatory purposes . . . merely asking for identification, in the absence of other circumstances manifesting a show of authority, does not amount to a stop." (Citations omitted). The court concluded "that defendant was not stopped until, after handing his identification to the officer, he heard the officer radio dispatch for information." From that point, the case depends on whether the officer had reasonable suspicion. Citing *State v Cloman*, 254 Or 1, 6 (1969), the court noted that "an officer must subjectively believe that the suspected person has 'a connection with criminal activity,' and that believe must be objectively reasonable." The court concluded that this officer lacked reasonable suspicion that defendant was violating parole or probation. The only basis for his suspicion was his "experience." The court reasoned that it is neither "intuitively obvious" nor on the other extreme is it "esoteric, specialized" knowledge that parolees or probationers may not be allowed in places where alcohol is served. Thus the court "cannot conclude that the officer's experience supports reasonable suspicion without some indication of the 'experience' on which the fact is based." The only evidence in the record is that the officer had been an officer for over 12 years: "That is not enough." The court thus "rejected" the state's argument that the officer's suspicion was objectively reasonable. However, handing the officer a penitentiary inmate card rather than a driver's license, while sitting behind the wheel of a parked car, allowed the officer to reasonably infer that defendant did not have a valid driver's license, and in that circumstance, the officer's suspicion became reasonable, although the officer did not articulate it. An officer need not articulate the reason for his suspicion:

> "'Article I, section 9, requires only that law enforcement officers reasonably believe that their conduct is justified, not that they be able to articulate a correct justification on which they actually relied.' *State v Brown*, 229 Or App 294, 303 (2009) (citing *State v Miller*, 345 Or 176, 186-88 (2008))."

The officer had reasonable suspicion when defendant handed him the inmate ID card. The "stop occurred after the development of reasonable suspicion, it was not unlawful, and the court did not err."

State v Wright, 244 Or App 586 (8/03/11) (Wollheim, Schuman, Sercombe) Police arrested a man in his apartment, and he asked them to tell defendant he'd been arrested. Defendant and his sister were sleeping in a car in the apartment's parking lot. The officer approached the car, found defendant and his sister sleeping in it, asked who they were, and asked for ID. Defendant gave the officer his Oregon ID card. Officer radioed defendant's name to dispatch and learned that defendant was a registered sex offender.

Officer returned to the car, asked defendant why he was sleeping in the car, and defendant said he was a transient. Officer asked defendant if he was living in the car instead of at his registered address. Officer asked defendant if he knew he had to register even if he didn't have a specific address. Defendant admitted he knew that. Officer arrested defendant. Trial court denied defendant's motion to suppress, which he'd made arguing that the stop was illegal because a reasonable person would not feel free to leave because the officer had his ID card. On appeal, the Court of Appeals reversed and remanded, then the Oregon Supreme Court vacated and remanded after *State v Ashbaugh*, 349 Or 297 (2010).

On remand, the Court of Appeals reversed and remanded. The court compared this case with *State v Radtke*, 242 Or App 234 (2011), *State v Parker*, 242 Or App 387 (2011), and *State v Zamora-Martinez*, 244 Or App 213 (2011). Here, the officer approached defendant, asked for ID, immediately radioed dispatch, went back to the car and returned defendant's ID and immediately began asking defendant questions about his status as a sex offender. "Unlike *Ashbaugh*, there was no pause between running the warrant check, returning the identification, and questioning defendant." A reasonable person would believe that the officer deprived defendant of his liberty or freedom of movement, and this was an unreasonable warrantless seizure.

State v Dampier, 244 Or App 547 (7/27/11) (Sercombe, Brewer, Landau pro tem) Defendant was a backseat passenger of a parked car by the Galaxy Motel in Philomath, known for drug activity. Police officers were following a bicyclist who didn't have a light at 3:10 a.m. The bicyclist parked his bike right up against the car. Officer approached the bicyclist and smelled the "overwhelming odor of unburned marijuana" and thought they interrupted a drug deal. Bicyclist stepped away from the officer, put his hands near his waistband, where officer noticed a bulge, which he thought was a weapon (it was a can of soda) but on the pat-down, officer found a container of marijuana and pot in his pants pockets, and put the bicyclist into the patrol car. Officer returned to the car, asked defendant what he was doing there, and defendant said he and his two companions had been at the Civil War football game and were asking for directions. Officer asked where the marijuana was. Defendant said he didn't have any. Officer asked defendant and the other occupants to get out of the car. Driver consented to search the car, where officer found 18 individual packages of marijuana directly underneath where defendant had been sitting. Defendant admitted that it was his. This happened less than 1000 feet from Philomath High School. Defendant was charged with unlawful delivery of marijuana within 1000 feet of a school and other charges. The trial court granted his motion to suppress, without making findings, but concluding that there was no reasonable suspicion to stop him and the subsequent search was a product of that unlawful stop.

The Court of Appeals reversed: the stop was supported by reasonable suspicion. "To be lawful under Article I, section 9, 'a warrantless stop must be supported by reasonable suspicion of criminal activity.' *State v Lay*, 242 Or App 38, 43 (2011)." To temporarily detain (stop) a person, the officer has to "point to specific and articulable facts" under the "circumstances and his experience that the person has committed or is about to commit a crime." (Emphasis added here). Merely being in a high crime area and talking to a bicyclist is not a reasonable suspicion of criminal activity, but here, the bicyclist had drugs and the smell of marijuana persisted after the bicyclist was put into the patrol car. In other words, the smell of drugs, without more, is sufficient to support reasonable suspicion: the court here cited *State v Johnson*, 120 Or App 151 (1993) (aroma of meth) and *State v Derrah*, 191 Or App 511 (2004) (scent of marijuana) to that end.

Defendant alternatively argued that he had been "stopped" before the officer returned to his car, but the court here rejected that idea. There is no evidence that when the bicyclist was being interrogated, the officer made any inquiries of defendant. Even though defendant watched officers arrest the bicyclist, defendant was a "bystander." The Court of Appeals stated: "Although, as a practical matter, defendant's ability to leave may have been impeded by those actions, there is nothing to suggest that the interference was intended to restrict defendant's freedom of movement or was anything other than an incidental inconvenience. *Cf. State v Domingues-Martinez*, 321 Or 206, 213 (1995)." The court also recited *Holmes*: an encounter is not a "seizure" merely because the encounter "may involve inconvenience or annoyance" by law enforcement. Also, the court observed that there is no evidence that the officers took defendant's license, or that their overhead lights were turned on, or that they told defendant he could not leave. In short, there was no "show of authority that intentionally and significantly restricted defendant's freedom of movement" and no "reasonable person would believe that such a restraint had occurred."

(c). <u>On Foot</u>

State v Mitchele, 240 Or App 86 (12/29/10) (<u>Armstrong</u>, Haselton, Rosenblum) Police received a call from a resident of a high-crime area about a suspicious white male in a black and red sock hat, black coat, black sweat pants, casing the street looking at homes. The caller relayed that information from his wife, and gave his name, address, and phone number. A pubic path in the area connects to the Springwater Trail, which had been used as an escape route by neighborhood criminals. Police found the suspect (defendant) on the path, and the suspect tucked himself into foliage. Police asked defendant to walk 15 feet back up the path to the patrol car. He did. Police asked why he was in the area. He said he was waiting for a friend. Police asked if he was on parole or probation or had any outstanding warrants. Defendant said he was on probation and told police his probation officer's name. He refused to consent to a search. Police called probation officer, who said that the address defendant had given to police was not his registered address, and asked police to ask defendant again to consent to a search, or else the probation officer would put a "detainer" on defendant for failing to report his address change. Defendant refused to consent to a search, police arrested him for the "detainer" and inventoried his belongings, and found meth.

Defendant moved to suppress the meth on grounds that he was unlawfully stopped, violating his statutory (ORS 131.615) and constitutional (Article I, section 9) rights. Trial court denied the motion. Court of Appeals affirmed: the statutory and constitutional analysis "is substantially the same" and the term "stop" in the opinion refers "generally to the temporary restraint of defendant's liberty for investigatory purposes." The legal standards: an "officer's stop of a person must be justified by reasonable suspicion of criminal activity. The standard has objective and objective components. An officer must subjectively believe that the person stopped is involved in criminal activity. . . . Reasonable suspicion is established when an officer forms an objectively reasonable belief under the totality of the circumstances that a person may have committed or may be about to commit a crime. . . . An officer must identify specific and articulable facts that produce a reasonable suspicion, based on the officer's experience, that criminal activity is afoot."

Here, the officer testified that he suspected defendant was engaged in criminal activity, so the subjective element is met. The objective element also is met because a "reliable

report from a citizen informant that criminal activity is imminent" may by itself be sufficient, based on three factors to determine "reliability," from *State v Hames*, 223 Or App 624 (2008). First, if the report is false, would the informant be subject to criminal and civil liability? (That factor is met if the informant gives his name to police, which occurred in this case.). Second, is the report based on personal observations containing sufficient detail? Third, do the officer's observations corroborate the informant's information? (That factor is met here, as officers found defendant just as the informant described him.). The issue here is that the informant was stating information from his wife, not information that the informant personally observed. The Court of Appeals wrote that the "three factors are not determinative of whether a citizen informant's report is reliable; those are merely intended to serve as an aid in evaluating the reliability of such a report," citing *State v Killion*, 229 Or App 347 (2009). So, "although the second factor is not satisfied in the strictest sense, we conclude that the report received . . . is reliable and may be considered as part of the specific and articulable facts supporting the officer's suspicion justifying the stop." In short, the totality of the circumstances known to the officer when the stop occurred included not only the caller's report, but also the frequency of burglaries in the neighborhood, and defendant's presence on a frequently used escape route, and defendant's furtive movements when the officer's approached him in their car.

(d) On Bicycles

Traffic statutes, and the Article I, section 9 analysis, apply to bicyclists on public ways; a bicycle stop may be a "traffic stop" if it occurs on a public way. ORS 814.400; *State v Jones*, 239 Or App 201, 203 n 3 (2010).

State v Jones, 239 Or App 201 (12/01/10) (Brewer, Edmonds) Defendant was biking the wrong way on a one-way street without a headlight. Officer recognized him as having an outstanding felony warrant, pulled alongside defendant who stopped the bike, and officer asked for ID. Defendant said he had none, speaking slowly with a "dry palate". Officer smelled alcohol and noticed defendant's bike fell to the ground and defendant lose his balance. Officer called another officer to assess defendant for "DUII." Before anyone else arrived, officer asked for consent to search for weapons and contraband, defendant consented, and officer found cocaine. One minute elapsed between the beginning of the encounter and officer's request for consent. Defendant moved to suppress the evidence; trial court denied that motion under *Amaya*. The trial court convicted defendant.

The Court of Appeals affirmed: Officer's "request for consent to search occurred during an unavoidable lull in an ongoing traffic stop while [officer] was attempting to ascertain and confirm defendant's identity. Because, in these circumstances, the request for consent to search did not delay the stop, it was not constitutionally proscribed. Because it was authorized by [statute], the request did not require independent reasonable suspicion or probable cause."

State v Radtke, 242 Or App 234 (4/20/11) (Schuman, Ortega, Sercombe) An officer was on "drug saturation patrol" and stopped bicyclist in a restaurant parking lot. That bicyclist consented to a search, he had meth, and he said he was waiting for a "lady friend" named Stacy. Officer arrested the bicyclist and put him in the patrol car. Defendant – Stacy – then rode her bike into the parking lot. Officer recognized her as

Stacy. Officer asked her, in a normal voice, "Hey, can I talk to you for a second?" and motioned for her to come over to talk. She stopped her bike and asked "What's going on?" and walked her bike to the patrol car. Officer walked to her. She had bloodshot, glassy eyes, and dilated pupils. Officer believed she was using a stimulant but did not believe she had committed a crime. Officer asked her for ID. She told him her name and date of birth. Officer wrote that information down. Officer asked if she had any drugs, weapons, or anything illegal. She said no, officer asked if he could check her person and pockets for drugs. She said, "I don't want you touching me, but I will show you." She began to show her pockets and tried to hide a plastic baggie with white powder. Officer "then took defendant's wrist, and the baggie fell from her hand." He arrested her. The state conceded that the officer lacked reasonable suspicion of criminal activity. Defendant moved to suppress the meth. Trial court denied the motion. Court of Appeals reversed, and the Supreme Court remanded after *Ashbaugh* (see, *ante*).

On remand, the Court of Appeals reversed and remanded. The issue is: "Was defendant seized when the police officer asked for, received, and wrote down her name and date of birth? We conclude that, under the totality of the circumstances in this case, she was." In other words: "To clarify, our inquiry is not whether taking defendant's information was by itself a stop; it is whether that action, combined with the immediately subsequent questioning, was a stop." The Court of Appeals concluded that "a reasonable person in defendant's position would have believed that an investigation began when [the officer] took note of her name and date of birth". The court pointed out several points raising a reasonable inference that when the officer took defendant's name and birth date, he did so for an investigatory purpose: (1) the man defendant was meeting was already "caged" in the patrol car; (2) two armed, uniformed police officers were present; and (3) in addition to taking defendant's personal information, one officer questioned her about illegal activity.

State v Abbey, 239 Or App 306 (2010), *rev den* 350 OR 423 (2011), discussed under Equal Privileges and Immunities at page 115.

2. <u>Other Public or Nonprivate Places</u>

(a) Public Parks

See ***State v Ashbaugh,*** 349 Or 297 (12/09/10) (Gillette for majority; with Kistler and Linder concurring; Durham concurring; Walters dissenting) discussed under "Public Ways," at page 29. This case involved an interaction between two mountain-biking police officers and a married couple sitting under a tree in a public park but has subsequently been applied to numerous highway-stop cases.

(b) Hospitals

Hospital emergency room, even a curtained-off portion of it, is open to the public and is not a private place; officers' observations of a defendant therein do not constitute a search for Article I, section 9, purposes. *State v Cromb*, 220 Or App 315, 320-27 (2008), *rev denied* 345 Or 381 (2009).

Where probable cause exists to arrest for a crime involving the blood alcohol content of a suspect, a warrantless blood draw at a hospital is permissible under Article I, section 9, due to the "exigent circumstance" that is "the evanescent nature of a suspect's blood alcohol," except in "the rare case that a warrant could

have been obtained and executed *significantly* faster" than the process used. *State v Machuca*, 347 Or 644, 657 (2010) (emphasis in original).

See Exigent Circumstances: Destruction or Escape, at page 59.

(c) Public Schools

See searches in Public School, under Exceptions to Warrant preference, at page 70.

State v M.W.H., __ Or App __ (11/09/11), 2011 WL 5386645 (Haselton, Armstrong, Duncan) An Ashland high school student was sent to the dean's office because he had made an "inappropriate comment" and his teacher suspected he had smoked pot. The dean noticed that his eyes were red, droopy, squinty, bloodshot, and he was "slumped" and having trouble forming answers, all in contrast to the way he looked and acted at other times the dean had talked to him. The dean asked if he had been smoking marijuana. The student ("youth") said he hadn't that morning but had the night before. The dean said, "I am going to have to ask you to empty your pockets." He placed the contents of his pockets on her desk: a lighter, an Altoid tin with marijuana flakes in it, and a double-edged dagger. The Ashland high school policy prohibited marijuana and weapons at school. Youth was charged as a juvenile with what would be the crime of possession of a concealed weapon. Before trial he contended that the dean had effected a warrantless school search of his person, to which he did not consent. (This case arose before *State v M A.D.*, 348 Or 381 (2010) so youth argued that the school lacked probable cause to search him, rather than that the school lacked reasonable suspicion to search him.). At the suppression hearing, youth testified on direct as follows:

> "[DEFENSE COUNSEL]: How did [the dean] request that you empty your pockets out?
> [YOUTH]: She told me to empty out my pockets.
> [DEFENSE COUNSEL]: Okay. Did you feel like you had any choice?
> [YOUTH]: Yes."

Youth testified affirmatively two more times that he felt that he voluntarily consented to the dean's request to empty his pockets. Then youth testified on direct that he did not feel like he had a choice. The trial court concluded that youth was not credible and the dean was credible, and that youth consented to the request to search.

The Court of Appeals affirmed, "emphasiz[ing] that our standard of review is non-de novo" and thus "we are constrained to affirm if there is any evidence in the record supporting the trial court's explicit, and independently sufficient, finding that '[youth] consented to the search.'" The trial court "like any other trier of fact – was free, based on a variety of considerations, including youth's demeanor, to credit his initial responses" that youth felt like he had a choice whether to empty his pockets or not. Affirmed.

(d) Jails and Juvenile Detention

See Jails and Juvenile Detention, under Exceptions to Warrant preference, at page 71.

State v Hartman, 238 Or App 582 (11/17/10) (Brewer, Wollheim, Rosenblum) *on reconsideration* (2/23/11) Officer observed defendant acting suspiciously in an area where burglaries had recently occurred. Defendant had an outstanding arrest warrant, wire-cutters, a knife, a screwdriver, a retractable mirror, and gloves embedded with glass

shards. Defendant was taken to the police department and put in a holding cell. His tools were inventoried on a countertop. A second officer who had investigated a recent restaurant burglary noted that the tools matched that burglary (ie. broken window and electrical box broken). A partial boot print had been found inside that restaurant. So the second officer asked the other officer to enter defendant's cell, take his boots, and bring the boots out so they could be photographed for comparison. Officer did so, although that was not normal practice to remove a detainee's footwear. Defendant released thereafter. Four days later, defendant was apprehended near the site of another restaurant burglary. He was arrested and jailed, where his clothes and boots were inventoried per jail policy. The boots were in a locker. An officer applied for a warrant to seize the boots, supporting that application with an affidavit and photo of defendant's boot print taken four days earlier and blurry one taken of a print at an insurance office. The warrant was granted. Defendant was indicted. He moved to suppress all evidence from his person during both arrests and the photo of his boots. State countered "inevitable discovery." Trial court concluded that although the seizure of defendant's boots (for the photograph) was unconstitutional, and thus all references to the photo should have been excised from the affidavit, and without those references, the affidavit did not establish probable cause to conclude that the insurance office print matched those at the second restaurant scene, but the boots would have inevitably have been discovered. Jury convicted defendant.

The Court of Appeals reversed and remanded. Defendant's rights were violated – he was not a convicted felon who had forfeited particular Article I, section 9, rights. He was detained – not arrested – on suspicion of a felony. The officer's removal of defendant's boots was a seizure that was unauthorized by any exception to the warrant requirement. The trial court correctly excised the officer's photo of the boot from the affidavit supporting the warrant. There was a second photo – blurry and of a boot print from the insurance office – but just that one without the jail photo was insufficient to establish probable cause.

The "inevitable discovery" doctrine, if applicable here, would permit the state to purge the taint of illegally obtained evidence, if the state proved by a preponderance of the evidence that such evidence would inevitably have been discovered, absent the illegality, by proper and predictable police investigatory procedures, under *State v Miller*, 300 Or 203 (1985). Here the state argued that the police department's inventory policy would have allowed the officer to photograph defendant's boots. The inventory policy at issue here requires shoes to be placed in plastic boxes and stored. None of the purposes of an inventory policy, under *State v Atkinson*, 298 Or 1 (1984), involves for searching for evidence of crimes. Nothing in this particular inventory policy allows for searching for evidence of crimes, much less photographing. The officer was not allowed to photograph defendant's boots as part of the inventory policy, thus it was not "inevitable" that the officer would have discovered the evidence used, whether based on "plain view" or any other theory.

In short, without the unlawfully obtained photo of defendant's boots, the affidavit would be insufficient to establish probable cause to seize those boots. The photographing officer did not have independent probable cause to seize the boots. Trial court erred in denying defendant's motion to suppress.

(e) Cyberspace

See ***United States v Warshak***, 631 F3d 266 (6th Cir 12/14/10) under Fourth Amendment, page 141.

See ***Chism v Washington State***, 655 F3d 1106 (9th Cir 8/25/11) under Fourth Amendment, page 141.

3. Houses, Rooms, and Curtilages

(a). Fourth Amendment

Physical entry into the home is "the chief evil against which the working of the Fourth Amendment is directed." *United States v U.S. District Court*, 407 US 297, 313 (1972). "The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion. *Entick* v. *Carrington*, 19 Howell's State Trials 1029, 1066; *Boyd* v. *United States*, 116 U.S. 616, 626-630." *Silverman v United States*, 365 US 505, 511 (1961).

(b). Oregon Constitution

"Article I, section 9, protects the privacy interest in land within the curtilage of a dwelling. Curtilage is 'the land immediately surrounding and associated with the home.' *State v Dixon/Digby*, 307 Or 195, 209 (1988) (quoting *Oliver v United States*, 466 US 170, 180 (1984))." *State v Baker*, 260 P3d 476, 481 n 7 (2011).

(c) Exigencies/Emergencies are Exceptions

See Exceptions to Warrant Requirement, *post*. "Absent consent, a warrantless entry can be supported only by exigent circumstances, *i.e.*, where prompt responsive action by police officers is demanded. Such circumstances have been found, for example, to justify entry in the case of hot pursuit, *United States v Santana*, 427 US 38 (1976), the destruction of evidence, *United States v Kulcsar*, 586 F2d 1283 (8th Cir 1978), flight, *Johnson v United States*, 333 US 10 (1948), and where emergency aid was required by someone within, *United States v Goldenstein*, 456 F2d 1006 (8th Cir 1972)." *State v Davis*, 295 Or 227, 237-38 (1983).

Under the Fourth Amendment, the United States Supreme Court "has identified several exigencies that may justify a warrantless search of a home. . . . . Under the 'emergency aid' exception, for example, 'officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect and occupant from imminent injury.' . . . . . Police officers may enter premises without a warrant when they are in hot pursuit of a fleeing suspect. . . . . And . . . the need 'to prevent the imminent destruction of evidence' has long been recognized as a sufficient justification for a warrantless search. . . . . " *Kentucky v King*, 131 S Ct 1849 (2011).

See ***State v Guggenmos***, 350 Or 243 (5/05/11) (Durham, De Muniz, Balmer, Walters for majority; Kistler and Linder dissenting) discussed under Officer Safety Exception to the Warrant Requirement, at page 60.

State v Olinger, 240 Or App 215 (12/29/10) (Rosenblum, Wollheim, Brewer) (Fourth Amendment not at issue). Sheriff's deputies went to defendant's residence to serve an

arrest warrant. The lights were off. A deputy shined a light through a window by the front door, and saw the hood of a car in the living room. The other officer walked around the side of the house to an "offshoot" of the driveway, where a car was parked. The car had no plates, no bumper, and it was "filled with boxes and stuff." Officer called in the VIN and it came back as a stolen car. Defendant arrived at the house, said he lived there for three weeks, and the car was his. Officer asked him if they could look in the car, he consented, and the officers did not see anything new. Defendant would not give the officers permission to look in the house. He consented to a search of his person. Officers found $1100 in mostly $20 bills in his wallet; defendant said he didn't know where the money came from. Officer said it didn't look good to have a stolen car and $1100 of unknown origin, and read defendant his *Miranda* rights. Officer said he wanted to search the house for stolen car parts and asked if defendant grew marijuana; defendant did not answer. Officer asked if defendant had a medical marijuana card; defendant said he was doing the paperwork. Officer asked if he was using hydroponics or dirt; defendant said both. Officer asked how many plants; defendant eventually said 12. Defendant again refused to consent to a search of the house. Officer said he would apply for a warrant and then search the house anyway. Defendant let the officers in. A lot of marijuana, packaged marijuana, seeds, drug records, and locked safe of money was in the house.

Defendant moved to suppress all evidence from the car search, the house search, and his statements, specifically that the officer trespassed on the curtilage of his property. Trial court denied the motion, finding that consent was freely, voluntarily, and intelligently given, but the trial court did not rule on defendant's argument that one officer illegally trespassed on defendant's curtilage. Defendant was convicted on all charges.

The Court of Appeals vacated and remanded. The voluntariness of defendant's consent is not at issue; rather the officer's entry onto the curtilage to observe the VIN on the car and the subsequent exploitation of the information (car stolen) to obtain defendant's consent to search. The legal issue is: did the officer have implied consent to enter the area on the side of the house? If yes, the VIN was in plain view and the officer's observation was not a search, see *State v Foster*, 347 Or 1, 5 (2009). If no, the officer's intrusion was a trespass and violated Article I, section 9, see *City of Eugene v Silva*, 198 Or App 101, 107 (2005). The Court of Appeals noted that "entry onto the property for purposes other than to contact persons at the front door" are "presumptively trespasses, unless the circumstances so strongly evince an invitation to the public that it can be said that the homeowner has implicitly invited entry." As to driveways (as here), "it is the location of the offshoot that matters." Here, the car was on the offshoot on the side of the house – "beyond the area in which implied consent is presumed." Thus the officer's entry was presumptively a trespass. Nothing in the record overcomes that presumption, such as a side door with a doorbell or anything else suggesting a public invitation to enter. The entry onto the offshoot to examine the car was an unlawful search. The state argued, however, that defendant's consent did not derive from that search, but the factual record does not permit resolution of that argument. The trial court did not make findings. The state argued that defendant failed to establish a minimal factual nexus between the car search and the consent to search the house. The state also argued that even if there was a factual nexus, any taint from the car search was attenuated by the collection of warnings that officers gave to defendant, including the *Miranda* warnings.

On remand, a "defendant can establish a factual connection not only by showing that the police were prompted by illegally obtaining information to seek consent, but also by showing that his or her decision to consent was 'significantly affected' by the unlawful policed conduct." Then if "defendant establishes a factual nexus between evidence obtained in a consent search and unlawful police activity, the state can nevertheless

prove that the disputed evidence is admissible by showing, among other things, that the illegality has 'such a tenuous factual link to the disputed evidence that that unlawful police conduct cannot be viewed properly as the source of that evidence."

State v Zamora-Martinez, 244 Or App 213 (7/13/11) (Ortega, Brewer, Carson SJ) A US Immigration and Customs Enforcement (ICE) officer went with local narcotics officers as they executed a search warrant at defendant's sister's house. During the search, officers found forged immigration and social security documents. The ICE officer detained some people for immigration violations, and the local officers arrested other people for drug charges. All adults were taken into custody. Several minors were present, so the ICE officer called their mother (defendant's sister) and asked her to come to the house. Defendant arrived 10-15 minutes later. Officers asked him why he was there, he said it was to take custody of the children, and local officers asked the ICE officer to come over. ICE officer was in plain clothes but wore a badge, and introduced himself to defendant, and asked him for ID. Defendant produced an Oregon ID card, officer asked where he was from, and he said "Mexico." ICE officer asked if he had any other ID, he pulled out a resident alien card and a social security card, which were both immediately recognizable as fake. That encounter lasted 2 minutes. Defendant was arrested and charged with possession of forged instruments. He moved to suppress the evidence of the forged instruments. Trial court denied the motion. The Court of Appeals vacated and remanded and the Supreme Court vacated and remanded under *State v Ashbaugh*, 349 Or 297 (2010).

On remand from the Supreme Court, the Court of Appeals reversed and remanded. The issue is whether the ICE officer's inquiry about "*additional* ID escalated the encounter into a stop" and whether "the stop was unsupported by reasonable suspicion," as Article I, section 9, requires. Alternately stated, the issue "reduces to whether a reasonable person, in light of the totality of the circumstances, would have believed that he or she was not free to leave when asked by the ICE agent for additional information." The test under *Ashbaugh* is whether "the content of the officer's questions or the officer's manner or actions would reasonably be perceived as a show of authority that restricted the defendant's freedom of movement." Comparing this case to *State v Radtke*, 242 Or App 234 (2011), the Court of Appeals concluded that a reasonable person in defendant's position would conclude that he or she was the subject of an investigation and was not free to leave. The ICE officer wore a badge and identified himself as a federal immigration officer, and every other adult at the house had been arrested. After producing an Oregon ID, the officer did not release the children to defendant but instead asked him where he was from and then if he had additional ID. The officer did not tell defendant that he was not in trouble. Reversed.

State v Baker, 350 Or 641 (9/01/11), discussed under Exceptions to Warrant Requirement, *post*. In deciding that "an emergency aid exception to the Article I, section 9 warrant requirement is justified" so as to allow "warrantless entries," the Court gratuitously recited the "elements of an emergency aid exception to the Fourth Amendment warrant requirement" from *Mincey v Arizona*, 437 US 385 (1978) and *Brigham City, Utah v Stuart*, 547 US 398 (2006) and cited Washington and Vermont state supreme court cases. The Court here stated that it "has acknowledged the existence of a so-called emergency aid exception in only two cases: *State v Davis* and *State v Bridewell*" and reminded itself of its recent warrantless- school-search case, *State v M.A.D.*, 348 Or 387 (2010) and officer-safety exception in *State v Bates*, 304 Or 519 (1987). The Court concluded that "an emergency aid exception to the Article I, section 9 warrant requirement is justified when police officers have an objectively reasonable belief, based on articulable facts, that a warrantless entry is necessary to either render immediate aid

to persons, or to assist persons who have suffered, or who are imminently threatened with suffering, serious physical injury or harm."

State v Brossart, 245 Or App 498 (9/08/11) (per curiam) A "police officer, without a warrant, ordered defendant to come out of his house and threatened to arrest defendant if he did not comply." Defendant moved to suppress evidence obtained thereafter. That motion was denied, and he was convicted for DUII and reckless driving. On appeal, he contended that the "warrantless seizure" was not supported by "probable cause plus exigent circumstances." The state argued that "no exception to the warrant requirement applied." The Court of Appeals reversed and remanded.

D. Warrants

"[N]o warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized." -- Article I, section 9, Or Const

1. Probable Cause

> "'Probable cause' has the same meaning throughout [state and federal] constitutional and statutory requirements." *State v Marsing*, 244 Or App 556, 558 n 2 (7/27/11).
>
> The "probable cause" necessary to conduct a warrantless search and to obtain a warrant to search is the same standard. *See* ORS 131.007(11) (probable cause to arrest); ORS 133.555 (probable cause to issue a search warrant). "'Probably' means 'more likely than not.'" "Those basic requirements for objective probable cause are equally applicable in the context of warrantless and warranted searches." *State v Foster*, 233 Or App 135, *rev allowed*, 348 Or 13 (5/04/10).

State v Fronterhouse, 239 Or App 194 (12/01/10) (Brewer, Edmonds) (consolidated opinion) (Note: the constitution is not mentioned in this opinion, only statutory standards). Detective sought a warrant to search defendants' property, asserting in his affidavit that he had probable cause to believe that marijuana would be found there. Detective attested that he had 30 years' experience, 20 of those identifying marijuana grow operations from aircraft surveillance, and he had an error factor of less than 3% identifying grow operations. He also attested that while flying above defendants' property he counted at least 8 marijuana plants and that he took photos. The magistrate issued the warrant. During the search, marijuana was discovered. Defendants moved to suppress the evidence arguing that the detective was not able to observe 8 plants. At the suppression hearing, the detective acknowledged that he was unable to count 8 marijuana plants in the photos he took. Trial court excised that sentence (about the 8 plants) from detective's affidavit, but concluded that the remainder of the affidavit was sufficient to establish probable cause to issue the search warrant. Defendants were convicted.

The Court of Appeals affirmed. Outlining the statutory standards for issuance of a search warrant – supported by probable cause – the Court of Appeals rejected defendant's theory that precedent (*State v Carter/Grant*, 316 Or 6 (1993)) requires affidavits supporting applications for search warrants to specify that the detective

observed plant characteristics that are unique to marijuana. Rather, probable cause is based on the totality of the circumstances and courts "consider the entire contents of the affidavit (as excised), to determine whether probable cause existed" rather than "merely scrutinizing the affidavit for accurate physical descriptions" of plants. As *Carter/Grant* requires, "the affidavit was required to demonstrate that it was more probable than not that the object to be seized was marijuana." Here the detective had more than 20 years' experience in aerial surveillance for marijuana, he'd identified what he believed to be more than 225 grow operations with less than a 3% error rate, "and, most importantly, he averred that he did, in fact, believe that the plants he observed at defendants' residence were marijuana." The trial court correctly concluded that under the totality of the circumstances the affidavit established that the detective subjectively believed that the plants were marijuana.

See ***State v Hebrard***, 244 Or App 593 (8/03/11) under Probable Cause to Arrest, page 53.

State v Ulizzi, __ Or App __ (11/09/11) (Haselton, Armstrong, with Edmonds concurring), 2011 WL 5386647. Defendant's former companion had reported to a detective that there was a possible marijuana grow operation at defendant's residence. Defendant's 11-year old son said that about a month ago, he had seen marijuana plants and "grow lights" in a shed at defendant's place (and told his mother – the former companion). Detective applied for a warrant with his affidavit relaying that fact, after interviewing the mother and children. The mother stated that she had broken off their relationship 11-12 years ago after seeing marijuana and money at the residence. The children described their observations of possible marijuana manufacture at the residence. Detective confirmed that defendant did not have a medical marijuana card. He relayed this information in his affidavit supporting his application for a search warrant, which included information based on his training and experience. The magistrate granted the search warrant. He was charged with possession of controlled substances and moved to suppress the evidence based primarily on the lack of probable cause: the lapse of time between the son's sighting of marijuana and the application for the warrant and that the heat lamp in itself is not evidence of a crime. The trial court denied his motion to suppress.

The Court of Appeals affirmed. It concluded that the issuing magistrate could reasonably infer that despite a 6-week interval, it was probable that some inculpatory evidence, specifically the heat lamp with the marijuana plants, could still be found at defendant's residence. "Staleness" is determined by time, perishability, mobility, "the nonexplicitly inculpatory character of the putative evidence," and the suspect's propensity to retain the evidence.

Concurrence would hold that the trial court correctly concluded that the affidavit provided probable cause for a reasonable magistrate to issue a search warrant to search defendant's residence for evidence of marijuana manufacturing.

State v Marsing, 244 Or App 556 (7/27/11) (Sercombe, Ortega, Rosenblum) A detective made an affidavit to search a residence. He wrote a detailed application with specific facts, based on his experience, a confidential reliable informant who said he saw a "small amount" of marijuana, and his previous use of the informant, and his recent use of the informant in making a marijuana purchase from defendant at defendant's residence. He sought a warrant to search the residence, the garage, all outbuildings, vehicles, and the premises located at 130 Orr Drive, as well as defendant's person, for marijuana evidence. Magistrate issued the warrant, and a search produced 17 grams of marijuana and drug items. After defendant was indicted, he moved to suppress for lack of probable cause to

support the warrant, because the informant said he saw only a "small amount" of marijuana 3 days before the search. The trial court granted the motion to suppress, for lack of probable cause, specifically because the informant stated that he had purchased marijuana at defendant's "residence" but nothing indicated that that "residence" was 130 Orr Drive. The state appealed.

The Court of Appeals reversed, concluding that the magistrate who issued the search warrant reasonably could have concluded from the affidavit that the evidence of marijuana would be found at 130 Orr Drive. This is not even a "doubtful or marginal case." Probable cause exists "if the magistrate could reasonably conclude that seizable things probably will be found in the place to be searched." Here, the affidavit referred to a "residence" nine times and that the informant had purchased marijuana from the defendant's residence before, at 130 Orr Drive. Five of the references to "residence" were explicitly linked to the 130 Orr Drive residence. That is "more than ample to establish probable cause." As for the past purchases and quantities, "the affidavit described past, recent, and likely drug dealing at 130 Orr Drive." The magistrate did not err.

The court footnoted: "'Probable cause' has the same meaning throughout [state and federal] constitutional and statutory requirements."

2. Scope

State v Walker, 350 Or 540 (7/28/11) (Landau) Police obtained a warrant to search a house for DVDs, a cell phone, and other stolen items. No person was named in the warrant. Numerous people were at the house when detectives executed the warrant. One of those was defendant, who was in a man's bedroom. Police moved everyone outside, handcuffed them, patted them down, read a collective *Miranda* warning, and asked the man (in whose bedroom defendant had been) for consent to search his bedroom. He consented. Defendant's purse was in the bedroom. A detective told defendant he thought the purse was hers and asked her for permission to search it. She said she didn't do anything, so she didn't know why she had to be there, but she consented. Meth and a glass pipe were inside. An officer read her *Miranda* rights again, and she then made several incriminating statements. She moved to suppress the meth and pipe, as well as her statements, as the search was outside the scope of the warrant and because her consent was involuntary or obtained through exploiting prior unlawful police conduct.

The trial court denied her motion to suppress, holding that the purse-search was within the scope of the warrant because stolen items could have been in the purse and her consent was voluntary. The Court of Appeals affirmed, holding that defendant failed to preserve her state constitutional arguments, and that she failed to cite an earlier decision in which the Court of Appeals rejected precisely the same arguments she advanced in her case.

The Oregon Supreme Court affirmed. First, contrary to the Court of Appeals' determination, defendant adequately preserved her state constitutional issues. She need not adduce particular cases to do so. And even if "the level of detail or thoroughness with which a party articulates a position may leave something to be desired does not mean that it was insufficient to serve the rule of preservation's pragmatic purposes." Second, defendant conceded that a purse could contain stolen property that was specifically listed in the search warrant. But she argued that the state bears the burden of establishing the lawfulness of the search. The state responded that the warrant authorized the purse search. The Court concluded that when "police have acted under

authority of a warrant . . . 'the burden is on the party seeking suppression (i.e., the defendant) to prove the unlawfulness of a search or seizure.' *State v Johnson*, 335 Or 511, 520 (2003)."

As to the merits: "Whether a premises warrant authorizes police to search the personal property of nonresident 'social guests' who happen to be on the premises at the time of execution of the warrant is a question of first impression for this court. It is an issue that has deeply divided other state and federal courts around the country," with its genesis in *Ybarra v Illinois*, 333 US 85 (1979), in which the Supreme Court held that a premises warrant does not authorized police to search persons who merely happened to be at the premises when the warrant is executed. States have developed a number of tests to determine the scope of a premises warrant. The record in this case, however, is silent as to the facts necessary to determine the scope of the warrant, under any test. "Given that it is defendant who bears the burden of proof, it is defendant who bears the consequences of that silence." The Supreme Court thus concluded that it reserves "for another day the question whether a premises warrant authorizes the search of the personal effects of individuals who happen to be on the premises when those effects are not in the physical possession of those individuals." Affirmed.

E. Exceptions to Warrant Requirement

"No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized." - Article I, section 9, Or Const

"[W]arrantless entries and searches are *per se* unreasonable unless falling within one of the few 'specifically established and well-delineated exceptions' to the warrant requirement." *State v Davis*, 295 Or 227, 237 (1983) (quoting *Katz v United States*, 389 US 347 (1967) and *State v Matsen/Wilson*, 287 Or 581 (1979)).

"Warrantless searches and seizures are *per se* unreasonable unless the state proves an exception to the warrant requirement." *State v. Bridewell*, 306 Or 231, 235 (1988).

Article I, section 9, speaks to both searches (privacy rights) and seizures (possessory rights), and with a few well-recognized exceptions, a warrant is required even when only possessory rights are implicated. *State v Smith*, 327 Or 366, 376-77 (1998).

1. Probable Cause to Arrest

"A warrantless arrest is appropriate if a police officer has probable cause to believe that a person has committed a felony. ORS 133.310(1)(a)." *State v Pollack*, 337 Or 618, 622-23 (2004); *State v Rayburn*, 2011 WL 5386660 (2011). "The state bears the burden of establishing the validity of a warrantless search or seizure." *State v Hebrard*, 244 Or App 593 (2011).

State v Rayburn, __ Or App __ (11/09/11) 2011 WL 5386660 (Schuman, Wollheim, Nakamoto) Portland police officers received a dispatch report of a red Honda Civic driving recklessly in a precise area, with occupants throwing things from the car. The

license plate matched that of a car stolen in Gresham. The officers saw a group of men standing around a parked red Honda Civil with the same license plate, with its engine running. Due to the number of men, the officers drew their weapons, ordered the occupants to raise their hands, and told the driver to shut off the engine. The driver was unable to remove the key. Officers testified that stolen vehicles are often started with a screw driver or a "shaved key" that cannot be removed, or are not easily removed. The others, including defendant, got out and were handcuffed. Officers smelled crack and found a used crack pipe. The key would not come out of the ignition. Defendant was charged with unauthorized use of a vehicle and possession of a stolen motor vehicle. He moved to suppress arguing that officers did not have probable cause to arrest him.

The trial court concluded that the officers lacked objective probable cause to arrest defendant – he was just a passenger.

The Court of Appeals reversed and remanded. The parties agree that defendant was arrested when he was removed from the car and handcuffed. Here, officers relied on a dispatch report of a stolen vehicle, the officers' observations corroborated the criminality of the conduct, and the driver was unable to remove the key from the ignition, indicating that it was a "shaved key" used to steal cars. In short, the officers "clearly had probable cause to believe that defendant was in a stolen car." The court here noted that it "strongly suspect[s] that the totality of the circumstances at the time that the officer arrested defendant are insufficient to establish beyond a reasonable doubt that defendant knew the car was stolen." But that is not the quantum of proof here: to establish probable cause, the state needs to prove only that *more likely than not*, defendant had the requisite mental state." (Emphasis by court).

State v Hebrard, 244 Or App 593 (8/03/11) (Wollheim, Schuman, Rosenblum) Officer was following a LoJack signal on a stolen gray Ford pickup with a blue canopy. He saw a truck with that description parked in a driveway with four people (including defendant) standing near another car 20-30 feet from the truck. The officer thought all four people were connected with the stolen truck. He told the four to put their hands in the air, and they did. The officer waited for more officers to arrive, then when they did, all four people were handcuffed. When defendant was handcuffed, he dropped a key on the ground, tried to cover it with his foot, then tried to kick it under a car. Officer picked up the key, patted down defendant, and got his wallet. The key had an Infinity SUV logo on it, and there was a stolen Infinity SUV with different license plates in the driveway. Officer pressed the key fob and the Infinity's lights turned on. Officer asked defendant for his name and date of birth, defendant misspelled his name and apparently gave an incorrect age. The name came back "unable to locate" when the officer ran a check. A social security card in defendant's wallet with a different name came back as showing an outstanding arrest warrant. Officer gave defendant *Miranda* warnings, asked defendant about the truck, and defendant said, "I know what you want me to say. This isn't my first rodeo; check my record." He moved to suppress all evidence on grounds that the officer lacked reasonable suspicion to stop him, the officer lacked probable cause to arrest him, and the outstanding warrant did not purge the taint of prior police illegality. Trial court denied his motion to suppress.

Court of Appeals reversed and remanded. "The state bears the burden of establishing the validity of a warrantless search or seizure. *State v Rudder*, 219 Or App 430, 435 (2008), *aff'd*, 347 Or 14 (2009)." Although an officer confronted with safety concerns may handcuff a person without converting a stop into an arrest, the stop is converted into an arrest if the officer continues to use force to restrain the person after the officer' safety concerns are dissipated. Here, the state did not argue that handcuffing defendant was a

reasonable amount of force to ensure officer safety, so officer safety concerns did not justify the handcuffing, the court concluded. Thus, "the handcuffing converted the stop into an arrest of defendant." As to probable cause, the court cited *State v Foster*, 233 Or App 135, 144 (2010, *aff'd* 350 Or 161 (2011): "In the context of justification to arrest a person, '[p]robable cause' means that there is a substantial objective basis for believing that more likely than not an offense has been committed and a person to be arrested has committed it." The court concluded that the officer lacked probable cause because although he had a substantial objective basis to believe that someone had committee the offense, "it was not more likely than not that defendant had committed the crime." Finally, the outstanding warrant did not purge the taint of the police illegality, because the officer searched defendant before the arrest on the outstanding warrant. (Note: the court did not discuss whether the arrest, charges, or convictions were felonies or misdemeanors).

2. Search Incident to Lawful Arrest

A search incident to arrest is one of the few specifically established exceptions to the warrant requirement. *State v Hite*, 198 Or App 1, 6 (2005).

Under Article I, section 9, there are three valid justifications for a warrantless search incident to lawful arrest: to protect the officer's safety, to prevent the destruction of evidence, and to discover evidence relevant to the crime for which the defendant was arrested. *State v Hoskinson*, 320 Or 83, 86 (1994).

An officer is authorized to search closed containers as an incident to arrest "so long as the search was reasonable in time and space and was either for evidenced of the crime prompting the arrest, to prevent the destruction of evidence, or to protect the arresting officer." *State v Caraher*, 293 Or 741, 759 (1982).

3. Exigent Circumstances: Entry into Homes and Curtilages

(a) Fourth Amendment

Under the Fourth Amendment, police officer may enter a home without a warrant if the officers have both probable cause to search plus specific and articulable facts proving their a reasonable belief that their entry is necessary to prevent physical harm to officers or others, or the destruction of relevant evidence, escape of the suspect, or some other consequence frustrating legitimate law enforcement efforts (such as fire, hot pursuit of fleeing felons, or destruction of evidence). *See Huff v City of Burbank*, 632 F3d 539 (9th Cir 2010); *Michigan v Fisher*, 130 S Ct 546, 548 (2009) ("law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury"); *but see Kentucky v King*, 131 S Ct 1849 (5/16/11), discussed *post* (no mention of probable cause; only a "genuine" exigency required and the search must be "reasonable")

Under the Fourth Amendment, the emergency doctrine applies when police officers reasonably believe entry is necessary to protect or preserve life or avoid serious injury. *Mincey v Arizona*, 437 US 385, 392 (1978). Probable cause may not be required, instead "there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched." *Huff v City of Burbank*, 632 F3d 539 (2011) (quoting *Hopkins v Bonvicino*, 573 F3d 752, 764 n 5 (9th Cir 2009)).

Kentucky v King, 131 S Ct 1849 (5/16/11) (Alito for majority, only Ginsburg dissenting) Police watched a "crack buy" outside an apartment complex. They ran into the breezeway of the building, heard a door shut, smelled marijuana, and banged on a door as loudly as they could, announcing "This is the police" or "police, police, police" then heard people moving inside. Suspecting that evidence was being destroyed, police kicked in the door, found people including defendant smoking marijuana, performed a protective sweep, and found marijuana, cocaine, and, later, crack and money.

The Court did not mention the quantum of proof (probable cause or reasonable circumstances) to determine if "exigent circumstances" (based on destruction of evidence) were present to justify a warrantless entry into a home. The Court twice stated that "we assume . . . that an exigency existed." Instead the Court stated: "Any warrantless entry based on exigent circumstances, must, of course, be supported by a genuine exigency." The Court held that "the exigent circumstances rule applies when the police do not gain entry to premises by means of an actual or threatened violation of the Fourth Amendment." Here, the police did not create an exigency.

The Court reiterated three "exigencies that may justify a warrantless search of a home. . . . . Under the 'emergency aid' exception, for example, 'officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.' . . . . . Police officers may enter premises without a warrant when they are in hot pursuit of a fleeing suspect. . . . . And – what is relevant here – the need to 'prevent the imminent destruction of evidence' has long been recognized as a sufficient justification for a warrantless search."

Notably, the Court focused on "the ultimate touchstone of the Fourth Amendment," which "is 'reasonableness'".

(b) Oregon Constitution

Under Article I, section 9, warrantless entries and searches are *per se* unreasonable unless the state proves an exception to the warrant requirement, such as the existence of exigent circumstances when the officers have probable cause to arrest a suspect. *State v Bridewell*, 306 Or 231, 235 (1988).

Under Article I, section 9, to justify entering a residence without a warrant because of an emergency, "the state must make a strong showing that exceptional emergency circumstances truly existed." *State v Miller*, 300 Or 203, 229 (1985), *cert denied*, 475 US 1141 (1986) (citing *Vale v Louisiana*, 399 US 30, 34 (1970)).

"[A]n emergency aid exception to the Article I, section 9, warrant requirement is justified when police officer have an objectively reasonable belief, based on articulable facts, that a warrantless entry is necessary to either render immediate aid to persons, or to assists person who have suffered, or who are imminently threatened with suffering, serious physical injury or harm." *State v Baker*, 350 Or App 641, 649 (2011) (referring to it as the "so-called emergency aid exception").

State v Baker, 350 Or 641 (9/01/11) (De Muniz) Police officers received a 911 domestic-disturbance call from an anonymous woman who said she heard "yelling and screaming coming from inside the residence" and she "thought there might be a child inside" and the female inside that residence, whom she knew by name, had used a "prearranged

code word" indicating that police were needed. Officers sped to the location with sirens and lights on, both believing there was an emergency. When they arrived at the residence, however, two people were on the front porch. When asked, they told the officers that a dispute was ongoing inside. The officers could hear yelling from inside but couldn't hear what was being said. The front door was locked. The people outside said the officers could go through the back door. Officers did not knock. Walking to the back door, officers saw defendant and the woman inside arguing, but there was no evidence of physical abuse. Officers went further around to the back of the house and saw defendant and the woman through the back window. The woman yelled "cops" and defendant began picking buds off a marijuana plant in the room. Officer opened the back door and asked the woman if assault had occurred. Officers decided that no assault had occurred. Officers found more marijuana plants (and defendant was manufacturing within 1000 feet of a school). Defendant was charged with five marijuana-related crimes. He moved to suppress the marijuana seized, arguing specifically that the "entry onto the rear of his property along the side of his house violated Article I, section 9" and that "the officers' continuation past the initial approach to the front of his house without a warrant" was not authorized under "an emergency aid exception." The trial court denied the motion.

The Court of Appeals reversed, under its 4-part test in *State v Follett*, 115 Or App 672 (1992), *rev den* 317 Or 163 (1993). On review, the state argued to the Supreme Court that *Follett* is "too narrow" because it only applies when officers believe their assistance is necessary to save "life" or that "life-threatening injury" is imminent. The state sought to have the emergency aid exception apply when officers believe their assistance is necessary to assist people who are threatened with "serious physical injury or harm."

The Oregon Supreme Court reversed the Court of Appeals' decision and defined an emergency aid exception that justifies warrantless entries:

> "[A]n emergency aid exception to the Article I, section 9, warrant requirement is justified when police officer have an objectively reasonable belief, based on articulable facts, that a warrantless entry is necessary to either render immediate aid to persons, or to assists person who have suffered, or who are imminently threatened with suffering, serious physical injury or harm." "[I]t does not matter whether the need to render immediate aid is triggered by a human source or a condition idiopathic to the person needing aid."

In defining the boundaries of an "emergency aid exception" to justify warrantless entry into homes, the Supreme Court mused that it "has acknowledged the existence of a so-called emergency aid exception in only two cases:" *State v Davis*, 295 Or 227 (1983) and *State v Bridewell*, 306 Or 231 (1988). The Court also footnoted the "elements of an emergency aid exception to the Fourth Amendment," and footnoted its research that "Other state supreme courts have also recognized emergency aid as an appropriate exception," those being Washington and Vermont. The Court observed that it had recognized warrant exceptions for officer-safety and public-safety reasons in *State v M A.D.*, 348 Or 387 (2010) and *State v Bates*, 304 Or 519 (1987). This type of case is a "similar kind of societal interest" so as to justify a warrantless entry into a home.

Here, when officers "proceeded beyond the front of the house," they had "an objectively reasonable belief, based on articulable facts, that it was necessary to do so to assist persons suffering from, or imminently threatened with, serious physical injury or harm." The facts supporting that conclusion are: (1) "yelling and screaming" had been reported; (2) the possible presence of a child had been reported; (3) a "code word indicating the

need for police intervention" had been given; and (4) two officers "believed that an emergency existed" and "sped to the location" and they could hear "arguing and yelling" from within the house." In sum, those "facts supported an objectively reasonable belief that an emergency existed," particularly the use of the "code word."

(Note that the Court stated that this is an "objective" test but it recited the two officers' subjective beliefs that an emergency existed in concluding that the test had been met.).

State v Tabib, 238 Or App 725 (11/17/10) (Ortega, Landau, Sercombe) Police dispatch received a 911 call that it sounded like "someone was being slammed around" in a residence. Officers arrived at that residence 5 minutes later. Nothing about the residence appeared unusual: no broken windows or damaged doorways. Two vehicles were parked. For about 20 minutes, deputies pounded on the door, identified themselves, and demanded entry. Officer contacted the 911 caller by telephone and that caller specifically identified the vehicles as belonging to the man and woman who lived at the residence and said that the sounds were "not someone pounding on the wall, but were definitely sounds of one person hitting another." No one knew where that caller lived and the next-door neighbor did not answered when police knocked there. Police heard people inside but no sounds of a physical fight. Police kicked down the door and discovered evidence of crimes that is the subject of defendant's motion to suppress due to the state's lack of a warrant. State argued that the emergency-aid doctrine applied. Officer testified that he had 19 years of experience, and the trial court found that he believed one person had been hitting another person, someone in the residence may be possibly seriously injured or was being held hostage. Trial court granted that motion to suppress, though, because there was no evidence that any officer believed entry was necessary to protect life and the record does not support the officers' conclusion that someone may have been injured.

The Court of Appeals reversed. The state established the basis for the emergency aid doctrine as set forth in *Follett*, *ante*. The subjective part of the test is met: the officer believed someone may be seriously injured and prevented from coming to the door. That belief also was objectively reasonable (and appellate courts examine it independently and "without reference to after-acquired knowledge"):

> "because the circumstances here included indications of physical violence inflicted on a person (as opposed to indications of a loud verbal dispute without signs of violence), the circumstances objectively indicated that a true emergency existed." . . . A "warrantless entry is not justified under the emergency aid doctrine when police are aware of only a loud argument, without any indication of a physical struggle or an act of violence."

The Court of Appeals also stated that the 911 caller's anonymity does not undermine the credibility of that report so as to eliminate its objective reliability.

4. Exigent Circumstances – Searches or Seizures other than in Homes

(a) Exigent Circumstances: Emergency Aid

> "Emergency Aid" exception to the warrant requirement in Article I, section 9, may exist if (1) police have reasonable grounds to believe there is an emergency and an immediate need for their assistance to protect life; (2) the emergency is a true emergency – a good-faith belief is not enough; (3) search is not primarily

motivated by intent to arrest or seize evidence; and (4) officer reasonably suspects the area to be searched is associated with the emergency and by making the entry, the officer will discover something to alleviate the emergency. *State v Follett*, 115 Or App 672, 680 (1992), *rev den* 317 Or 163 (1993), but see *State v Baker*, 350 Or 641 (2011) (warrantless entries justified by imminent threat of serious physical injury or harm).

The "emergency aid" exception can justify warrantless searches, but Oregon appellate courts have never applied it to justify warrantless traffic stops. *Sivik v DMV*, 235 Or App 358 (2010).

An exigent circumstance is a situation that requires police to act swiftly to prevent danger to life or serious damage to property, or to forestall a suspect's escape or the destruction of evidence. *State v Stevens*, 311 Or 119, 126 (1991).

(b) Exigent Circumstances: Destruction or Escape

If the warrantless search is undertaken to prevent destruction of evidence or escape, the state must prove that the destruction or escape was imminent. *State v Matsen/Wilson*, 287 Or 581, 587 (1979).

But the state need not prove that destruction of blood-alcohol evidence is imminent: "the evanescent nature of a suspect's blood alcohol content is an exigent circumstance that will ordinarily permit a warrantless blood draw," or a warrantless breath test, when an officer has probable cause to believe a suspect has been drunk driving. *State v Machuca*, 347 Or 644, 657 (2010) (blood draw); *State v Allen*, 234 Or App 363 (2010) (breath test). Extraction of human bodily fluids – such as blood draws - is both a search and a seizure. *Weber v Oakridge School Dist*., 184 Or App 415, 426 (2002).

State v Martinez-Alvarez, 245 Or App 369 (9/08/11) (Haselton, Armstrong, Sercombe) An officer stopped defendant for a traffic infraction and believed him to be drunk driving. Defendant failed field sobriety tests and was arrested for DUII. The officer, however, did not transport defendant to jail, but rather waited for a tow truck to arrive. While he waited, he did not consider applying for "a telephonic warrant" but estimated later that it might have taken about 30 minutes to obtain one. An hour after the stop, the officer transported defendant to jail (an 8-minute trip). About 90 minutes after the stop, the officer gave defendant a breath test, which defendant failed. Defendant moved to suppress his breath-test results. The trial court suppressed defendant's breath test after finding that "more than one hour is unaccounted for, during which the officer could have applied for and received a warrant," under the Court of Appeals' opinion in *State v Machuca* (which was, subsequent to this case, reversed by the Oregon Supreme Court).

The Court of Appeals vacated and remanded for further findings specifically as to whether this can be the "rare case" exception noted but unexplained in *Machuca*. That "rare case" exception is: "particular facts may show, in the rare case, that a warrant could have been obtained and executed *significantly* faster than the actual process otherwise used under the circumstances . . . only in those rare cases will a warrantless blood draw be unconstitutional." Here, the Court of Appeals observed that "the Supreme Court did not provide much guidance as to the application of that standard," it "necessarily includes a case in which an objectively reasonable officer would have understood at the time of the DUII stop and arrest that a warrant could have been

obtained significantly more quickly than the actual time (and consequent dissipation of alcohol" between the probable cause determination and the administration of the breath test or blood draw."

State v Girod, 245 Or App 642 (9/21/11) (Schuman, Wollheim, Nakamoto) Defendant was stopped for reckless driving. Officer immediately developed probable cause to believe he was drunk driving. Defendant failed a breath test. The officer did not have a warrant to seize that breath sample. The trial court suppressed the breath-test results before the Oregon Supreme Court's opinion in *State v Machuca* (held: warrantless blood draws are ordinarily permitted because blood alcohol's "evanescent nature" is "an exigent circumstance). *Machuca* applies to breath samples. The Court of Appeals reversed.

State v Amos, 245 Or App 637 (9/21/11) (Brewer, Edmonds) Defendant failed roadside field sobriety tests then was arrested for drunk driving. At the police station, defendant took a breath test 58 minutes after his arrest. It would have taken about 90 to 120 minutes to obtain a warrant. Defendant's blood alcohol tested above the legal limit. He moved to suppress the results of that test arguing that his is a "rare case" under *Machuca* where a warrant could have been obtained and executed "significantly faster" than the actual process used. The trial court denied his motion to suppress. The Court of Appeals affirmed.

5. Officer Safety

Article I, section 9, does not forbid an officer from taking reasonable steps to protect himself and others if, during the course of a lawful encounter with a citizen, the officer develops a reasonable suspicion based on specific and articulable facts that the citizen might pose an immediate threat of serious physical injury to the other officer or to others then present. *State v Bates*, 304 Or 519, 524 (1987).

(a) Closed Containers

Warrantless searches of closed containers may be justified under several situations, for example:

- Inventories
- Searches incident to arrest for officer safety
- Abandonment

For officer safety, an officer may search closed containers without a warrant as an incident to a lawful arrest, "so long as the search was reasonable in time and space and was either for evidence of the crime prompting the arrest, to prevent the destruction of evidence, or to protect the arresting officer." *State v Gotham*, 109 Or App 646, 649 (1991) *rev den* 312 Or 677 (1992) (citing *State v Caraher*, 293 Or 741, 759 (1982)).

(b) Patdowns

> "A patdown, because of its limited intrusiveness, is constitutionally permissible if it is based on a reasonable suspicion of a threat to officer safety. But intrusion *into* a suspect's clothing requires something more – either probable cause or some greater justification than was present here." (Emphasis in original). *State v Coffer*, 236 Or App 173 (2010) (quoting *State v Rudder*, 347 Or 14, 25 (2009)).

(c) "Protective Sweeps of a House"

State v Guggenmos, 350 Or 243 (5/05/11) (Durham; Kistler and Linder dissenting) Three police officers went to a house without a warrant. They'd heard rumors from unidentified informants that it was, or had been at some time, a "drug house." A brown pickup truck in the alley may have contained drugs at some point, based on an unidentified informant, but the record was unclear as to whether that truck was parked near the house when the officers went to the house.

One uniformed officer stood at the back door. Two officers in plainclothes knocked at the front door, displayed a badge, and identified themselves. A male occupant let them in. His girlfriend and child were in the living room. Officer said he was looking for people with outstanding warrants. The male occupant said no one with outstanding warrants was in the house. He said no one except himself, the girlfriend, the child, and "Sam" were in the house. There was no sign of drugs or weapons in the house at this point. Occupant was cooperative and agreed to allow an officer search the residence for wanted persons. Then two men came quickly down a staircase. Officer yelled for them to stop. The two men paused, looked at the officer, then continued down the stairs and out the back door, where they ran into the uniformed officer and stopped. The men did not answer when asked why they were running. One of those two men was defendant. One officer went back inside to "clear" the rooms upstairs to determine if anyone else was in the house. Officer searched defendant's bedroom – without asking for anyone's consent to search the bedroom – and in plain view saw white powder and straws on a mirror. Defendant had an outstanding warrant. Officer arrested and *Mirandized* defendant, told him about the drugs on the mirror, and asked him for consent to search his bedroom (which he'd just searched). Defendant gave consent and made incriminating statements. Officer found a bag of meth.

Defendant moved to suppress the physical and testimonial evidence against him under the state and federal constitutions. Trial court denied the motion under the officer-safety exception to the warrant requirement. Defendant was convicted. Court of Appeals affirmed, on ground that the "stop" of defendant was justified by the circumstances, including his flight down the stairs, the informants' reports about wanted persons and past drug activity in the house, and the occupant's misstatement about the presence of defendant in the house. The officer's entry into the bedroom was part of a "protective sweep" that was not exploiting an illegality (and defendant subsequently gave his consent).

A four-justice majority of the Supreme Court reversed. This is a warrantless search, so under a statute (ORS 133.693(4)), "the burden of proving by a preponderance of the evidence the validity of the search is on the prosecution." And then under Article I, section 9, "a warrantless search of one's private living quarters is *per se* unreasonable and unlawful unless the search fits within a recognized exception to the warrant requirement," citing *State v Paulson*, 313 Or 346, 351 (1992). Under *State v Cocke*, 334 Or 1 (2002), a "protective sweep" is not an exception to the warrant requirement; rather a protective sweep can be justified under the Oregon Supreme Court's "standards for an officer safety search."

The majority identified its job: "Our task here is to apply the officer safety exception to the facts of this case." The quest is to determine if the circumstances, "viewed separately or as a whole," are "specific and articulable facts on which an officer could base a reasonable suspicion that one or more persons in [the] house posed an immediate threat of serious physical injury to an officer or others present." As to the reliance on informants, the "state may rely on such tips" to establish reasonable suspicion in the officer-safety search. But here, the record does not demonstrate that the report of the unnamed informants were credible or reliable. The officer's suspicion of an immediate threat of serious physical injury must be based on "specific and articulable facts" under *State v Bates*, 304 Or 519 (1987); the reports in this case do not meet that standard. Running down the stairs does not support an inference of an immediate threat to officer safety (no drugs or weapons visible). Running down the stairs and ignoring a police order to stop "was a circumstance that understandably justified heightened police attention" but not more. Also, an officer "could have no more than a hunch, not reasonable suspicion, that one or more people were hiding upstairs." And as to defendant's consent to the bedroom search, that consent was not voluntary. (The majority distinguished this bedroom search from a purse search during a traffic stop.) Reversed and remanded.

Two justices dissented, and would hold that the state had sufficient evidence to meet the reasonable suspicion standard that there was a risk of serious physical injury to the officer in the downstairs of the house. The detective searching the house did "reasonably perceive an immediate threat of serious injury to another officer" and discovered defendant's meth while taking reasonable steps to protect another officer's safety.

(d) <u>Use of Force</u> – Fourth Amendment

> Under the Fourth Amendment, an officer's use of force must be objectively reasonable in light of the facts and circumstances confronting him (including the severity of the crime at issue), whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. *Graham v Connor*, 490 US 386, 396 (1986).

Glenn v Washington County et al, __ F3d __ (11/04/11), 2011 WL 5248242. Lukus Glenn had just graduated from Tigard High. He had no history of violence or criminal activity. He went to a football game with his girlfriend. He returned home at 3:00 a.m, agitated and intoxicated. He wanted to ride his motorcycle. His parents had never seen him drunk before. He damaged their windows and cars. The parents called two of Lukus's friends to help calm him down. The friends could not do so. Lukus held a pocketknife to his neck and threatened to kill himself. His mother called 911 and asked for help, stating that he said Lukus threatened to kill himself if the cops come, that he had attempted suicide once before and was "really depressed," but he had always been a good athlete and a good kid.

Lukus was not in a physical altercation with anyone, he did not threaten anyone, and no one was trying to take away the pocketknife he had at his own neck. One officer (Gerba) was not on duty but "for some unknown reason" went to the home, and was the first officer to arrive. Upon arrival, Officer Gerba pointed his gun at Lukus's friend David and said, "get on the fucking ground." David complied. Officer Gerba then stood 8 to 12 feet from Lukus and held his .40 caliber Glock semiautomatic pistol aimed at Lukus. He was screaming at Lukus, threatening to kill him. Lukus may not have heard this because many people were yelling at once. That officer was "angry, frenzied, amped, and

jumpy." Officer Gerba did not try to persuade Lukus to drop the knife. His mother began pleading with the officer not to shoot him.

Another officer arrived one minute later, and drew his gun and began screaming commands such as "drop the fucking knife" and "drop the knife or you're gonna die." Lukus's friend Morales implored the officers to "calm down" and stated that Lukus was only threatening to cut himself, not anyone else. Officers then ordered Morales to crawl behind them and he did. A third officer arrived – Gerba ordered that officer to "bean bag him" and that third officer opened fire on Lukas, shooting all 6 lead-pellet beanbags at Lukus, who then looked "surprised, confused, and possibly in pain," and he began to move away from the beanbag fire.

Lukus said, "tell them to stop screaming at me" and asked, "why are you yelling?" Seconds later, and less than four minutes after they arrived, the two officers began firing their semiautomatic weapons at Lukus. They fired 11 shots, 8 striking Lukus, 3 striking the house. Lukus bled out and died on the porch. The Washington County Sheriff announced that "no policies were violated" during that incident.

Lukus's mother, as his personal representative, filed a complaint against the County and the two officers. Judge Mosman concluded that the officers' use of force did not violate Lukus Glenn's Fourth Amendment rights and concluded that defendants were entitled to qualified immunity and granted summary judgment for defendants on all claims.

The Ninth Circuit panel reversed. The legal standard under *Graham v Connor*, 490 US 386, 397 (1989) in evaluating a Fourth Amendment claim of excessive force requires courts to ask "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." The Ninth Circuit panel here noted that because excessive-force claims "nearly always require[] a jury to sift through disputed factual contentions . . . we have held on many occasions that summary judgment . . . in excessive force cases should be granted sparingly." The Ninth Circuit panel evaluated exhaustively the numerous considerations applicable to excessive force claims and concluded that the district court erred: "on summary judgment, the district court is not permitted to act as a factfinder."

6. Inventories (a type of administrative search)

(a) Oregon Constitution

Governments "may authorize officers to inventory the contents of an impounded car to protect the owner's property, to reduce the likelihood of false claims against the police, and to protect the safety of the officers. *State v Atkinson*, 298 Or 1, 7 (1984). The purpose of the inventory is not to discover evidence of a crime. Rather, an inventory serves civil purposes and is one type of administrative search." *State v Connally*, 339 Or 583, 587 (2005).

Under Article I, section 9, police may inventory the contents of a lawfully impounded vehicle or the personal effects of a person being taken into custody if a valid statute, ordinance, or policy authorizes them to do so, and the inventory is designed and systematically administered to involve no exercise of discretion by the officer conducting the inventory. *State v Atkinson*, 298 Or 1 (1984). The state has the burden of proving the lawfulness of an inventory. *State v Marsh*, 78 Or 290, 293 (1986).

"Generally, police officers cannot open closed, opaque containers to inventory their contents," but such closed containers may be opened if the containers are "designed for carrying money or valuables, if the applicable inventory policy so directs." *State v Guerrero*, 214 Or App 14, 19 (2007). The dispositive inquiry is whether the container "was *designed* to contain valuables and not whether such items were often used to hold valuables." The "officer's belief that the container *might contain* valuables is inapposite to whether it was *designed* to do so." *State v Keady*, 236 Or App 530 (2010) (emphasis in original); *State v Swanson*, 187 Or App 477, 480 (2003).

(b) Fourth Amendment

An inventory search is valid under the Fourth Amendment if conducted according to "standard police procedures." *South Dakota v Opperman*, 428 US 364, 372 (1976)).

State v Jorgenson, 245 Or App 494 (9/08/11) (per curiam) The State conceded that the trial court erred in denying defendant's motion to suppress meth found "as a result of the removal of a console located between the front seats of his vehicle" because the "removal of the console exceeded the scope of a valid inventory search because the area searched was not designed to hold valuables." The Court of Appeals reversed and remanded. No constitutional provision and no case was cited.

See ***State v Hartman***, 238 Or App 582 (11/17/10) *on recons* 241 Or App 195 (02/23/11) (Brewer, Wollheim, Rosenblum), discussed at page 46..

7. Other Statutorily Authorized Noncriminal Administrative Searches

A search conducted pursuant to a "statutorily authorized administrative program . . . may justify a search without a warrant and without any individualized suspicion at all." *Juv Dep't of Clackamas County v M.A.D.*, 348 Or 381, 389 (2010) (citing *State v Atkinson*, 298 Or 1, 8-10 (1984)).

"An 'administrative' search is one conducted 'for a purpose other than the enforcement of laws by means of criminal sanctions.' *State v Anderson*, 304 Or 139, 141 (1987). . . . If those intended consequences are criminal prosecution, then the search is not administrative in nature. *Id*. at 104-05." *Weber v Oakridge School Dist.*, 184 Or App 415, 433-34 (2002). Another example: DNA testing by swabbing a cheek "is a reasonable administrative search" under Article I, section 9, because it was to establish paternity, was conducted per a statute that eliminated discretion – every person denying paternity must provide a DNA sample. *State v Spring*, 201 Or App 367, 373 (2005).

State v Atkinson held that "an administrative search conducted without individualized suspicion of wrongdoing could be valid if it were permitted by a 'source of the authority,' that is, a law or ordinance providing sufficient indications of the purposes and limits of executive authority, and if it were carried out pursuant to a 'properly authorized administrative program, designed and systematically administered' to control the discretion of non-supervisory officers." *Nelson v Lane County*, 304 Or 97, 104-05 (1987) (Carson, J, for plurality) (held: police sobriety checkpoints were not conducted under a recognized source of authority, thus they violated Article I, section 9).

State v B.A.H., 245 Or App 205 (8/31/11) (Schuman, Wollheim, Nakamoto) (See discussion of this case under Public Schools exception to the warrant requirement, page 70). A teacher found B.A.H., a public school student, in possession of a cigarette lighter in the bathroom. Cigarettes are contraband. This student had received two prior tobacco violations and at least one prior drug violation. The official school "disciplinarian" thus decided to search the student, in the presence of another official disciplinarian and an armed, uniformed police officer. No one touched the student but the disciplinarian asked student to empty his pockets, pull up his pants legs, and open his jacket sleeves. He appeared to be hiding something in his shirt sleeve. Disciplinarian asked about it, and the student removed a small container with white powder inside, which was methadone. Student was charged with possession of a controlled substance.

The trial court granted student's motion to suppress, apparently on student's argument that the search violated Article I, section 9 (the opinion does not say that, however). The trial court, in so ruling, allowed into evidence the school's administrative search policy, which allowed a district official to search of a student if the official had "individualized, 'reasonable suspicion' to believe evidence of a violation of law, Board policy, administrative regulation or school rule is present in a particular place." The trial court concluded that the search was valid under the district policy, but the fruits of the search could not be used in a criminal prosecution. The state appealed.

The Court of Appeals reversed, not under the administrative exception, but rather under the public school exception to the warrant requirement set out in *Clackamas County v M A.D.*, 348 Or 381 (2010). As to the administrative exception, the Court of Appeals recited the elements of that exception:

> "In general, a search qualifies for the exception if it is conducted for a purpose other than law enforcement . . . pursuant to a policy that is authorized by a politically accountable lawmaking body . . . if the policy eliminates the discretion of those responsible for conducting the search," citing *State v Anderson*, 304 Or 139 (1987), *Nelson v Lane County*, 304 Or 97 (1987), *State v Atkinson*, 298 Or 1 (1984), and *State v Coleman*, 196 Or App 125 (2004), *rev den* 338 Or 16 (2005).

The Court of Appeals agreed that the district's search policy was promulgated by an official politically accountable body (school board) but disagreed that the purpose of the search was not for law enforcement. The search was conducted in the presence of an armed, uniformed police officer, and the policy's objectives is seizing evidence of illegal acts or prohibited items. Also, the "no discretion" element here is "problematic." The Court of Appeals distinguished *AFSCME v Dep't of Corrections*, 315 Or 74 (1992) (the case the state relied on to argue that an administrative search policy that requires reasonable suspicion on the searcher's part is consistent with *Atkinson*). Rather than decide this case under the administrative exception, it decided the case under the public school exception for drug searches. See discussion, *post*.

8. Consent

> Ordinarily a search must be conducted pursuant to a search warrant. *State v Paulson*, 313 Or 346, 351 (1992). A warrantless search is reasonable under Article I, section 9, if it falls into a recognized exception to the warrant requirement. Consent is one such exception. *Id*. The state must prove by a preponderance of the evidence that someone with authority to consent voluntarily gave consent for

the police to search the person or property and that officials complied with any limits to the scope of consent. *State v Weaver*, 319 Or 212, 219 (1994).

Traffic stops:
"ORS 810.410(3)(e) authorizes police to request consent to search during a lawful traffic stop even with no individualized suspicion and . . . neither Article I, section 9, nor the Fourth Amendment prohibits such a request." *State v Wood*, 188 Or App 89, 93-94 (2003).

Nontraffic stops:
"[O]ther than certain appellate court decisions involving the application of ORS 810.410 to traffic stops (and not applicable to [stops of persons on foot in a public park]), no authority supports the proposition than an officer cannot, during the course of a stop that is supported by reasonable suspicion or probable cause, inquire whether the stopped person is carrying weapons or contraband. *State v Simcox*, 231 Or App 399, 403 (2009).

State v Ashbaugh, 349 Or 297 (2010) (Note: this case is discussed, *ante*, under Traffic Stops in Public Ways, in greater detail). "[U]nlawful police conduct . . . provides a basis for suppression of evidence seized during a search performed with the consent of that individual in one of two ways: (1) the unlawful police conduct affected the supposed voluntariness of the individual's consent; or (2) the consent actually derived from, or was obtained through 'exploitation' of the prior violation of the individual's constitutional rights." (citing *State v Rodriguez*, 317 Or 27, 38-40 (1993)).

See ***State v M.W.H.***, __ Or App __ (11/09/11), 2011 WL 5386645 (Haselton, Armstrong, Duncan), under Public Schools, page 45, regarding consent searches of juveniles in public schools.

Cf. United States v Chaney, 647 F3d 401 (1st Cir 7/27/11) In assessing whether a suspect's consent to a warrantless search was truly voluntary or instead the product of coercion, the First Circuit considers "the suspect's age, education, experience, knowledge of the right to withhold consent, and evidence of coercive tactics." Here it was "important[]" that the suspect had been arrested more than 12 times before, and it was "reasonable to infer that a veteran of the criminal justice system will be 'less likely than most to be intimidated by the agents' show of force.'" The First Circuit panel affirmed the district court's conclusion that that defendant voluntarily consented to a pants-pocket search ("The tight confines of a pants pocket leave a searching hand little room for maneuvering and distinguishing between various objects," so the scope was reasonable too).

9. Abandonment

(Note: Abandoning something does not necessarily allow it to be searched or seized as an exception to the warrant requirement. Rather, abandonment may relinquish a protected privacy interest in the item.)

If a person gives up all rights to control the disposition of property, that person also gives up his privacy interest in the property in the same way that he would

if the property had been abandoned. *State v Howard/Dawson*, 342 Or 635, 642-43 (2007).

10. Mobile Automobiles

(a) Article I, section 9

"The automobile exception is one of 'the few specifically established and carefully delineated exceptions to the warrant requirement' of Article I, section 9." *State v Kurokawa-Lasciak*, 351 Or 179 (2011) (quotations omitted).

Automobiles may be searched and seized without a warrant, under Article I, section 9, if the automobile is mobile when police stop it and have probable cause to believe that the auto contains crime evidence. *State v Brown*, 301 Or 268, 274 (1986) (creating the automobile exception as a subset of the exigent circumstances exception).

An auto is not mobile if it is "parked, immobile, and unoccupied" when police first encounter it; in that case, a warrant or another exception is required to search. *State v Kock*, 302 Or 29 (1986). "Operability" is not the test for the mobile automobile exception. *State v Kurokawa-Lasciak*, 351 Or 179 (2011) (a vehicle is not "mobile" just because it is "operable").

But a vehicle remains mobile even when blocked by a police car and the driver is under arrest because such a vehicle could be moved after officers relinquish control of it. *State v Meharry*, 342 Or 173, 181 (2006).

(b) Fourth Amendment

"That mobility requirement is specific to the Oregon Constitution." Under the Fourth Amendment, the police may search a stationary vehicle solely on the basis of probable cause. *State v Meharry*, 342 Or 173, 178 n 1 (2006) (so noting); *California v Carney*, 471 US 386, 392-93 (1985) (a stationary vehicle, not on a residential property, that is capable of being used on a roadway, is "obviously readily mobile by the turn of an ignition key" and there is a "reduced expectation of privacy" on a roadway as opposed to at a "fixed dwelling" thus justifying a search under the federal constitution).

State v Groom, 239 Or App 462 (12/15/10) (Schuman, Wollheim, Rosenblum) Officer ran the license plates of a car he was following and determined that the owner had an outstanding warrant for a drug offense. The car then turned down a side street and officers found it parked with two women were standing beside it. The car's owner (defendant) was identified and arrested. She refused to consent to a search of the car. A drug dog was called out. A plastic baggie with meth residue was on the ground by the car. Defendant was arrested and said officers would find drugs in the car. Drug dog alerted to her purse, which contained drugs. She moved to suppress, arguing that the automobile exception did not apply because the car was "parked, immobile, and unoccupied" when officers first encountered it. Trial court denied the motion to suppress.

The Court of Appeals affirmed: "the vehicle was mobile at the moment the police first encountered and focused attention on it" and it was "actually in motion." "Although *at that point* the officer had no suspicion of criminal activity," that "does not preclude application of the exception." This is why the automobile exception applies: "At the time probable cause to search the vehicle developed in this case, the vehicle was operable and not being impounded," as the Court of Appeals recently noted in *Kurokawa-Lasciak*. (Note: the Oregon Supreme Court subsequently overturned the Court of Appeals' decision in *Kurokawa-Lasciak*, as discussed on the next page herein).

State v Wiggins, 245 Or App 119 (8/17/11) (Sercombe, Brewer, Landau pro tem) A person called the police department about an altercation at a residence. The caller said that a Hell's Angels gangmember in a black car with California plates said he was going to get a gun and return. Police located the car at a convenience store. An officer pulled him over for making an unsignaled turn. Defendant drove forward 30 feet and pulled into a driveway. Officer ordered defendant out of the car and handcuffed him, and read him *Miranda* rights but explained that he was not under arrest. Defendant admitted that he was involved in a dispute but denied being a member of Hell's Angels or making any threats. He would not consent to a search of his car for weapons. Defendant's breath smelled of alcohol. Officer called defendant's parole officer who directed defendant to consent to the search of his car. Defendant denied consent. Officer arrested defendant for the parole violation. As he was being arrested, defendant shouted to the residents of the house (where his car was parked) to have his girlfriend pick up his car. Officers left the car unattended for about 25 minutes between the time officers took defendant to jail and the time they returned to the car. Officers overheard a phone conversation from defendant at the jail admitting that he had a gun in the car. He told his girlfriend to get the car and make sure no one accessed it. Officer contacted his supervisor to apply for a search warrant, believing he had probable cause that defendant was a felon in possession of a firearm. Another officer stood by the car guarding it. Girlfriend showed up, agitated and insisting on taking the car. Officers called their supervisor and concluded that exigent circumstances justified searching the car without the warrant. A loaded gun was on the floorboard and additional ammo was in the back seat. The officers seized that evidence and released the car. Defendant moved to suppress the evidence on grounds that the search was not justified under either exigent circumstances or the automobile exception. The trial court suppressed the evidence.

The Court of Appeals reversed, characterizing the "automobile exception" as "a subset of the exigent circumstances exception" to the warrant requirement, citing *State v Meharry*, 342 Or 173, 177 (2006), *State v Brown*, 301 Or 268, 274 (1986), and several other cases. A warrantless search of an automobile is permissible if (1) the automobile is mobile when police stop it; and (2) probable cause exists for the search. An auto is "mobile" if it is operable, the court here reasoned. (Note: see *State v Kurokawa-Lasciak*, discussed on this page herein). Here, the police had probable cause, and the only issue is whether defendant's vehicle was mobile when officers first encountered it. The court concluded that it was, whether the initial encounter was at the convenience store or when the officer traffic-stopped it. "In either case, the car was occupied and operable." Moreover, the 25-minute break while the officers took defendant to jail did not strip the car of its mobility. The car was not impounded, it was not functionally disabled, and nothing prevented the car from being driven away.

State v Kurokawa-Lasciak, 351 Or 179 (10/06/11) (Walters) Defendant was gambling at the Seven Feathers Casino. The casino suspected that he was laundering money, so it

prohibited him from transacting in cash for 24 hours, posted his photograph at the cashier's area, and monitored him on its video cameras. He attempted to transact in cash, grabbed his photo from the cashier's area, drove off in a van to a gas station, then returned, parked, and began walking back to the casino. An officer stopped defendant when defendant was about 30 feet from his van. The van was parked, immobile, and unoccupied. An officer recorded his conversation with defendant, telling him he was being detained on suspicion of money laundering and read him his *Miranda* rights. Defendant said he had rented the van and that he had $4500 on him, but later said he didn't know how much money he had on him. Officer asked defendant about a marijuana pipe in his pocket and asked him how much drugs he had in the van; defendant did not respond. Officer told defendant he was under arrest for disorderly conduct and theft (for taking his photo). Defendant refused to consent to a search of his van. Officers told defendant he was either going to jail or if he consented to a search of the van, the officer might cite him and release him. Defendant said he wanted to talk to a lawyer. Officer took him to jail and left the van parked. No one impounded the van, or inventoried it, or applied for a search warrant. Instead, the officer continued his investigation by contacting defendant's girlfriend at a restaurant. Girlfriend had the van keys. Officer interrogated the girlfriend about drugs and money in the van. She admitted that there was some marijuana. Officer asked for her consent to search the van. She hesitated and said she intended to leave, that she felt "badgered," and finally signed a "consent to search" form. Inside the van were 77 grams of marijuana, 56 grams of hashish, electronic scales, and $48,000 in cash.

Defendant moved to suppress. The state argued that the warrantless search was valid under either the automobile exception or under the girlfriend's consent. The trial court granted defendant's motion to suppress, concluding that the automobile exception did not permit the warrantless search of the van and the girlfriend's consent did not negate defendant's prior refusal to consent. The Court of Appeals reversed, holding that the search was valid under the automobile exception, and did not reach the consent issue.

The Oregon Supreme Court reversed the Court of Appeals' decision on the automobile exception and remanded to the Court of Appeals to decide whether the girlfriend consented to the search. The Court lengthily traced through its precedent -- *Brown, Kock, Meharry* – to restate the premise that "operability" does not equal "mobility" for the automobile exception:

> "When the court decided *Brown* and *Kock* in 1986, it expressly rejected operability as the basis for the automobile exception to the Oregon Constitution."

If the Court "were to alter that line," it "would be overruling those cases," and neither party has asked or demonstrated a basis for doing so. "Therefore," the Court concluded, "we adhere, as the court did in *Meharry*, to the line that the court drew in *Brown* and *Kock*." The trial court was correct that the automobile exception did not permit the warrantless search of defendant's van.

11. Public School Searches for Illegal Drugs

(Note: The right to attend public school is not a fundamental right under the U.S. Constitution). *San Antonia Independent School District v Rodriguez*, 411 US 1, 33-37 (1973)).

(a). Random urine testing – no individual suspicion required

i. Fourth Amendment

"Special needs" inhere in the public school context. "Fourth Amendment rights . . . are different in public schools than elsewhere; the [Fourth Amendment] 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children." *Vernonia School Dist. v Acton*, 515 US 646, 656 (1995). Suspicionless drug testing of student athletes does not violate the Fourth Amendment – students' privacy interest is limited where the state is responsible for maintaining discipline. *Id*.

A school district's policy, requiring all middle and high school students to consent to urinalysis testing for drugs to participate in any extracurricular activity is a reasonable means of furthering the school district's important interest in preventing an deterring drug use in school children and does not violate the Fourth Amendment. *Bd of Education of Pottawatomie County v Earls*, 536 US 822 (2002).

Drug testing of students need not "presumptively be based upon an individualized reasonable suspicion of wrongdoing . . . . The Fourth Amendment does not require a finding of individualized suspicion." *Earls*, 536 US at 837.

ii. Article I, section 9

(b). Nonrandom student-searches – reasonable suspicion required

i. Fourth Amendment

"[S]chool officials need not obtain a warrant before searching a student who is under their authority." *New Jersey v T.L.O.*, 469 US 325, 340 (1985). "Under ordinary circumstances, a search of a student by a teacher or other school official will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id*. at 341-42.

ii. Article I, section 9

"[W]hen school officials at a public high school have a reasonable suspicion, based on specific and articulable facts, that an individual student possesses illegal drugs on school grounds, they may respond to the immediate risk of harm created by the student's possession of the drugs by searching the student without first obtaining a warrant." *Clackamas County v M A.D.*, 348 Or 381 (2010). "For the same reasons that we have applied the less exacting 'reasonable suspicion' standard, rather than the probable cause standard, to determine whether a limited officer-safety search is permissible under Article I, section 9, we conclude that the reasonable suspicion standard should apply to a search . . . for illegal drugs that is conducted on school property by school officials acting in their official capacity." *Id*.

State v B.A.H., 245 Or App 205 (8/31/11) (Schuman, Wollheim, Nakamoto) A teacher found B.A.H., a public school student, in possession of a cigarette lighter in the bathroom. Cigarettes are contraband. This student had received two prior tobacco violations and at least one prior drug violation. The official school "disciplinarian" thus decided to search the student, in the presence of another official disciplinarian and an armed, uniformed police officer. No one touched the student but the disciplinarian asked student to empty his pockets, pull up his pants legs, and open his jacket sleeves. He appeared to be hiding something in his shirt sleeve. Disciplinarian asked about it, and the student removed a small container with white powder inside, which was methadone. Student was charged with possession of a controlled substance.

The trial court granted student's motion to suppress, apparently on student's argument that the search violated Article I, section 9 (the opinion does not say that, however). The trial court, in so ruling, allowed into evidence the school's administrative search policy, which allowed a district official to search of a student if the official had "individualized, 'reasonable suspicion' to believe evidence of a violation of law, Board policy, administrative regulation or school rule is present in a particular place." The trial court concluded that the search was valid under the district policy, but the fruits of the search could not be used in a criminal prosecution. The state appealed.

The Court of Appeals reversed, not under the administrative exception, but rather under the public school exception to the warrant requirement set out in *Clackamas County v M A.D.*, 348 Or 381 (2010). In *M A.D.*, the Court held that, in the school setting, reasonable suspicion is required to allow public school officials to search a student for illegal drugs on public school premises, although not "all school searches should be subject to a 'reasonable suspicion' standard." Here, the Court of Appeals summarized M.A.D.'s legal standard and applied it to this case:

"Warrantless searches of students without probable cause or some other exception to the warrant requirement such as consent, then, appear to be permissible when a school official reasonably suspects, based on specific and articulable facts, that the student is in possession of something that poses an immediate threat to the student or others, including illegal drugs such as marijuana. Such a search is not permissible based on generalizations about drug use or on stale information. Under these standards, the search of youth in this case did not violate his rights under Article I, section 9, as construed by the Supreme Court in *M A.D.*" The evidence should not have been suppressed.

12. Jails and Juvenile Detention

(a). Article I, section 9

See State v Hartman, 238 Or App 582 (11/17/10) (Brewer, Wollheim, Rosenblum) *on reconsideration* (2/23/11), discussed at page 46.

(b). Strip Searches - Fourth Amendment

i. Adults

Bell v Wolfish, 441 US 520 (1979) held that a mandatory, routine strip search policy applied to prisoners after every contact visit with a person from outside

the institution, without individualized suspicion, was facially constitutional. Where "the scope, manner, and justification for San Francisco's strip search policy was not meaningfully different from the scope, manner, and justification for the strip search policy in *Bell*," Ninth Circuit concluded that a policy requiring strip searching (including visual body-cavity searching) every arrestee *without* individualized reasonable suspicion as part of the jail booking process, provided the searches are no more intrusive than those in *Bell* and are not conducted in an abusive manner, does not violate the arrestees' rights. *Bull v City and County of San Francisco*, 595 F3d 964 (9th Cir 2010).

ii. Juveniles

"The Fourth Amendment generally requires searches to be conducted pursuant to probable cause, or at least 'some quantum of individualized suspicion.' *Skinner v Ry Labor Executives' Ass'n*, 489 US 602, 624 (1989)." In certain limited circumstances, commonly referred to as "special needs" cases, the warrant and probable cause requirements are impracticable. Examples of "special needs" cases are public schools, see *Vernonia Sch Dist v Acton*, 515 US 646, 656 (1995) and *Pottawatomie County v Earls*, 536 US 822, 829 (2002). *Mashburn v Yamhill County*, 698 F Supp 2d 1233 (D Or 2010).

"Fourth Amendment challenges in the context of prisons and jails are not typically referred to as special needs cases," but the Supreme Court and Ninth Circuit have upheld prison searches predicated on less than probable cause, or even reasonable suspicion, such as "suspicionless strip searches of arrestees who were confined in a prison's general population," see *Bell v Wolfish*, 441 US 520, 560 (1979) and *Bull v City and County of San Francisco*, 595 F 3d 964, 980-82 (9th Cir 2010 (en banc). *Mashburn*, 698 F Supp 2d 1233 (strip searches conducted on juveniles on admission to detention do not violate Fourth Amendment standards, but the searches after contact visits violate the Fourth Amendment).

13. Probation Status

State v Hiner, 240 Or App 175 (12/29/10) (Ortega, Landau, Schuman) Defendant's family members were intoxicated in a casino parking lot. Deputy questioned them and asked the casino security to bring defendant to the parking lot. Before defendant arrived, deputy ran a computer check of all the involved people and discovered that defendant did not have a valid driver license and he was on probation for cocaine possession. Defendant arrived and had red, watery eyes, messy hair, and the deputy smelled alcohol on his breath. Defendant denied drinking, then said he had had a few sips, and refused the deputy's request to search him, pivoting his body sideways with his hands in his pockets, then trying to walk away. Deputy told him to stop, that he was not free to leave. Deputy said he knew defendant was on probation. Defendant then admitted he was on probation and his probation conditions prohibited alcohol consumption. Deputy called his probation officer, who told him to advise defendant that his probation conditions required consent to search. After some back-and-forth, defendant consented, and cocaine was found on him. Defendant's probation did not actually prohibit alcohol consumption. Defendant moved to suppress the evidence, which the trial court denied.

Court of Appeals affirmed. Defendant was stopped when the deputy told him he was not free to leave. "To comply with Article I, section 9, that stop had to be justified by reasonable suspicion." A statute (ORS 137.545(2) and case precedent (*State v Steinke*, 88

Or App 626, 629 (1987)) allow a police officer to arrest a probationer without a warrant for violating any condition of probation. The Court of Appeals quoted an Oregon Supreme Court for street encounters:

> "[T]here are three generally recognized categories of street encounters between policeman and citizen. In descending order of justification, they are: (1) arrest, justified only by probable cause; (2) temporary restraint of the citizen's liberty (a 'stop'), justified by reasonable suspicion (or reliable indicia) of the citizen's criminal activity; and (3) questioning without any restraint of liberty (mere conversation), requiring no justification." *State v Warner*, 284 Or 147, 161 (1978); *Steinke*, 88 Or App at 630.

Thus the authority to arrest a probationer for violation of a probation condition implies the authority to stop persons reasonably suspected of violating that probation condition. And as for the fact that defendant's probation conditions did not actually prohibit alcohol consumption, "[r]easonable suspicion, as a basis for an investigatory stop, does not require that the facts as observed by the officer conclusively indicate illegal activity but, rather, only that those facts support the reasonable inference of illegal activity by that person."

Defendant also validly consented to the search. Under a statute (ORS 144.350(1)(a) and case precedent (*State v Davis*, 133 Or App 467, 473-74, *rev den* 321 Or 429 (1995)), a probation officer may order the arrest of a probationer when the officer has reasonable grounds to believe that the probationer has violated the conditions of probation. Here, the officer told defendant he could refuse consent, also noting that such a refusal could subject him to arrest for a probation violation.

F. Remedies and Exceptions

General tenets:

> The Fourth Amendment "says nothing about suppressing evidence obtained in violation of" the right of people to be secure against unreasonable searches and seizures. "That rule – the exclusionary rule – is a 'prudential doctrine' . . . created by [the Supreme] Court to 'compel respect for the constitutional guaranty." *Davis v United States*, 131 S Ct 2419, 2426 (2011) (quotations omitted). "Exclusion is 'not a personal constitutional right,' nor is it designed to 'redress the injury' occasioned by an unconstitutional search." *Ibid*. "The rule's sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations." The rule's "bottom-line effect, in many cases, is to suppress the truth and to set the criminal loose in the community without punishment. . . . Our cases hold that society must swallow this bitter pill when necessary, but only as a last resort." *Ibid*. (quotations omitted).
>
> "The criminal is to go free because the constable has blundered." *People v Defore*, 242 NY 13, 21-22 (1926) (Cardozo, J.). "The thought is that in appropriating the results [of a federal officer's trespass], he ratifies the means." *Id*. at 22.
>
> "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the

administration of the criminal law the end justifies the means . . . would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face." *Olmstead v United States*, 277 US 438, 485 (1928) (Brandeis, J., dissenting); *Miranda v Arizona*, 384 US 436, 480 (1966) (quoting Brandeis).

"One way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else." *Elkins v United States*, 364 US 206, 217 (1960) (quotation omitted).

"It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense [against the right to be free from unreasonable searches and seizures]; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property". *Boyd v United States*, 116 US 616, 630 (1886).

"Cooley said of the Fourth Amendment 110 years ago that 'it is better oftentimes that crime should go unpunished than that the citizen should be liable to have his premises invaded, his trunks broken up, [or] his private books, papers, and letters exposed to prying curiosity.' * * * If the government could not have gained a conviction had it obeyed the Constitution, why should it be permitted to prevail because it violated the Constitution? * * * It is possible that the real problem with the exclusionary rule is that it flaunts before us the price we pay for the Fourth Amendment." *State v Warner*, 284 Or 147, 163-64 (1978) (quoting Yale Kamisar, *Is the Exclusionary Rule an 'Illogical' or "Unnatural' Interpretation of the Fourth Amendment?*, 62 JUDICATURE 66, 73-74 (Aug 1978)).

1. Article I, section 9: Exception or applicability of exclusionary rule

Oregon's exclusionary rule for Article I, section 9, violations is not based on a deterrence rationale like the Fourth Amendment's. Instead, in Oregon, the right to be free from unreasonable searches and seizures also encompasses the right to be free from the state's use (in certain proceedings) of evidence obtained in violation of Article I, section 9, rights. *State v Hall*, 339 Or 7, 24 (2005).

Under Oregon's Constitution, "the deterrent effect on future practices against others, though a desired consequence, is not the constitutional basis for respecting the rights of a defendant against whom the state proposes to use evidence already seized. In demanding a trial without such evidence, the defendant invokes rights personal to himself." *State v Murphy*, 291 Or 782, 785 (1981).

If a defendant establishes that, but for unlawful police conduct, evidence of a crime would not have been discovered, then the evidence must be suppressed unless the state establishes *either* (1) that the evidence would have been discovered independently of the illegality (inevitable discovery or obtained not only as a result of the illegality but also as a result of a chain of events that did not include any illegality) *or* (2) the connection between the unlawful stop and discovery of evidence is so tenuous that the unlawful police conduct cannot be viewed as the source of that evidence. *State v Hall*, 339 Or App 7, 25 (2005).

ORS 136.432 precludes courts from excluding evidence for statutory violations. *But see State v Davis*, 295 Or 227, 236-37 (1983) (There is "no intrinsic or logical difference between giving effect to a constitutional and a statutory right. Such a distinction would needlessly force every defense challenge to the seizure of evidence into a constitutional mold in disregard of adequate state statutes. This is contrary to normal principles of adjudication, and would practically make the statutes a dead letter.")

(a). Inevitable Discovery as Exception to Suppression

"Generally, evidence that police officers discover as a result of an unlawful seizure must be suppressed under Article I, section 9. An exception is that evidence that law enforcement officers would have inevitably discovered will not be suppressed." *State v Medinger*, 235 Or App 88 (2010).

See ***State v Hartman***, 238 Or App 582 (11/17/10) (Brewer, Wollheim, Rosenblum) *on reconsideration* (2/23/11), discussed at page 46.

(b). Attenuation as Exception to Suppression

"After a defendant shows a minimal factual nexus between unlawful police conduct and the defendant's consent, then the state has the burden to prove that the defendant's consent was independent of, or only tenuously related to, the unlawful police conduct." "*Hall* requires the defendant to establish a 'minimal factual nexus between unlawful police conduct *and the defendant's consent*,' not the police officer's request for consent. That is, the focus of the factual nexus determination . . . is on whether defendant would have consented to the search that uncovered the evidence if the officer had not unlawfully seized him." *State v Ayles*, 348 Or 622 (2010) (emphasis in original).

"A defendant gains nothing from having a constitutional right not to be seized if the police can seize him and – by definition – use the circumstance of that seizure as a guarantee of an opportunity to ask him to further surrender his liberty. There was a minimal factual nexus between defendant's illegal seizure and his decision to consent." *Id*.

2. Fourth Amendment: Exception or application of exclusionary rule

"It is one thing for the criminal 'to go free because the constable has blundered.' *People v. Defore,* 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926) (Cardozo, J.). It is quite another to set the criminal free because the constable has scrupulously adhered to governing law. Excluding evidence in such cases deters no police misconduct and imposes substantial social costs. We therefore hold that when the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply." *Davis v United States*, 131 S Ct 2419, 2433 (2011).

If a seizure violated a person's Fourth Amendment rights, that violation must be "egregious," to justify exclusion of the evidence as a remedy. An "egregious" constitutional violation occurs when the violation is "deliberate" or "a reasonable officer should have known" that his conduct violates the Constitution." *Martinez-Medina v Holder*, 616 F3d 1011 (9th Cir 2010).

A "violation of Oregon law does not constitute a violation of the Fourth Amendment" "even if a reasonable Oregon law enforcement officer should have known he lacked authority under his own state's law to apprehend aliens based solely on a violation of federal immigration law" and cannot be the basis for an egregious Fourth Amendment violation, under *Virginia v Moore*, 553 US 164, 173-74 (2008). *Martinez-Medina v Holder*, 616 F3d 1011 (9th Cir 2010).

Fourth Amendment's Good-Faith Exception to the Exclusionary Rule:

Even if a search violates the Fourth Amendment, the evidence is not subject to the exclusionary remedy if the government, in good faith, relied on a statute or case precedent to obtain the evidence. The exclusionary rule's purpose of deterring law enforcement from unconstitutional conduct would not be furthered by holding officers accountable for mistakes of a legislature. Thus, even if a statute is later found to be unconstitutional, an officer "cannot be expected to question the judgment of the legislature." *Illinois v Krull*, 480 US 340, 349-55 (1987).

"Where the search at issue is conducted in accordance with a municipal 'policy' or 'custom,' Fourth Amendment precedents may also be challenged, without the obstacle of the good-faith exception or qualified immunity, in civil suits against municipalities. See 42 USC §1983; *Los Angeles County v Humphries*, 562 US ___, ___ (2011) (slip op at 7) (citing *Monell v New York City Dep't of Social Svcs*, 436 US 658, 690-91 (1978))." *Davis v United States*, 131 S Ct 2419, 2433, n 9 (2011).

V. SELF-INCRIMINATION

"No person shall be * * * compelled in any criminal prosecution to testify against himself." – Article I, section 12, Or Const

"The right against self-incrimination stated in [Article I, section 12] of the Oregon Constitution is identical to, and presumed to have been based on, Article I, section 14, of the Indiana Constitution of 1851. . . . . It was adopted by the framers apparently without amendment of debate of any sort. . . . . The text of the Indiana provision was taken from Kentucky and Ohio bills of rights . . . which were based on the nearly identically worded Fifth Amendment to the United States Constitution. . . . . The Fifth Amendment, in turn, was based on existing state constitutional bills of rights that were adopted following the revolution, notably Section 8 of the Virginia Declaration of Rights [of 1776]." *State v Davis*, 350 Or 440, 447-48 (2011) (citations omitted).

"Surveys have shown that large majorities of the public are aware that individuals arrested for a crime have a right to remain silent (81%), a right to a lawyer (95%), and have a right to an appointed lawyer if the arrestee cannot afford one (88%)." *J.D.B. v North Carolina*, 131 S Ct 2394 n 13 (6/16/11) (Alito, J dissenting) (internal quotations omitted).

A. *Miranda* Rights

1. Federal Constitution

"[W]e hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. . . . . He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. . . . . [U]nless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of the interrogation can be used against him." *Miranda v Arizona*, 384 US 436, 478-79 (1966) (Fifth Amendment through Fourteenth).

"Any police interview of an individual suspected of a crime has 'coercive aspects to it.' *Oregon v Mathiason*, 429 US 492, 495 (1977) (per curiam). Only those interrogations that occur while a suspect is in police custody, however, 'heighte[n] the risk' that statements obtained are not the product of the suspect's free choice. *Dickerson v United States*, 530 US 428, 435 (2000)." *J.D.B. v North Carolina*, 131 S Ct 2394 (6/16/11). "Because [*Miranda* warnings] protect the individual against the coercive nature of custodial interrogation, they are required "'only where there has been such a restriction on a person's freedom as to render him 'in custody.'" *Stansbury v California*, 511 US 318, 322 (1994) (per curiam).

A confession is involuntary if it is not "the product of a rational intellect and a free will." *Townsend v Sain*, 372 US 293, 307 (1963). "Coercive police activity," which can be either "physical intimidation or psychological pressure," is a predicate to finding a confession involuntary. *Id*. at 307. Factors considered in that finding are: the length, location, and continuity of the police interrogation and the suspect's maturity, education, physical condition, mental health, and age. *Yarborough v Alvarado*, 541 US 652, 668 (2004). Threats and promises relating to one's children carry special force. *Brown v Horell*, 644 F3d 969 (9th Cir 2011) (quoting *Haynes v Washington*, 373 US 503, 514 (1963) and *Lynum v Illinois*, 372 US 528, 534 (1963)).

A person subjected to custodial interrogation is entitled to the procedural safeguards in *Miranda* regardless of the nature or severity of his suspected offense. *Berkemer v McCarty*, 468 US 420 (1984) (affirming constitutionality of no *Miranda* warning during roadside seizure for misdemeanor DUII before arrest).

In determining whether a suspect has been interrogated in a custodial setting without being afforded *Miranda* warnings, a court may consider the suspect's age. *J.D.B. v North Carolina*, 131 S Ct 2394 (6/16/11) (held: "so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test.").

Remedy for violation

Involuntary or coerced confessions are inadmissible at trial because their admission is a violation of a defendant's right to due process under the Fourteenth Amendment. *Lego v Twomey*, 404 US 477, 478 (1972); *Jackson v Denno*, 378 US 368, 385-86 (1964).

"Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means . . . would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face." *Olmstead v United States*, 277 US 438, 485 (1928) (Brandeis, J., dissenting); *Miranda v Arizona*, 384 US 436, 480 (1966) (so quoting).

2. Oregon Constitution

"'*Miranda* warnings' are those warnings 'required to effectuate the protections afforded by Article I, section 12,' so named for the United States Supreme Court's decision, *Miranda v Arizona*, 384 US 436 (1966)." *State v Bielskies*, 241 Or App 17, 19 n 1 (02/23/11) *rev denied* 350 Or 530 (6/30/11) (citing *State v Vondehn*, 348 Or 462, 470 (2010)).

Under Article I, section 12, *Miranda* warnings must be given to a person subjected to custodial interrogation who is in "full custody" and also to a person in circumstances that create a setting which judges would and officers should recognize to be compelling. *State v Roble-Baker*, 340 Or 631, 638 (2006). "Compelling" circumstances are determined by four factors in the encounter: (1) location; (2) length; (3) pressure on defendant; and (4) defendant's ability to terminate the encounter. *Id*. at 640-41; *State v Shaff*, 343 Or 639, 645 (2007) (same).

Under Article I, section 12, the state has the burden to prove, by a preponderance of the evidence, that any admissions or confessions by a defendant were made voluntarily. *State v Stevens*, 311 Or 119, 135-37 (1991).

Article I, section 12, does not prohibit police from attempting to obtain incriminating information from a suspect at a time that he is not in custody or in compelling circumstances, even if he has invoked his right against self-incrimination and even if the police use subterfuge in obtaining statements from the suspect. *State v Davis*, 350 Or 440 (2011).

State v Moore/Coen, 349 Or 371 (12/16/10) *cert denied sub nom, Coen v Oregon*, 131 S Ct 2461 (2011) (De Muniz) (Two consolidated cases; see Due Process, *post*, for further discussion.) Held: the trial courts erroneously admitted incriminating statements that police officers had obtained in violation of Article I, section 12, of the Oregon Constitution.

The Oregon Supreme Court remanded for new trials: "In Oregon, Article I, section 12, is an independent source for warnings similar to those required under the Fifth Amendment" by *Miranda v Arizona*, 384 US 436 (1966). "*Miranda*-like warnings" must be given to in-custody defendants and under "compelling" circumstances. Violations of this constitutional right result in exclusion of the statements "to restore the defendant to the position that he or she would have been in if police had not violated that constitutional

right." It does not matter if statements are obtained through "actual coercion" or through "police interrogation" in the absence of *Miranda*-like warnings. The Court here concluded that when a defendant's unconstitutionally-obtained statements are admitted into evidence at trial, it is assumed that the defendant's trial testimony is "tainted" by the error, and thus the testimony "must be excluded on retrial or from harmless error review by an appellate court unless the court can determine from the record before it that a defendant's trial testimony did not refute, explain, or qualify the erroneously admitted pretrial statements."

Here, Moore's trial testimony could not support a finding of guilt, thus "it is obvious that the erroneously admitted statements likely affected the verdict." His judgment is to be remanded for a new trial. As to Coen, the state did not even dispute that Coen's decision to testify was untainted, thus his judgment is remanded for a new trial. See further discussion of this case under Due Process, *post*.

State v Lunacolorado, 238 Or App 691 (11/17/10) (Schuman, Rosenblum; Wollheim concurring) Defendant violated a restraining order by writing and having a letter delivered. He was arrested and questioned at a police station. He was given *Miranda* warnings in English but he said he did not understand them. A detective repeated them point by point and asked defendant if he understood. He said he did. Defendant asked for an interpreter at some point and the detective told him no interpreter was available. Detective believed that he and defendant were communicating effectively. He said he would talk about the letter, but denied writing it several times before stating that he wrote it because he "loved his kids." At a motion to suppress his admission, his ex-partner testified through an interpreter that whenever an English-speaking person telephoned, defendant took the call and spoke in English. The trial court denied defendant's motion to suppress and defendant was convicted of criminal contempt.

The Court of Appeals affirmed: the only issue is whether defendant understood the *Miranda* warnings. The record shows that the trial court did not misapprehend the law – it applied the correct legal test and implicitly found the fact that defendant understood the *Miranda* warnings. Under Article VII (Amended), section 3, the Court of Appeals "must accept the fact if there is any evidence to support it." Here there is more than adequate support of that finding.

The concurrence agreed that the court is bound by the trial court's findings because there is evidence to support them, but that if the concurrence were to weight the evidence again, it "might reach a different outcome."

State v Roberts, 239 Or App 37 (11/24/10) (Haselton, Brewer, Armstrong) Police questioned defendant while defendant was in his front yard. Officers told him he "was not under arrest" and did not have to talk to police. He was read his *Miranda* rights. When an officer specifically asked about sexual contact with an alleged victim, defendant said he did not want to answer questions and wanted an attorney. The officer ended the conversation. Defendant was arrested later. At the police station, he then waived his *Miranda* rights and made inculpatory statements. The trial court denied his motion to suppress his inculpatory statements.

The Court of Appeals affirmed: defendant was not "in custody" during the backyard encounter when he invoked his right to an attorney. The court elaborated: "the governing constitutional principle . . . is that, if a criminal suspect unambiguously invokes the right to counsel *while in custody*," such as during custodial interrogation, "police cannot subject the suspect to further interrogation . . . until counsel has been

made available . . . unless the accused himself initiates further communication, exchanges, or conversations with the police." (Emphasis in original; citing *Edwards v Arizona*, 451 US 477 (1981)). Here, defendant was not in custody when he invoked his right to an attorney in his own backyard, and he was told that he was free to leave. The circumstances were not "compelling" so as to trigger constitutional protections under *State v Kell*, 303 Or 89 (1987) (adopting Edwards formulation for Article I, sections 11 and 12, of the Oregon Constitution).

State v Bielskies, 241 Or App 17 (02/23/11) *rev den* 350 Or 530 (2011) (Brewer, Sercombe, Landau pro tem) Officer saw defendant driving, knew he had a suspended license, and followed him to his house. Officer pulled his car alongside defendant, talked to him, and took him into custody. After handcuffing defendant, the officer found a pill bottle with large quantities of separately packaged pills (Oxycontin, Oxycodone, Valium) and $1000 cash. Officer inventoried the car and found a written drug ledger and $881 cash under the floor mat. Officer kept defendant in the patrol car and questioned defendant about drug trafficking in the neighborhood. Officer did not give defendant *Miranda* warnings and told him that nothing defendant said would be admissible because he had not been given *Miranda* warnings. Defendant denied drug-trafficking knowledge and said the pills were his for an injury. After a one-hour drive-around, officer put defendant in a holding cell and gave him *Miranda* warnings. Then officer drove defendant to jail, and questioned him about the pills. Defendant said he was addicted, sold pills to support his addiction, and each pill was worth $5-10. Before trial, defendant moved to suppress all of his statements both pre- and post-*Miranda*. The state conceded the pre-*Miranda* statements were inadmissible, and the trial court denied the motion as to the post-*Miranda* statements.

The Court of Appeals affirmed under *State v Vondehn*, 348 Or 462 (2010). First, "*Miranda* warnings are required by Article I, section 12," and "where those warnings are not given, the remedy is suppression of the evidence." Second, the "exploitation" analysis from Article I, section 9 cases does not apply to Article I, section 12 cases. The court affirmed, reasoning that here, as in *Vondehn*, there was a difference in the type of pre- and post-*Miranda* questions. The officer asked about other people's drug trafficking during the trip from defendant's house to the police station. After giving *Miranda* warnings, on the trip from the police station to the jail, the officer asked about defendant's drug trafficking. Second, there was the break in questioning between the two trips (*Miranda* warnings issued between the two trips). Additionally, although defendant was handcuffed in the back of the patrol car, he was not "subjected to any additional coercion." No error in denying the motion to suppress the post-*Miranda* statements, and the trial court correctly suppressed the pre-*Miranda* statements as the state conceded.

State v Nieman, 242 Or App 269 (4/20/11) (Ortega, Sercombe, Landau pro tem) Officer saw defendant alone in a truck outside of a restaurant. He parked 50 feet away without any overhead lights. Officer approached, and noticed defendant bent over with a small light looking at papers, and noted that the steering wheel was broken. Defendant seemed nervous. A pile of keys was on the seat. Asked for ID, defendant searched for it but couldn't find it, and refused to consent to the officer searching him. Officer asked defendant to step out of the truck. Defendant did, asked why, and the officer said, "I have not stopped you," but instead this was "just having a conversation" and defendant was free to leave. Defendant said he had nothing wrong. Another officer arrived. Officer asked to search defendant for ID, defendant refused, but said his ID might be inside the truck, and said, "Maybe I should have an attorney present." Officer began

taping the encounter, gave defendant *Miranda* warnings, told him he was not under arrest, then patted him down (finding nothing), let him get his driver's license, searched his truck after defendant consented (finding nothing), but did not search defendant because defendant asked him not to, then asked to look at defendant's eyes. Defendant allowed that, and the officer said defendant's pupils "appeared to be medium and fixed and they did not respond to the umbra of my flashlight or the outer edge of my flashlight as it ran across his eyes." This indicated recent stimulant use, the officer concluded. Officer asked defendant if he used stimulants and that he suspected defendant had something "illegal" on him. After pressuring defendant to "give him the illegal substance" and "stop using drugs," defendant finally produced a used syringe from his left sock, denied that it was his, then said it was his, and that he had used drugs that morning. After more back-and-forth, defendant produced a $20 bag of meth. Defendant moved to suppress all statements he made after receiving *Miranda* warnings. Defendant argued that his interaction with the officer placed him in "compelling circumstances" so that when he said, "Maybe I should have an attorney present," he had unequivocally asserted his right to counsel, at which point the officer was required to stop all questioning. The trial court denied the motion.

The Court of Appeals affirmed, citing *State v Schaff*, 343Or 639 (2007) and *State v Roble-Baker*, 340 Or 631, 641 (2006): the question turns on "how a reasonable person" would have understood the situation under "the totality of the circumstances," with an "overarching inquiry" into "whether the officers created the sort of police-dominated atmosphere that *Miranda* warnings were intended to counteract." After identifying the factors Oregon appellate courts look at to determine whether the circumstances are "compelling," the court here concluded that when defendant said, "maybe I should have an attorney present," the "circumstances were not compelling." This was a brief encounter on a public street, defendant was told he was not under arrest, he was not under restraints, only two officers were present (one of whom played no significant role), the tone was casual and cordial, and the police car was 50 feet away with no lights activated. "Accordingly, his invocation of his right to counsel did not require police to either stop questioning him or limit their questions to clarification of his intentions regarding asserting his right to counsel, and did not operate to render his continued voluntary participation in a police interview involuntary."

State v Nunez, 243 Or App 246 (6/01/11) (Brewer, Edmonds) A woman in an apartment complex reported that she was raped by an intruder who spoke English with a thick Hispanic accent. The complex also had had burglaries. Officers talked to defendant and asked if he had been at the complex. He said he had not. Later an officer went to defendant's trailer, turned on a tape recorder, and casually conversed with defendant. He admitted he had been looking inside windows (apparently of the apartment complex), and defendant agreed to go with the officer to identify the windows he had been looking into. Defendant rode in the back of the police cruiser. Defendant pointed out the windows he'd looked in, including one near the rape victim. Defendant made motions indicating that he had entered the apartment through the window. Officer handcuffed defendant. The rape victim saw defendant through her window and told the police that defendant looked like the rapist. During the 3-block ride to the police station, officer did not question defendant. At the station, police unhandcuffed defendant and began questioning him. Defendant talked about taking off window screens and his uncle's drinking problem. Officer realized he forgot to read defendant his *Miranda* rights and read them to him in English. Defendant admitted that he had raped the victim. Officer realized that there "might be some issues" with the interview so he stopped asking questions and took him to another officer who spoke Spanish. That officer was

not wearing a uniform. About 45 minutes later, that officer read defendant his *Miranda* rights in Spanish, defendant said he understood. Officer asked if defendant knew why he was there. Defendant said, "because he got high, he got drunk, he went to look into windows, and then he laid on some lady's bed." He admitted he raped the victim and gave DNA samples that matched the samples from the rape victim. Defendant moved to suppress the statements he made to the English-speaking and the Spanish-speaking officers as well as the DNA samples. The trial court suppressed the pre-*Miranda* statements made while defendant was handcuffed, but allowed in defendants statements made while he was not handcuffed, and did not suppress the post-English-language *Miranda* statements because those were understood.

The Court of Appeals affirmed. Before defendant was handcuffed, the circumstances were not "compelling" so as to require *Miranda* statements. When the officer handcuffed defendant, then that became a "compelling" circumstance, as the trial court concluded. As for the English-language warnings, the tape recording demonstrates that although defendant was not fluent in English, he understood it, as is apparent from that tape recording. No error.

State v Johnson, 244 Or App 574 (8/03/11) (Wollheim, Schuman, Rosenblum) Defendant was patted down after a witness to a robbery called police. He had a weapon and a loaded magazine. Officers asked if he had anything else, he said he had a gun in his car. Defendant said he had just robbed the store. Officer put him in the patrol car, gave him *Miranda* warnings, and interviewed him. He made incriminating statements. In the police station, officers again gave him *Miranda* warnings before interviewing him. He moved to suppress all statements as "not voluntary." The trial court denied the motion with one exception: the statement that he had a gun in the car.

The Court of Appeals affirmed the trial court's denial of defendant's motion to suppress statements defendant made. Defendant was given *Miranda* warnings in the middle of questioning, here as in *State v Vondehn*, 348 Or 462 (2010) (in which the Oregon Supreme Court adopted the plurality opinion in *Missouri v Siebert*, 542 US 600 (2004) to determine whether *Miranda* warnings mid-questioning are effective). The *Vondehn* court had adopted a six-factor test to determine if *Miranda* warnings were effective. Here, they were.

State v Ford, 244 Or App 289 (7/13/11) (Sercombe, Ortega, Landau) Officer observed a pickup truck illegally parked on a remote country road at 1:00 a.m., and stopped to do a "welfare check." Officer could see defendant and a 15 or 16 year old girl, both shirtless, through fogged windows, and the girl appeared to be sitting on his lap facing him. Officer asked for defendant's license. He was 20 years old, and the girl said she was 16. Another officer arrived with his police strobe lights flashing. Officer asked defendant to voluntarily exit the vehicle, which he did. A third deputy arrived. For over an hour, the officer told defendant 5 or 6 times that he knew what defendant had been doing with the girl, that she had given a story different than he was giving, and admonished defendant to tell him exactly what had happened. Defendant eventually made incriminating statements. Defendant was never given *Miranda* warnings, and the officer never told defendant that he was not free to leave. He was charged with third-degree sex abuse. Trial court denied defendant's incriminating statements.

The Court of Appeals reversed, citing the *Roble-Baker* and *Schaff* factors. Here, in a prolonged encounter in an isolated remote country road that was unfamiliar to defendant (the court concluded that without citing to evidence of that unfamiliarity) late at night in frigid December under the glare of a spotlight, officer persistently pressured

defendant for information that assumed defendant's guilt, without advising defendant of his *Miranda* rights. Although the officer did not threaten defendant or restrain him and the interview was one-on-one, nevertheless the spotlight and police lights shone, defendant's license was retained, defendant was not free to leave, and he was under the officer's supervision, the additional factor here is that the officer told defendant that his story did not match the victim's story and implied that she had accused him of a crime. The Court of Appeals thus concluded "that the officer's repeated commands to divulge more information, coupled with his implications of guilt, gave the encounter coercive overtones."

State v Bahmatov, 244 Or App 50 (6/29/11) Trial court properly suppressed a 15-year old defendant's statements made after officer threatened to take him to jail unless he told the truth because, at that point, defendant was in compelling circumstances necessitating *Miranda* warnings.

State v Northcutt, __ Or App __, 2011 WL 506711 (10/26/11) (Haselton, Brewer, Armstrong) Defendant advertised a "purse party" where she intended to sell designer clothes and accessories without authorization. She hosted the purse party at a hotel that was arranged for by an undercover FBI informant. On the first day of the purse party, two FBI agents entered the hotel suite with the informant's permission and showed defendant their FBI identifications. The FBI agents saw the designer clothing displayed with a credit card machine. Four or five more agents and a local detective then arrived. All were in plain clothes ("soft clothes") and none displayed a gun or handcuffs. Defendant was not arrested or given *Miranda* warnings during the encounter. One agent asked her some questions while other agents inventoried the items. In the bedroom part of the hotel suite, two agents sat down, one taking notes while the other asked questions from a chair. The bedroom door was closed but was opened when the inventorying agents entered to talk to the questioning agents in the bedroom. Questioning lasted about 90 minutes. Defendant did not ask or attempt to leave. Officers did not tell her she was free to leave. An officer told defendant that selling counterfeit items is an offense. Defendant immediately said she understood that it is illegal. She confessed. Defendant was remorseful, emotional, almost tearful. Officers were "very cordial, very nice," according to defendant. She never asked to take a break. After 90 minutes, officers told her she was free to go. One agent asked her to "stick around" to sign an inventory receipt for the seized items; she did so for about 20-30 minutes. The entire encounter thus lasted about two hours. She moved to suppress the evidence obtained during the motel encounter as an unlawful entry and that her statements were involuntary and that she was not advised of *Miranda* rights. She testified at the suppression hearing that she had confessed because she felt guilty about committing the crime and that, "As funny as it may sound, doing an illegal activity, I'm still an honest person." The trial court denied her motion.

The Court of Appeals affirmed, citing the *Roble-Baker* factors, 340 Or 631, 641 (2006), under Article I, section 12, and the Fifth Amendment. The court identified the difference between the two constitutional standards:

> "Under Article I, section 12, *Miranda* warnings are required prior to a custodial interrogation *and* when a suspect is under 'compelling' circumstances that do not rise to the level of full custody. *State v Magee*, 204 Or 261, 265 91987). Under the Fifth Amendment, '*Miranda* warnings must be given when a person is "in custody," i.e., when a person's freedom has been "significantly restrained[.]" *State v Smith*, 310 Or 1, 8 (1990)." (Emphasis by court).

Here, going over the factors: (1) the location was neutral; (2) the duration is not as important as "the qualitative dynamics," (3) there were no "aggressive or coercive police interrogation practices" (defendant never denied guilt but readily confessed at the outset), and (4) defendant's ability to terminate the encounter is "less clear-cut" and the trial court had concluded that defendant reasonably believed she was not free to leave, thus "that factor supports" the idea that "the circumstances were compelling." In sum though, notwithstanding that fourth *Roble-Baker* factor, the court agreed that under the totality of the circumstances, specifically the "complete lack of any sort of aggressive, overbearing, or coercive questioning, including (especially) with respect to defendant's damning admission of guilt at the very outset of the interview," this is not the sort of "police-dominated atmosphere that *Miranda* warnings were intended to counteract" under either constitution.

B. False Pretext Communications

State v Davis, 350 Or 440 (6/30/11) (Landau) A 17-year old girl reported to police that her stepfather had been sexually abusing her since she was 5 or 6. Detective contacted defendant by phone to discuss that. Defendant asked the detective if he needed an attorney and if there was a warrant out for him. Detective said defendant was not "wanted" and that it was up to defendant to get an attorney. Defendant hired an attorney, who sent a letter to the detective, in which the attorney invoked defendant's right to remain silent, and directed the detective not to talk to defendant. Eight months later, the girl reported to the detective that defendant had instant-messaged her. Detective asked the girl to come to his office twice a week to engage in monitored instant messages with defendant. She did. The detective instructed her to portray a persona, to elicit incriminating evidence. In three IMs and two phone calls, defendant made several incriminating statements. Detective used those statements to obtain a search warrant. Defendant was then charged with numerous counts of rape, sodomy, sex abuse, and the like.

Defendant moved to suppress the evidence of his conversations and any evidence discovered from the execution of the search warrant, on grounds that he had invoked his right to counsel and his right to remain silent. The trial court granted the motion. The state appealed and the Court of Appeals affirmed, only under Article I, section 12 (the police violated defendant's right against self-incrimination under Article I, section 12).

The Oregon Supreme Court reversed, in a detailed and reasoned analysis, which is not adequately condensable here. In a nutshell, the Article I, section 12 analysis is as follows (see discussion of this case under Right to Counsel, *post*, for Article I, section 11, analysis):

Article I, section 12, does not prohibit police from attempting to obtain incriminating information from a suspect at a time that he is not in custody or in compelling circumstances, even if he has invoked his right against self-incrimination and even if the police use subterfuge in obtaining statements from the suspect. Here, there is no suggestion that defendant's incriminating statements were not voluntarily made and defendant concedes that he was not in custody or otherwise in compelling circumstances. There "is no basis for concluding that defendant's self-incriminating statements were obtained in violation of Oregon's Article I, section 12." In so concluding the Court traced the history of Article I, section 12, back to 16th Century objections to the infamous Star Chamber and ecclesiastical Court of High Commission, or to other common-law antecedents. The Court here understood that although "scholars may debate the precise genealogy of the privilege, they do not appear to debate its animating principle, namely, an aversion to compelled testimony." At common law, "testimony obtained by means of

pretext or deception was not regarded as having been compelled." When Article I, section 12 was adopted, "the constitutional right against self-incrimination generally was understood to limit the means by which the state may obtain evidence from criminal defendants by prohibiting compelled testimony." And from "very early on, this court's cases held that the focus of Article I, section 12, is whether a defendant's testimony was compelled, or, conversely, whether it was voluntarily given. . . . . "[C]ompulsion is the principal underpinning of the protection." See also discussion of this case on page 88.

C. Polygraph Testing

Ordering parents to take a polygraph test to determine who caused injuries to their child (rather than for treatment only), without providing immunity from criminal prosecution as a condition, violated parents' Fifth Amendment rights against self-incrimination under *Kastigar v United States*, 406 US 441,444-45 (1972). *Dep't of Human Services v KLR*, 235 Or App 1 (2010).

D. Right to Counsel

"In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor." -- Article I, section 11, Or Const

1. Arrested Drivers

Article I, section 11, right to counsel includes the right of an arrested driver, on request, to a reasonable opportunity to obtain legal advice before deciding whether to submit to a breath test. *State v Spencer*, 305 Or 59, 74-75 (1988). That right includes the right to consult with counsel confidentially, in private. *State v Durbin*, 335 Or 183, 191 (2003). That right, however, "is triggered by a request for legal advice, not merely a request to talk with an individual who happens to be a member of a bar association." *State v Burghardt*, 234 Or App 61 (2010). "The requirement of confidentiality is a consequence of the privileged nature of conversations between an attorney and his or her client." *Id*. Asking a person to take field sobriety tests or breath tests is not "interrogation" under the state or federal constitution. *State v Highley*, 236 Or App 570 (2010) (citing *South Dakota v Neville*, 459 US 553, 564 n 15 (1983)); *State v Gardner* 236 Or App 150, 155 (2010); and *State v Cunningham*, 179 Or App 498, 502, *rev den* 334 Or 327 (2002)).

The state has the burden to show that a defendant was afforded a reasonable opportunity to consult with counsel in private. *State v Carlson*, 225 Or App 9, 14 (2008).

2. Investigations

The Article I, section 11, "right to an attorney is specific to the criminal episode in which the accused is charged. The prohibitions placed on the state's contact with a represented defendant do not extend to the investigation of factually unrelated criminal episodes." *State v Sparklin*, 296 Or 85, 95 (1983).

State v Robinson, 244 Or App 368 (7/20/11) (Schuman, Wollheim, Nakamoto) Police arrested defendant for DUII, brought him to jail, put him in a small room, and asked if he wanted to contact "anyone for advice." He said he did. Officer gave him 20 minutes and left the door either closed or two-inches open. Defendant could not get a hold of his attorney. Officer told him his time was up and asked him to take a breath test. Defendant refused. Trial court denied his motion to suppress evidence of his breath-test refusal. He was found guilty of DUII.

The Court of Appeals affirmed, sketching through the case law: Article I, section 11, contains no right "to actually contact an attorney," only "the right to a reasonable opportunity to do so." There is no "particular script or timeline that officers must follow" either, in that the actual request for a breath sample does not need to precede any opportunity to consult with counsel. "The touchstone in this circumstance is whether a DUII suspect has been provided a 'reasonable opportunity' to obtain counsel before submitting to the breath test." Here, the officer communicated, and defendant understood, that the opportunity to consult with counsel was to obtain advice about whether to take the breath test. Also, if the door was left ajar "up to two inches," that is not the equivalent of officers remaining in the room with him; there is no basis in this record that the cracked door had any effect – chilling or otherwise – on defendant's efforts to contact counsel.

Additionally, contrary to his argument, the introduction of evidence of defendant's breath-test refusal did not place him in a Hobson's choice to either leave his refusal unexplained or to offer evidence explaining why he refused it. Defendant chose to explain it (through cross of the officer) with evidence that he had said, "I'm not saying I won't take the test. Since I can't get a hold of my attorney, I don't know what to do." The prosecutor, during closing, noted that defendant chose to make that excuse. The trial court had denied defendant's motion to exclude evidence of his refusal to submit to the breath test and denied his motion for a mistrial. Affirming, the Court of Appeals cited *State v Anderson*, 53 Or App 246 (1981) and OEC 403 (no error to exclude evidence) and *State v Clark*, 233 Or App 553 (2010) (prosecutor's comments in closing were not grounds for a mistrial where defense counsel "opened the door" to the prosecutor's comment).

State v Potter, 245 Or App 1 (8/10/11) (Brewer, Edmonds SJ) Defendant tried to cash a forged check at a bank, where he was arrested. Defendant was in custody and had a lawyer appointed. Defendant's brother tried to cash a forged check at a bank, but he fled, leaving his ID at the bank; he was later arrested at that bank when he went back to try to cash the check again. He told one detective that defendant had made the forged check. That detective went to defendant's house, where his wife gave that detective defendant's hidden hard drive. That detective contacted the detective who had been assigned to defendant's case and the two together went to defendant's house and questioned defendant's wife. The detective assigned to the brother's case then went to defendant's house (after defendant was released), gave him *Miranda* warnings, and asked him specific questions about the brother's forged checks and also asked defendant to reveal the names of his accomplices. Defendant admitted having used a computer to create fraudulent checks, and admitted he gave one to his brother.

Before trial, defendant moved to suppress the statements he made to the detective who was investigating his brother's case, arguing that he had invoked his right to counsel on his own case and those cases were factually related. (Note: nothing in the factual statement in this opinion states that defendant invoked his right to counsel). Trial court denied defendant's motion.

The Court of Appeals reversed and remanded. The legal test under *State v Sparklin*, 296 Or 85 (1983) is whether the state's contact with a represented defendant was during the investigation of "factually unrelated criminal episodes." The right to counsel does not protect against factually unrelated criminal episodes. After reciting the facts of *Sparklin* and three subsequent cases, the court concluded that the two fraud investigations in this case were "factually related" for Article I, section 11: the cases involved "the same suspect," "the crimes in the consolidated cases were remarkably similar, involved overlapping evidence, and were committed in the same jurisdiction within close temporal proximity to each other, and the detectives investigating both sets of crimes were working collaboratively."

State v Gilmore, 350 Or 380 (5/26/11) (Kistler) Defendant was in jail for robbery with a sword. She sent notes to a detective asking to talk with him. Per police policy requiring two detectives to be present at such meetings, the detective asked another detective to accompany him. Unbeknownst to the requesting detective, the second detective had arrested defendant (and did not know he was going to be in defendant's presence). At the jail, defendant said she did not want the arresting detective there, she wanted to see her kids, her attorney was an asshole, she would plead right away, and she also agreed to "give up" the sword used in the robbery (she used a phone to call the person who was keeping the sword). No one read her *Miranda* warnings, no one reminded her that she had a right to an attorney, and no one tried to determine if she knowingly and intentionally chose to waive her right to counsel on the pending charges. Her lawyer – the asshole – moved to suppress her statements and the sword, as evidence obtained in violation of her right to counsel under Article I, section 11, and the Sixth Amendment. The trial court denied that motion, and the Court of Appeals affirmed.

The Oregon Supreme Court reversed: "because this record does not disclose that defendant was aware of the risks of foregoing counsel's assistance, the state failed to prove that she knowingly waived her right to counsel." The fact that she said her lawyer is an asshole does not allow the trial court to infer that defendant was aware that the statements she made to the officers could be used against her, or that the lawyer couldn't have provided valuable assistance.

Sketching out the basic principles, the Supreme Court quoted *State v Randant*, 341 Or 64 (2006) and *State v Sparklin*, 296 Or 85 (1983), to state that ordinarily, "there can be no interrogation of a defendant concerning the events surrounding the crime charged unless the attorney representing the defendant on that charge is notified and afforded a reasonable opportunity to attend." That bar is not absolute, in that the right is "offense-specific," meaning that the state constitutional prohibitions placed on the state's contact with a represented defendant do not extend to the investigation of factually unrelated criminal episodes. And Article I, section 11, "does not preclude the state from using statements about the charged crime that a defendant unilaterally volunteers." Also, if a defendant initiates a conversation about a charged crime and knowingly waives the right to counsel, Article I, section 11, does not bar the state from using any statement the defendant makes. The issue here, though, is that even if defendant initiated the discussion with the detectives, the state still had to prove that defendant knowingly and intentionally waived her right to counsel, which it failed to do.

State v Davis, 350 Or 440 (6/30/11) (Landau) A 17 year old girl reported to police that her stepfather had been sexually abusing her since she was 5 or 6. Detective contacted

defendant by phone to discuss that. Defendant asked the detective if he needed an attorney and if there was a warrant out for him. Detective said defendant was not "wanted" and that it was up to defendant to get an attorney. Defendant hired an attorney, who sent a letter to the detective, invoking defendant's right to remain silent, and directing the detective not to talk to defendant. Eight months later, the girl reported to the detective that defendant had instant-messaged her. Detective asked the girl to come to his office twice a week to engage in monitored IMs with defendant. She did. The detective instructed her to say certain things to elicit incriminating evidence. In three IMs and two phone calls with his stepdaughter, defendant made several self-incriminating statements. Detective used those statements to obtain a search warrant. Defendant was then charged with numerous counts of rape, sodomy, sex abuse, and the like. Defendant moved to suppress his conversations and any evidence discovered from the execution of the search warrant, on grounds that he had invoked his right to counsel and his right to remain silent. The trial court granted the motion. The state appealed and the Court of Appeals affirmed, holding that the police violated defendant's right against self-incrimination under Article I, section 12 (not addressing Article I, section 11).

The Oregon Supreme Court reversed, in a detailed and reasoned analysis, which is not adequately condensable here. In a nutshell, the Article I, section 12, analysis is as follows (see discussion of this case under Right Against Self-Incrimination, *ante*, for Article I, section 12, analysis):

Article I, section 11, does not prohibit police from continuing a criminal investigation of a suspect, by attempting to obtain information from the suspect himself, before the initiation of any criminal prosecution, even if the suspect announces that he has retained counsel and will not speak with police without the presence of counsel. Here, when police obtained the statements from defendant through false pretext (guiding the victim on what to say), defendant was not under arrest and no formal charges had been brought against him. Thus, he was not an "accused" in a "criminal prosecution" under Article I, section 11. The police did not violate his right to counsel even though he attempted to invoke an Article I, section 11, right to counsel before he was formally charged with a criminal offense and before he was arrested.

In so concluding, the Court traced the history of Article I, section 11, to the English common law, through the early American colonial period, the post-Independence period, and nineteenth-century reforms:

> "Notably, the Sixth Amendment, like a number of parallel provisions of existing state constitutions, refers to a right of 'the accused' that may be exercised during 'criminal prosecutions,' which suggests that the focus of the amendment is on the rights of a defendant at trial or, at the earliest, following formal charging."

It follows that when Article I, section 11, was adopted,

> "the constitutional right to counsel would have been understood to guarantee a right to counsel at trial and, perhaps, some measure of preparation for trial following the commencement of formal adversary proceedings. . . . . [E]ven when state and federal courts began to extend the right to counsel to stages of a criminal prosecution before the trial itself – nearly a century after the adoption of the Oregon Constitution – they uniformly adhered to the conclusion that the text of the guarantee and its underlying purpose could not justify extending the right to encounters before the initiation of formal criminal proceedings."

And "prior decisions of this court are consistent that, *at the earliest*, the right to counsel under Article I, section 11, attaches at the time a defendant has been taken into formal custody." Here, defendant was not arrested and had not been charged, thus, he was not an "accused" in any "criminal prosecution" yet. See also discussion of this case on page 84.

VI. ACCUSATORY INSTRUMENTS

"(3) Except as provided in subsections (4) and (5) of this section, a person shall be charged in a circuit court with the commission of any crime punishable as a felony only on indictment by a grand jury.

"(4) The district attorney may charge a person on an information filed in circuit court of a crime punishable as a felony if the person appears before the judge of the circuit court and knowingly waives indictment.

"(5) The district attorney may charge a person on an information filed in circuit court if, after a preliminary hearing before a magistrate, the person has been held to answer upon a showing of probable cause that a crime punishable as a felony has been committed and that the person has committed it, or if the person knowingly waives preliminary hearing.

"(6) An information shall be substantially in the form provided by law for an indictment. The district attorney may file an amended indictment or information whenever, by ruling of the court, an indictment or information is held to be defective in form." – Article VII (Amended), section 5, Or Const

Article VII (Amended), section 5, requires generally that those charged with a felony must be charged by grand jury indictment. That provision serves four functions: (1) to provide notice; (2) to identify the crime to protect against additional prosecution for the same crime; (3) to inform the court; and (4) to ensure that a defendant is tried only for an offense that is based on facts found by the grand jury. *State v Burnett*, 185 Or App 409, 415 (2002).

The primary function of an indictment is to provide notice to a defendant as to what crime he is being prosecuted for. An indictment pleaded in the language of the relevant statute ordinarily is sufficient to withstand a demurrer. When an indictment completely lacks language regarding an essential element of a crime, as in *Burnett*, then the indictment is insufficient. *State v Anderson*, 233 Or App 475 (2010).

Article VII (Amended), section 5(6) "does not require that a grand jury find facts that pertain only to sentencing." There "is no requirement that facts that pertain only to sentencing be pleaded in the indictment." *State v Williams*, 237 Or App 377 (2010).

Subcategory facts that pertain only to sentencing need not be submitted to the grand jury; the "Oregon Constitution does not require that a grand jury find facts that pertain only to

sentencing. That is because a fact that pertains only to sentencing is not a matter that is essential to show that an offense has been committed." *State v Williams*, 237 Or App 377, 383 (2010)

The "Oregon Constitution does not require that enhancement factors be set forth in the indictment." *State v Sanchez*, 238 Or App 259, 267 (2010), *rev den* 349 Or 655 (02/17/11).

VII. DELAYS

A. Pre-indictment Delay – Due Process (Fifth and Fourteenth Amendments)

The time before an arrest or formal charge is not taken into consideration in determining whether a defendant has been given a speedy trial under the state and federal constitutions. *State v Serrell*, 265 Or 216, 219 (1973); *United States v Marion*, 404 US 307, 313 (1971).

B. Speedy Trial

"[J]ustice shall be administered, openly and without purchase, completely and without delay." - Article I, section 10, Or Const

Speedy trial claims under Article I, section 10, are guided by considering the length of the delay and, if it is not manifestly excessive or purposely caused by the government to hamper the defense, the reasons for the delay, and prejudice to the defendant. *State v Harberts*, 331 Or 72, 88 (2000).

State v Loza, 244 Or App 71 (6/29/11) (Armstrong, Brewer, Haselton) (Statutory, not constitutional case). Delay of 101 and 110 months in two cases is attributable to the state, and is unreasonable, and therefore violated defendant's statutory speedy trial rights. Judgments reversed. Constitutional speedy trial rights are "normally" considered before statutory speedy trial rights because a state may refile charges in some cases, depending on the type of crime and applicable statute of limitations Here, the charges cannot be reprosecuted if dismissed, and thus the court began and ended with the statutory arguments.

State v Coulson, 243 Or App 71 (6/01/11) (Haselton, Armstrong; Brewer concurring) (Case decided on statutory grounds without reaching constitution). Defendant received a citation directing him to appear in court on December 2, 2002, for unauthorized use of a vehicle. The state did not file a complaint or information based on that citation, but instead initiated a separate prosecution based on an indictment on November 19, 2002, for the same UUV charge plus two other felonies stemming from the same incident. The state issued a warrant on that November indictment, but did not execute that warrant until it expected defendant to appear for his citation on December 2, 2002. Defendant failed to appear on December 2, but he had no notice that an indictment had been issued against him, or that any prosecution separate from the citation-based one that the state then abandoned. The state received ten notices that defendant had been arrested in various places in California, but the state made no attempt to extradite him. On May 15, 2008, he was arrested in Portland. The trial court dismissed the indictment-based prosecution on statutory speedy trial grounds (not reaching the constitutional issue).

The Court of Appeals affirmed: "Absent such notice, defendant cannot be deemed to have consented to the delay in this case, which was based on the indictment." Where "a defendant fails to appear pursuant to a citation without knowledge of a subsequent *indictment*, that failure to appear cannot constitute delay of trial of the offenses charged by the indictment." In other words: "even if a prosecution commences for speedy trial purposes with the issuance of a citation, as opposed to an information, in this case the *indictment* began a new prosecution for speedy trial purposes." In sum, the court concluded, defendant did not consent to any of the delay between his nonappearance on December 2, 2002, and his apprehension in Oregon on May 15, 2008.

The court also footnoted: "The order of our analysis in this case is somewhat atypical. . . . [A] defendant is entitled to a dismissal with prejudice if he or she prevails on a speedy trial claim raised under Article I, section 10, or the Sixth Amendment," so the court "usually" considers those claims first. Here, as in *State v Snyder*, 227 Or App 544, 552 (2009), the court did not do so "because the trial court expressly declined to reach defendant's constitutional arguments for dismissal" and thus "it did not resolve any of the factual issues material to such a determination (e.g., factual matters pertaining to actual prejudice to the defense as a result of the delay."

State v Glushko/Little, __ Or __ (11/10/11), 2011 WL 5429289 (Landau) (statutory not constitutional case) ORS 135.747 provides that the court shall order an accusatory instrument to be dismissed if a defendant, charged with a crime, is not brought to trial within a reasonable time period, unless the trial was postponed at defendant's request or with his consent. Defendant Glushko's trial was delayed for 101 months and Little's was delayed for 114 months. The trial courts denied their statutory speedy trial motions to dismiss. The Court of Appeals AWOP'd.

The Oregon Supreme Court affirmed, holding that a defendant's mere failure to appear at scheduled hearings does not constitute consent under ORS 135.747. But in these cases, the delays were reasonable under the two-step analysis in State v Davids, 339 Or 96, 100-01 (2005). First, the Court determines the amount of delay by subtracting delay that defendant requested or consented to from the total delay. Second, the Court determines whether that delay is reasonable. The Court here traced the statutory history of Oregon's speedy trial statute to Oregon's Territorial Code of 1854 and concluded: "based on the text, context, and historical origins of ORS 135.747, we hold that a defendant gives 'consent' to a delay only when the defendant expressly agrees to a postponement requested by the state or the court." As to reasonableness, in these cases, "there is no question but that both defendants caused the delays in bringing their cases to trial by their failures to appear." No error.

VIII. TRIAL

A. Criminal

"**In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor.**" -- Article I, section 11, Or Const

"Article I, section 11, was adopted as part of the original state constitution. Its wording is identical to the wording of Article I, section 13, of the 1851 Indiana Constitution and is, consequently, presumed to have been based on that state's guarantee. . . . . It was adopted without amendment or debate." *State v Davis*, 350 Or 440, 464 (2011) (citations omitted).

The original Article I, section 11, was amended in 1932 and 1934 by adding other guarantees concerning jury verdicts in first-degree murder trials. *State v Davis*, 350 Or 440, 462 n 9 (2011).

The right to a jury trial in Article I, section 11, extends to all offenses if they have the character of criminal prosecutions. *Brown v Multnomah County District Court*, 280 Or 95 (1977). Indicia to determine a civil from a criminal proceeding include: the type of offense, the penalty, the collateral consequences, punitive sanctions, and arrest and detention. *Id*. at 102-108.

1. Venue

> Under "Article I, section 11, of the Oregon Constitution guarantees a criminal defendant the right to a trial 'in the county in which the offense shall have been committed.' This venue requirement is a material allegation of the indictment that must be proven beyond a reasonable doubt." *State v Turner*, 235 Or App 462 (2010) (quoting *State v Cervantes*, 319 Or 121, 123 (1994)).

State v Harris, 242 Or App 438 (4/27/11) (Ortega, Sercombe, Landau pro tem) Defendant advertised her erotic services for sale on a website. A Washington County investigating officer called her number and spoke with her while she was in Multnomah County. Over the phone, defendant offered or agreed to engage in sexual contact for a fee. She met with the officer in Washington County and was arrested for prostitution. She was tried in the Washington County Circuit Court. When the state closed, she moved for judgment of acquittal because the state failed to prove venue in Multnomah County where the crime occurred. Trial court denied her motion.

The Court of Appeals affirmed, first citing the constitutional grounds for venue, and then the statutory grounds. The only dispute is where the "offer" to have sex for a fee occurred. Court of Appeals examined that statute that uses the word "offer" and "agree" and interpreted them under *Webster's Third New Int'l Dictionary*, reasoning that: "The definitions of both 'offer' and 'agree' contemplate the presence and participation of another party in the completed commission of each act. That is, although the act of making an offer may technically require only unilateral conduct . . . that offer must be made to someone . . . Similarly . . . the act of agreeing requires at least two persons." Given those meanings in the statute, "when an offer to provide sexual services for a fee is communicated to a person in another county by telephone, venue is proper in the locations where the parties to the conversation are located."

The state also argued that venue should be treated "as a waiveable constitutional right associated with the place of trial." Court of Appeals rejected that argument "without further discussion," citing *Cervantes*.

2. Jury

(a). Jury Unanimity

> "**[I]n the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by unanimous verdict, and not otherwise[.]**" – Article I, section 11, Or Const

A criminal defendant's constitutional right to trial by jury in Article I, section 11, does not require a unanimous verdict, nor does it forbid conviction by a 10-to-2 verdict. *State v Gann*, 254 Or 549 (1969).

The "privileges and immunities of citizens of the United States do not necessarily include all the rights protected by the first eight amendments to the Federal Constitution against the powers of the Federal government." *Maxwell v Dow*, 176 US 581, 597-98 (1900) (thus States "should have the right to decide for themselves . . . whether there shall be a jury of twelve or a lesser number, and whether the verdict must be unanimous or not.").

The Sixth Amendment, through the Fourteenth, does not require a unanimous jury verdict in state courts, although the Sixth Amendment requires unanimity in federal jury trials. *Apodaca v Oregon*, 406 US 404 (1972) ("The origins of the unanimity rule are shrouded in obscurity, although it was only in the latter half of the 14th century that it became settled that a verdict had to be unanimous.") *Id*. at 407 & n 2.

Cf. State v Jones, __ Or App __ (11/09/11), 2011 WL 5386653 (Brewer, Haselton, Armstrong) Defendant was charged with numerous crimes, including assault and strangulation, against his wife. The Court of Appeals opinion states: "Defendant was convicted by the jury." The court footnotes: "Defendant raises [an] assignment of error regarding nonunanimous jury verdicts, which we reject without further discussion. *See, e.g., State v Cobb*, 224 Or App 594 (2008), *rev den*, 346 Or 364 (2009)."

(b). Number of Jurors

A State can, consistently with the Sixth Amendment as applied to the States through the Fourteenth, try a defendant in a criminal case with a jury of six rather than twelve members. *Williams v Florida*, 399 US 78, 86 (1970).

This is so even though "there can be no doubt" that the Sixth Amendment was intended to be composed of twelve jurors and that the Seventh Amendment was intended to require unanimity of those twelve jurors: the States may make and enforce their own laws as long as they do not conflict with the Fourteenth Amendment. The right to as 12-person jury is not a privilege or immunity of national citizenship, thus the Seventh Amendment does not preclude the States

from enacting laws as to the number of jurors necessary to compose a petit jury in a noncapital criminal case. *Maxwell v Dow*, 176 US 581 (1900).

(c). Waiver of Jury-Trial Right

"In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury * * * any accused person, in other than capital cases, and with the consent of the trial judge, may elect to waive trial by jury and consent to be tried by the judge of the court alone, such election to be in writing[.] * * * " -- Article I, section 11, Or Const

Holding a bench trial without any written waiver of defendant's right to a jury trial violates Article I, section 11. *State v Barber*, 343 Or 525 (2007); *State v Webster*, 239 Or App 538 (2010).

State v Bailey, 240 Or App 801 (02/16/11) (Gillette, SJ and Brewer) Defendant was convicted of disorderly conduct and trespass, apparently by the court rather than a jury. She did not object to proceeding to trial without a jury. No evidence in the record indicates that defendant waived that right in writing, as Article I, section 11, mandates. She signed a "conditional release agreement" that said, if she failed to appear, among other things, her release agreement will be revoked, an arrest warrant will issue, and "the jury will be notified not to appear." On appeal, the state argued that that "conditional release agreement" is sufficient to be a waiver of her constitutional jury-trial right. Court of Appeals disagreed: "it says nothing as to warn that defendant's signature also will constitute a waiver of a right to a jury trial." The Court of Appeals block-quoted from *State v Barber*, 343 Or 525, 529 (2007) (Gillette) and also noted:

> "as the *Barber* opinion explains, this particular species of error is one that is apparent on the face of the record and, because of the unique specificity of Article I, section 11, this court has no discretion to ignore the error, once it is called to our attention. *Barber*, 343 Or at 528-30."

State v Wilson, 240 Or App 708 (02/16/11) (Armstrong, Schuman, Rosenblum) Defendant's license was suspended for a DUII conviction. He was driving after consuming alcohol, noticed a police car following him, sped away on a residential street with his lights off, ran a stop light, and crashed into another car. That driver died. He was convicted of first-degree manslaughter among other crimes. The trial court, after discussing the issue in chambers then on the record, had denied his request to waive his right to a jury trial (he wanted to try the case to the court instead). The trial court had said, among other things, "Well, it's been my policy over the years to try to be in a situation where if someone had an objection to me acting as the finder of fact that I would not, in fact, act in that capacity."

The Court of Appeals affirmed. In 1932, Oregon voters adopted the part of Article I, section 11, that gives defendants in noncapital cases the right to waive a jury trial and be tried by the court. The purpose was to promote the efficient use of judicial resources by changing the former constitutional rule that had required criminal cases to be tried to a jury. As explained in *State v Baker*, 328 Or 355 (1999), Article I, section 11, "grants to only one person the power to defeat a defendant's choice to be tried by the court sitting

without a jury – the trial judge." The trial court has discretion to grant or deny such a request.

Here, the court's decision to deny defendant's motion to waive the jury does not reflect an understanding that the trial judge had no choice but to deny the waiver just because the state wanted a jury, as defendant argued. The trial court did not cede to the state the decision whether to grant defendant's waiver request.

State v Harrell, 241 Or App 139 (02/23/11) (Sercombe, Ortega, Landau) Defendant was on trial for multiple assault-related crimes. After the jury had been deliberating for several hours, defendant offered a written waiver of his jury-trial right and tried to have the judge act as fact-finder. The state objected. Trial court denied the waiver on grounds that it did not have discretion at that point to allow the waiver unless the state agreed. Trial court also issued a provisional verdict to avoid retrial, and would have acquitted defendant on all charges. Jury found defendant guilty of two of the counts. After trial, before judgment was entered, defendant moved the court to reconsider its decision, and the trial court recharacterized its decision as a discretionary decision, stating that his biggest consideration was "the timing of the waiver."

The Court of Appeals affirmed. As noted in *State v Baker*, 328 Or 355, 359 (1999), Article I, section 11, gives a criminal defendant in a noncaptial case the right to waive a jury, subject to only two conditions: (1) waiver must be in writing and (2) trial court must consent to the waiver. The text does not limit when a defendant must waive that right. No case has limited that time, either. The history of Article I, section 11, suggests a focus on judicial economy, see *Baker*. Under *Baker* and last week's *Wilson* opinion [discussed on page 94], the trial court has the discretion to grant a waiver but may not deny a waiver based solely on the state's objection. The court may consider the state's position. Here, the determination was not based exclusively on the state's objection to the waiver; the state's objection was one consideration and that consideration was not an abuse of discretion. The "timing of the waiver was particularly relevant" in this case "given that the trial court and the parties might have approached the case differently knowing that the court, and not a jury, would act as factfinder." No abuse of discretion here; affirmed.

(d). Juror Anonymity

State v Sundberg, 349 Or 608 (02/17/11) (Balmer, De Muniz, Durham, Kistler, Walters, Linder) (Gillette and Landau not participating) The Linn County circuit judges implemented a jury-trial policy to identify jurors with numbers rather than with their names. Under that policy, and in this case, during *voir dire*, jurors were instructed not to reveal their names, addresses, or their employers' names. The policy arose based on jurors' concerns about revealing their names to litigants, according to the trial court in the present case. Some jury trials in Linn County, however, did not use anonymous juries, including *voir dire* in a concurrent jury trial, a pool from which some of *this* defendant's jurors had been taken.

Defendant was charged with several sex crimes against his 10-year old niece. Overruling defense counsel's objection, the trial court empaneled an anonymous jury that convicted defendant. After the verdict, defendant moved for a new trial on grounds that the anonymous jury selection process was an "irregularity" that denied him an impartial jury, in violation of Article I, section 11, and the Sixth Amendment. Trial court denied that motion.

The Court of Appeals affirmed, concluding that defendant waived any objection because he did not object before the jury convicted him, and defendant failed to ask the trial court to make findings to justify the use of an anonymous jury, nor request any cautionary instructions.

The Oregon Supreme Court reversed. First, defendant did not waive the objection: the concerns he raised although they did not cite the constitutions directly implicated his right to an "impartial jury" under Oregon's Constitution, see *State v Hitz*, 307 Or 183, 188 (1988) (issue, source, argument). As to the merits, this is an issue of first impression for the Court. The Court cited the *Priest v Pearce*, 314 Or 411, 415-16 (1992), methodology (wording, historical circumstances, case law) to determine if an anonymous jury violated Article I, section 11. The Court concluded that although jurors' names were known, traditionally, from the late 1700s, nothing in the text or history of Article I, section, "indicates that a defendant's right to an 'impartial jury' includes a constitutional right to be provided with the names of jurors." Oregon's case law, "more generally," demonstrates "that the impartial jury guarantee protects a defendant both from individual jurors who are biased and from external factors, such as courtroom conditions, suggesting a particular defendant's dangerousness or guilt." In "a criminal case, there is a significant risk that members of the jury might infer that their names were being withheld to protect them from defendant or others acting on his behalf."

The Court then recited numerous other jurisdictions' cases and agreed with them:

> "We agree with the other state and federal courts that have held that anonymous juries are permissible only if the trial court 'concludes that there is a strong reason to believe that the jury needs protection' and the court takes 'reasonable precautions to minimize any prejudicial effects on the defendant and to ensure that his fundamental rights are protected. [*United States v Paccione*, 949 F2d 1183, 1192 (2nd Cir 1991), *cert denied*, 505 US 1220 (1992)]."

The Court stated that the decision to empanel an anonymous jury "must be made on the facts of each case – and not on the basis of a generalized desire to protect the anonymity of all jurors in all cases in the interests of juror privacy." Further, "we do not endorse any particular list of 'factors'" but one "federal court has identified a nonexclusive list of factors to be considered in deciding when it is appropriate to withhold juror names:

> "(1) the defendants' involvement with organized crime; (2) the defendants' participation in a groups with the capacity to harm jurors; (3) the defendants' past attempts to interfere with the judicial process or witnesses; (4) the potential that the defendants will suffer lengthy incarceration if convicted; and (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation and harassment. [*United States v Fernandez*, 388 F3d 1199, 1244 (9th Cir 2004), *cert denied*, 544 US 1043 (2005)]."

Here, the trial court erred, and that error was not harmless. "Article I, section 11, permits an anonymous jury only when the trial court finds that the circumstances of a particular case justify that practice and takes steps to mitigate any prejudice to defendant." The Supreme Court did not appear to analyze or decide the case under defendant's Sixth Amendment claim.

(e). <u>Jury's Duties</u>

"**In all criminal cases whatever, the jury shall have the right to determine the law, and the facts under the direction of the Court as to the law, and the right of new trial, as in civil cases.**" -- Article I, section 16, Or Const

State v Johnson, 238 Or App 672 (11/17/10) (Schuman, Wollheim, Rosenblum) Defendant was in an altercation with a police officer who ordered him to stop resisting. Defendant did not stop. He was arrested and convicted of interfering with a peace officer, among other crimes. He contended that the statute criminalizing one's refusal to obey a "lawful" order is facially unconstitutional under Article I, section 16, because it "forces a jury to make an ad hoc determination" about whether a particular "order" was "lawful."

The Court of Appeals affirmed. The statute (ORS 162.247(1)(b)) does not allocate duties between judge and jury. "When a court . . . presents only predicate factual questions to a jury but makes the determination regarding the legal effect of those facts on its own – or, in the words of Article I, section 16, directs the jury with respect to legal questions – no violation of Article I, section 16, occurs." The Court of Appeals noted that the text of Article I, section 16, is the result of a compromise at the Oregon Constitutional Convention after intense debate, as noted in Carey's *The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857* (1926). The Court of Appeals also noted prior interpretations of that provision:

> "[U]nder Article I, section 16 . . . it would be error to allow the jury to decide questions of law. Although the text of the provision states, 'In all criminal cases whatever, the jury shall have the right to determine the law, and the facts under the direction of the Court as to the law,' the Oregon Supreme Court long ago explained, 'In order to effectuate the clause in the [C]onstitution, "under the direction of the court as to the law," it is the plain duty of the jury to accept and apply the law as given them by the court.' *State v Wong Si Sam*, 63 Or 266, 272 (1912)."

3. Right to Counsel

(a). During Trial

A criminal defendant may waive the right to be represented by counsel at critical stages in criminal proceedings; the waiver must be voluntarily and knowingly made. *State v Meyrick*, 313 Or 125, 132 (1992). "In determining whether a waiver was knowingly and intelligently made [under the Sixth Amendment], the proper inquiry should focus on the assessment of the defendant's 'knowing exercise of the right to defend himself.'" *Meyrick*, 313 Or at 137 (quoting *Faretta v California*, 422 US 806, 836 (1975)).

State v Easter, 241 Or App 574 (3/23/11) (Wollheim, Brewer, Rosenblum) Defendant had been arrested 27 times with 9 felony convictions for property crimes. This case was about theft of a vacuum. In this case and two other pending cases, the same court-appointed counsel represented him. Defendant told the court that he would get his own attorney before trial, but went to trial with appointed counsel. At trial, he very actively co-defended his case with his attorney by, for example, objecting the state's opening statement, correcting and disagreeing with his attorney during trial, and telling the trial judge that his attorney "doesn't speak too well." After the state closed its case, defendant moved to discharge his attorney. Trial judge warned defendant that that "would be a

very bad move." Defendant continued to assert his right to represent himself. The trial judge continued to express concerns and warned defendant that he could lose his right to any closing argument by misbehaving "like you've done about five times today already." The trial court emphasized the gravity of not having counsel. Defendant promised not to misbehave and reiterated that he could clearly express himself. The trial court discussed defendant's lack of legal training and asked to retain the attorney just so that defendant could confer with his attorney. Defendant said he understood. The trial court set ground rules and defendant agreed to allow the attorney to be present as a legal advisor. Defendant did his own closing argument. After the jury was excused to deliberate, court told attorney that he had "been fired" and that he was "free to go." The jury unanimously convicted defendant of theft and interfering with a police officer.

On appeal, defendant argued that he did not "knowingly" waive his right to counsel under the state and federal constitutions. The Court of Appeals affirmed: "This case is about chutzpah." First, the Court of Appeals reiterated that "the obligation rests with the court to determine whether the waiver of counsel is made knowingly." As to the merits, closing argument is a critical stage of a criminal proceedings to which Article I, section 11, and the Sixth Amendment attach. To "knowingly" (or "intelligently") waive the right to counsel, a defendant must be aware of the right and understand the risks of waiving it. A "colloquy on the record is the preferred method of establishing that the waiver was made knowingly," but courts "will also affirm a trial court's acceptance of a defendant's waiver of the right to counsel where, under the totality of the circumstances, the record reflects that the defendant knew of the right to counsel and understood the risks of self-representation." Evidence to establish an inference of a "knowing" waiver can be the defendant's "prior experience with the criminal justice system," his "first-hand experience of 'some of the basic things that an attorney could do,'" and a "request for retained counsel."

Here, the state concedes that the trial court did not engage in the preferred colloquy as in *State v Meyrick*, 313 Or 125, 132 (1992) but that the totality of the circumstances demonstrates that defendant understood his right. He has 9 prior convictions, at least one of which went to trial, he observed his attorney's conduct (so he has first-hand experience), and the trial court had specifically warned him about the dangers of proceeding and had the attorney remain as a legal advisor. Defendant responded to each of those warnings. Affirmed under both state and federal constitutional standards.

(b). Post-trial

A trial court may accept a defendant's proffered waiver of counsel only if it finds that the defendant knows of his or her Article I, section 11, right to counsel and, if indigent, of his or her right to court-appointed counsel, and that the defendant intentionally relinquishes or abandons that right. *State v Meyrick*, 313 Or 125, 133 (1992). Under *Meyrick*, to determine if a defendant has intentionally relinquished or abandoned that right, appellate courts examine the record as a whole and consider the defendant's age, education, experience, and mental capacity, the charge, the possible defenses, and other relevant factors. *State v Phillips*, 235 Or App 646 (2010).

4. Right to Self-Representation

Under Article I, section 11, and the Sixth Amendment, a criminal defendant has a right to be represented by counsel and to represent himself, see *State v Verna*, 9

Or App 620, 624 (1972) and *Faretta v California*, 422 US 806, 819 (1975). *State v Blanchard*, 236 Or App 472 (2010) (citing those cases).

Under the Sixth Amendment, a court's denial of a defendant's right to be self-represented is "structural error" that is not subject to a harmless-error analysis. *State v Blanchard*, 236 Or App 472 (2010) (citing *US v Gonzalez-Lopez*, 548 US 140, 149-50 (2006)).

5. Right to be Heard (see also Punishment, at page 106).

Modifying length of post-prison supervision, *sua sponte*, and without giving defendant notice or an opportunity to be heard, eight years after the original conviction and sentencing, violated defendant's statutory right to be present at sentencing and his Oregon constitutional right to allocution under Article I, section 11. *State v Herring*, 239 Or App 416 (2010).

6. Prosecutorial Comments

The state, at trial, may not call attention to a defendant's post-arrest silence; a prosecutor's comments to a jury that implicate a defendant's post-arrest silence generally are improper. But under both Article I, section 12, and the Fifth Amendment, a defense attorney during trial cannot "open the door" to the reason for the defendant's post-arrest silence, and then complain that the prosecutor pointed out the defendant's silence to the jury. *State v Clark*, 233 Or App 553 (2010).

See ***State v Robinson***, 244 Or App 368 (7/20/11), discussed at page 86.

7. Confrontation

"In all criminal prosecutions, the accused shall have the right * * * to meet the witnesses face to face * * *." -- Article I, section 11, Or Const

State v Simmons, 241 Or App 439 (3/16/11) (Armstrong, Haselton, Brewer) Defendant was involved in a melee inside a house and hit the victim. Three witnesses testified at trial about that fight. Officer testified that when he arrived at the house, the victim had obviously just been beaten: he was staggering, looked terrified, he was disoriented, was bleeding from one ear, and had a lumped up, bloody face. State did not subpoena the victim to appear at trial. Victim apparently expressed fear to the state about testifying. Victim did not appear for trial. State moved to admit the hearsay statements that the victim had made to Officer. Defense counsel argued that allowing the officer to testify about the victim's hearsay statements would violate the state and federal constitutional rights to confront witnesses. The state put on three witnesses (outside of the jury's presence) to attempt to show that the state had made a good-faith effort to secure the victim's presence. Basically, the state had prepared a subpoena for the victim about 2 or 2-1/2 months before trial, but made only a minimal effort to serve the victim with it, and never attempted to serve it on the victim at his residence. The sheriff twice attempted to serve the subpoena on the victim, but only when he was supposed to be in court for other matters (and he had not appeared for those other matters). The only effort the state made to secure the victim's attendance was the day before trial, by calling the victim's

stepmother and later by speaking with the victim by phone. Until the victim did not appear on the first day of trial, the state did not ask police to assist in finding the victim.

The trial court ruled that the victim's hearsay statements were admissible. Trial court allowed the officer to testify about statements that the victim made to the officer during that initial encounter: that defendant was crazy, that defendant and another man attacked him, and they were still in the house.

The Court of Appeals reversed and remanded. The state failed to establish that it made a good-faith effort and thus failed to establish that the victim was unavailable as a witness, as required under the state and federal constitutions:

> "[T]o admit hearsay evidence under OEC 803 in a criminal case, the state must establish that the declarant is unavailable for purposes of Article I, section 11." To be properly admitted, two requirements must be met under Article I, section 11: "First, the declarant must be unavailable, and second, the declarant's statements must have 'adequate indicia of reliability.'" *State v Cook*, 340 Or 530, 540 (2006) (quoting *Ohio v Roberts*, 448 US 56, 66 (1980))."

Here the Court of Appeals cited precedent in reaching its conclusion: "A declarant is 'unavailable' under Article I, section 11 if the proponent of the declarant's hearsay statements made a good-faith but ultimately unsuccessful effort to obtain the declarant's testimony at trial. *State v Nielsen*, 316 Or 611, 623 (1993)." "'The degree of effort which constitutes due diligence in attempting to secure an unavailable witness depends upon the particular circumstances presented by each case.' *State v Anderson*, 42 Or App 29, 32, *rev den*, 288 Or 1 (1979)." In the present case, defendant adequately preserved its objections and on this record, the trial court erred in concluding that the victim was "unavailable." Error was not harmless.

State v Supanchick, 245 Or App 651 (9/28/11) (Ortega, Sercombe, Landau) Defendant had been a military tour guide at the Pentagon who never saw combat. He married a woman who also was in the armed forces; they moved to Eugene. Defendant's wife filed a petition against him under the Family Abuse Prevention Act. In her petition, wife alleged that defendant controlled what and when she ate, threatened to beat her, threatened to slit her throat, and had loaded guns in the house. The trial court issued the order.

A month later, defendant, dressed in military garb, went to his wife's house after midnight with a loaded shotgun, duct tape, socks, latex gloves, and a large knife. He entered the house, found his wife reading in bed, covered her hands with socks, and bound her hands together with duct tape. He offered her $1000 and his car if she would swear in writing that she was an unfit mother, had lied in the FAPA petition, would give up custody of their child, and would leave Oregon. She refused despite several hours of captivity. Police arrived, saw the wife bound through a window, and kicked the door in. Defendant then killed his wife. Police recorded an interview with defendant after the shooting in which he called her an idiot, a whore, an unfit mother, and a piece of shit. They found several pages of the wife's handwritten notes in the house, which included notes that he had told her he would beat her with a wooden spoon, he would slit her throat bilaterally, and he had already dug her grave.

At his trial for aggravated murder and other charges, his defense was that he suffered from PTSD because he had been a tour guide, even though he never saw combat. He also contended that his dead wife's notes, his statements to police, and his wife's FAPA petition and the court's FAPA order should not be admitted into evidence – his wife's

notes "lacked reliability" and thus should be inadmissible under Article I, section 11, of the Oregon Constitution and the Sixth Amendment. The trial court denied his motion and admitted that hearsay evidence under OEC 804(3)(f)–(g), which is the "forfeiture by misconduct" exception. A jury convicted him.

The Court of Appeals affirmed. The forfeiture by misconduct exception to the hearsay rule was properly applied here: it does not require the state to prove that the defendant engaged in wrongdoing "for the sole or primary purpose of causing a witness to be unavailable."

The Court of Appeals next turned to the Confrontation Clause in the U.S. Constitution (rather than, as is standard practice, first addressing the Oregon Constitution). Under *Giles v California*, 554 US 353 (2008) and *Crawford v Washington*, 541 US 36, 54 (2004), the US Supreme Court explained that the only exceptions to the Sixth Amendment confrontation right are those "established at the time of the founding." And the "common-law doctrine of forfeiture by wrongdoing constitutes such a founding-era exception to the confrontation right," but "the defendant must have engaged in wrongful conduct intended to prevent the witness from testifying and, by such wrongful conduct, must have actually prevented such testimony." Defendant's sole intent need not have been to prevent the victim from testifying against him. In short, *Giles* does not require OEC 804(3)(g) to require that the sole purpose of a wrongdoer's act was to make the victim unavailable as a witness.

Turning then to the state constitution, Article I, section 11, gives an accused the right "to meet the witnesses face to face." Under Article I, section 11, out-of-court statements made by declarant not testifying are admissible only if (1) the declarant is unavailable and (2) the statement has adequate indicia of reliability, per *State v Campbell*, 299 Or 633, 648 (1985). A statement that falls within a "firmly rooted hearsay exception" or has "particularized guarantees of trustworthiness" is considered "reliable" under *State v Nielsen*, 316 Or 611, 623 (1993). Here, defendant argued that his dead wife's statements "lacked reliability" and is not a "firmly rooted hearsay exception" because it was added to the OEC in 2005. Thus, her notes about him should not have been offered to the jury.

The Court of Appeals did not cite any aspect of Oregon's pre-statehood history of confrontation rights, its constitution, or its early court decisions. Instead, it rested on the research and conclusion of the US Supreme Court in *Giles*:

> As "the Court detailed in *Giles*, the common-law 'doctrine has its roots in the 1666 decision in *Lord Morley's Case* . . . at which judges concluded that a witness's having been 'detained by the means or procurement of the prisoner' provided a basis to read testimony previously given at a coroner's inquest,' . . . and has been applied through the centuries following that case. . . . . Given the centuries-long history of the doctrine of forfeiture by wrongdoing, we conclude that the exception is 'firmly rooted' and, accordingly, admission of the victim's statements pursuant to the exception does not violate defendant's Article I, section 11, rights."

State v Nelson, __ Or App __ (10/19/11), 2011 WL 4953990 (Wollheim, Schuman; with Rosenblum SJ dissenting) Defendant was charged with third-degree sex abuse and six counts of using a child – his teenage granddaughter – in a pornographic display. He had her dance and pose in her underwear and lingerie that he bought for her, while he photographed her then touched her intimate body parts with a vibrator and with his hands. A detective had the granddaughter make a pretext phone call, wherein defendant said that she did not have to worry about that, after she said she did not want the touching and nudity to resume. At trial, he sought to introduce evidence that his

granddaughter had falsely accused her stepbrothers of rape and her stepfather of sex abuse. The trial court excluded that evidence.

The Court of Appeals reversed and remanded for the trial court to "clarify" its ruling. Under *State v LeClair*, 83 Or App 121 (1986) *rev den* 303 Or 74 (1987), if there is some evidence from which the court could find that the victim had made a false accusation of past sex abuse, the court must balance whether the probative value of that evidence is substantially outweighed by the risk of prejudice, confusion, embarrassment, or delay." Here, it was not clear that the trial court had performed that balancing test. In *LeClair*, the court reasoned that prior accusations by a victim is probative of credibility, and therefore, regardless of the prohibitions of OEC 608 [specific instances of a witness's conduct, to attack or support the witness's credibility, may not be proved by extrinsic evidence; specific instances of conduct may not be inquired into on cross], the Confrontation Clause of Article I, section 11, requires that the court permit a defendant to cross-examine the complaining witness in front of the jury" in certain situations. Under *LeClair*, "if there is some evidence from which the court could find that the complaining witness had made a false accusation, the court must balance whether the probative value of the evidence which the defendant seeks to elicit on cross-examination is 'substantially outweighed by the risk of prejudice, confusion, embarrassment or delay." Here there is some evidence that the victim had made prior false accusations of sex abuse against her stepbrothers and stepfather. On remand, the trial court is to "balance the evidence as required by *LeClair*."

The dissent would hold that defendant failed to preserve his assignments of error: "Defendant was presented with the perfect opportunity to alert the trial court to the error in its ruling as to the victim's accusation against her stepbrothers [that the evidence was excluded under OEC 412 – the rape shield law – despite its relevance]. Defendant stood silent and let the error remain uncorrected" even when the trial court asked if him to point to some authority otherwise.

8. Victims' Rights

"To preserve and protect the right of crime victims to justice, to ensure crime victims a meaningful role in the criminal and juvenile justice systems, to accord crime victims due dignity and respect and to ensure that criminal and juvenile court delinquency proceedings are conducted to seek the truth as to the defendant's innocence or guilt, and also to ensure that a fair balance is struck between the rights of crime victims and the rights of criminal defendants in the course and conduct of criminal and juvenile court delinquency proceedings, the following rights are hereby granted to victims in all prosecutions for crimes and in juvenile court delinquency proceedings:

"(a) The right to be present at and, upon specific request, to be informed in advance of any critical state of the proceedings held in open court when the defendant will be present, and to be heard at the pretrial release hearing and the sentencing or juvenile court delinquency disposition[.]" -- Article I, section 42, Or Const

State v Barrett, 350 Or 390 (5/27/11) (De Muniz) Stalking victim invoked her constitutional and statutory right to be notified in advance of defendant's sentencing, by timely returning a form to the DA's office. But the DA's office worked out a plea bargain

with defendant and the trial court sentenced defendant to two years' probation, without the victim's presence and without the statutory colloquy required by statute (ORS 147.510). On learning of that sentencing, victim filed a claim for violation of her rights as a crime victim on the statutory form, under Article I, section 42(1)(a). Victim asked that the parties be required to appear and show cause why defendant's sentence should not be set aside and a new sentencing hearing be held. The DA also moved to vacate defendant's sentence, based on the violation of the victim's rights. Defense counsel opposed those motions. The trial court held a hearing and agreed that the DA had violated her Article I, section 42, right to be informed of and be present at critical stages of the proceedings, and that the DA had violated her statutory rights to be present at sentencing and to notify the court whether the victim was present. But the trial court declined to vacate his sentence on grounds that the Oregon Constitution and statutes do not provide a remedy for those violations. Victim appealed to the Oregon Supreme Court.

The Supreme Court reversed on constitutional grounds rather than statutory grounds, on two bases: first, the parties failed to address the statutes and the legislature "created a clear and expedited procedural path" by statute in this type of victims'-rights case. Here, victim established a violation of her constitutional right to advance notice of the plea and hearing. As to the remedy, under Article I, section 42(3)(a), a remedy includes invalidating "a ruling of a court" but does not include "invalidating a conviction or adjudication." The Court concluded that "resentencing (at least in this case) would not require invalidating a 'conviction.'" Here, "defendant's sentencing was neither a 'conviction' nor an 'adjudication,'" but rather is a "ruling of a court." As such, it is a legally permissible remedy that does not violate his Fifth Amendment Double Jeopardy rights (despite defendant's argument to the contrary), which "does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be." In sum, the "victim was entitled to a remedy by due course of law under Article I, section 42(3)(a). Her proposed remedy – vacating defendant's sentence and conducting a resentencing hearing – was permissible, in that it was not barred by the Double Jeopardy Clause." The Court specifically noted that it does "not suggest that the trial court must impose any different sentence than it did previously." The state constitutional right against former jeopardy was not at issue in this case because Article I, section 42, only protects federal constitutional rights.

B. Civil Jury

"**In all criminal cases whatever, the jury shall have the right to determine the law, and the facts under the direction of the Court as to the law, and the right of new trial, as in civil cases.**" -- Article I, section 16, Or Const

"**In all civil cases the right of Trial by Jury shall remain inviolate.**" -- Article I, section 17, Or Const

"**In actions at law, where the value in controversy shall exceed $750, the right of trial by jury shall be preserved * * *.**" -- Article VII (Amended), section 3, Or Const

> "The language of the constitution indicates that the right of trial by jury shall continue to all suitors in courts in all cases in which it was secured to them by the laws and practice of the courts at the time of the adoption of the constitution. . . . . So that, in order to ascertain whether such right exists in this case, we must look into the history of our laws and jurisprudence, at and before the adoption of the state constitution." *Tribou v Strowbridge*, 7 Or 156, 158-59 (1879).
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> Article I, section 17, "of the constitution creates no new right to trial by jury. It simply secures to suitors the right to trial by jury in all cases where that right existed at the time the constitution was adopted." *Dean v Willamette Bridge Ry Co*, 22 Or 167, 169 (1892); *see also Jensen v Whitlow*, 334 Or 412, 422 (2002) (Article I, section 17, "is not a source of law that creates or retains a substantive claim or a theory of recovery in favor of any party.")
>
> The right to a jury trial is guaranteed under the Oregon Constitution in those classes of cases in which the right was customary at the time the constitution was adopted and does not extend to cases that would have been tried in equity. *McDowell Welding & Pipefitting v US Gypsum Co.*, 345 Or 272, 279 (2008).
>
> "As we contemplate the brutalities of despotic power arbitrarily exercised in other lands, we can well say with Blackstone, that the right to jury trial is the glory of our law, as the great Commentator felt it to be the glory of the English law." *Pacific Indemnity Co. v McDonald*, 25 F Supp 522, 529 (D Or 1938) (commenting on both the Oregon and federal constitutions).

Klutschkowski v Peacehealth et al, 245 Or App 524 (9/21/11) (Haselton, Armstrong, Duncan) This is a medical negligence action. Plaintiffs are a child injured at birth during his delivery and his parents. Defendants are several doctors and medical entities. The jury awarded plaintiffs about $557K in economic damages plus $1.375 million in noneconomic damages. Defendant moved to reduce plaintiffs' noneconomic damages award to $500K based on the statutory cap on noneconomic damages in ORS 31.710, contending that the statutory cap did not violate either Oregon's constitutional remedy clause (Article I, section 10), or the jury trial clauses (Article I, section 17, and Article VII (Amended), section 3), because a claim for prenatal injuries did not exist when the Oregon Constitution was adopted in 1857. Plaintiffs countered that the statutory cap would violate the remedy clause because theirs is a common-law negligence claim. The trial court entered general judgment consistent with the jury's verdict, without explaining its denial.

The Court of Appeals reversed the trial court's entry of general judgment on the noneconomic damages issue, concluding that the statute capping noneconomic damages does apply and does not violate the remedy clause. Under *Christiansen v Providence Health System*, 210 Or App 290 (2006), *aff'd on other grounds*, 344 Or 445 (2008), a claim for prenatal injuries—including those that occur during birth -- did not exist in 1857 when the Oregon Constitution was adopted, thus "the remedy clause does not preclude application of the statutory cap on noneconomic damages."

In addition, the two civil jury trial provisions in the Oregon Constitution do not prohibit application of the cap on damages. As the Oregon Supreme Court explained in *Lakin v Senco Products, Inc.*, 329 Or 62, *on recons*, 329 Or 369 (1999), "Article I, section 17, guarantees a jury trial in civil actions for which the common law provided a jury trial when the Oregon Constitution was adopted in 1857 and in cases of like nature." That

constitutional provision is not a source of law, as recently reiterated in *Hughes v PeaceHealth*, 344 Or 142 (2008). The Court of Appeals concluded that under *Hughes* and Christiansen, a claim for prenatal injuries is not "of like nature to a negligence claim that existed in 1857." As to the other jury trial provision in the Oregon Constitution – Article VII (Amended), section 3 – it, too, "is not a source of law that creates or retains a substantive claim or theory of recovery and is like Article I, section 17, in that regard," as understood in *Voth v State of Oregon*, 190 Or App 154 (2003, rev denied 336 Or 377 (2004). A claim for prenatal injuries did not exist in 1857 when the Oregon Constitution was adopted, thus "Article VII (Amended), section 3, does not assist plaintiffs." (Note: Article VII (Amended), section 3, was adopted in 1910).

"In sum, neither the remedy clause of Article I, section 10, nor the jury trial provisions . . . preclude application of ORS 31.710 under the circumstances of this case. For that reason, the trial court erred in denying [defendant's] motion to reduce plaintiffs' award of noneconomic damages to $500,000 pursuant to ORS 31.710(1)."

IX. DOUBLE JEOPARDY

"**No person shall be put in jeopardy twice for the same offence, nor be compelled in any criminal prosecution to testify against himself.**" – Article I, section 12, Or Const

Retrial may be barred for egregious prosecutorial misconduct when (1) the misconduct cannot be cured by anything other than a mistrial; (2) the prosecutor knew the conduct was improper and prejudicial; and (3) the prosecutor intended or was indifferent to the resulting mistrial or reversal. *State v Kennedy*, 295 Or 260, 276 (1983).

See ***State v Barrett***, 350 Or 390 (5/27/11), discussed under Victims' Rights, *ante*, regarding the Fifth Amendment protection against double jeopardy.
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X. PUNISHMENT

"**No person arrested, or confined in jail, shall be treated with unnecessary rigor.**" -- Article I, section 13, Or Const

"**Laws for the punishment of crime shall be founded on these principles: protection of society, personal responsibility, accountability for one's actions and reformation**." -- Article I, section 15, Or Const [amended November 1996]

"**Excessive bail shall not be required, nor excessive fines imposed. Cruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense. In all criminal cases whatever, the jury shall have the right to determine the law, and the facts under the direction of the Court as to the law, and the right of new trial, as in civil cases.**" -- Article I, section 16, Or Const

A. Cruel and Unusual; Proportionality

"Cruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense." - Article I, section 16, Or Const

"This court first articulated the test for determining whether a sentence violates the proportionality provision of Article I, section 16, in *Sustar v County Court of Marion County*, 101 Or 657 (1921)." *State v Wheeler*, 343 Or 652, 668 (2007).

"Since *Sustar*, this court often has used the 'shock the moral sense' standard to resolve a claim that a sentence does not meet the proportionality requirement." *State v Wheeler*, 343 Or 652, 668 (2007). "This court has used the test of whether the penalty was so disproportioned to the offense as to 'shock the moral sense of reasonable people' and ordinarily has deferred to legislative judgments in assigning penalties for particular crimes, requiring only that the legislature's judgments be reasonable." *Id*. at 676.

A punishment is constitutionally disproportionate if it "shocks the moral sense of all reasonable [persons]". Three factors to make that determination are: (1) comparison of the penalty to the crime; (2) comparison of other penalties imposed for other related crimes; and (3) defendant's criminal history. *State v Rodriguez/Buck*, 347 Or 46, 57-58 (2009).

In *Wheeler*, the proportionality test includes an assessment of whether the legislature's penalty is founded on an "arguably rational basis," out of respect for separation of powers. In *Rodriguez/Buck*, "the court appears to have abandoned the 'arguably rational basis' test described in *Wheeler*," replacing with a 3-factor test: (1) comparison of the severity of the penalty to the gravity of the crime; (2) comparison of the penalties for other related crimes; and (3) the defendant's criminal history (and a court's consideration of a defendant's criminal history is not limited to the same or similar offenses). *State v Alwinger*, 231 Or App 11 (2009), a*dh'd to as modified on recons*., 236 Or App 240 (2010).

Criminal history is one factor in disproportionality analysis, but the lack of a history has never been sufficient to render an otherwise constitutional penalty disproportionate. *State v Shaw*, 233 Or App 427, *rev den* 348 Or 415 (2010).

State v Simonson, 243 Or App 535 (6/15/11) (Gillette and Brewer) Defendant was 23 when he engaged in sexual intercourse with victims under the age of 18 (the opinion does not disclose the victims' ages but they must have been 16 or 17). He was convicted of 5 counts of second-degree sex abuse. The trial court imposed sentences of 19, 21, 25, 31, and 36 months for each, to run concurrently. Defendant demurred to the indictments on constitutional proportionality grounds, as applied to him: one statute prohibits intercourse with a victim under age 16 but carries a lesser penalty than his crime (sex with a victim under age 18). His offenses carried a crime score of 7 (36 months at most), but if he had had the same sex act with a 14 or 15 year old, his crime score would have been 6, with a lesser sentence (30 months at most).

The Court of Appeals vacated his sentence and remanded. First, the court declined defendant's request for reconsideration of *State v Stamper*, 197 Or App 413, *rev den* 339 Or 230 (2005) (statute violated because underage victim cannot legally consent to intercourse, even if s/he willingly participates). (*Stare decisis* adhered to unless a case was wrongly decided.) The court condensed the proportionality analysis this way:

> "Under Article I, section 16, a 'penalty' is the amount of time that an offender must spend in prison for his 'offense.' *State v Rodrigutez/Buck*, 347 Or 46, 60 (2009). An 'offense' is a defendant's 'particular conduct toward the victim that constitute[s] the crime.' *Id*. at 62. There are two bases on which a particular sentence may violate the proportionality principle. In the first, a sentence may be impermissible if its severity is inappropriate, given the defendant's criminal act. *See id*. at 63 . . . In the second, a penalty is impermissible if it is disproportionately severe when compared to a sentence that may be imposed for other, related crimes. *Id*.".

The present case is "a textbook example for the application of the principle of vertical proportionality: Defendant's acts in committing sexual abuse in the second degree necessarily are less severe than the same acts would have been if defendant's victims had been younger, but the potential penalty for defendant's acts is greater than the potential penalty for the same acts against younger victims. Such a scheme does not comport with the standard set by Article I, section 16." The court, in vacating and remanding, did not direct the trial court to impose any specific sentence.

State v Wilson, 243 Or App 464 (6/15/11) (Schuman, Wollheim, Nakamoto) Defendant was convicted of first-degree sex abuse for putting his hand into a 4-year old's underwear while he babysat her. He was sentenced to 75 months under Measure 11. His attorney argued that he had "diminished capacity" and the state argued that *Rodriguez/Buck* did not allow the court to consider "diminished capacity."

The Court of Appeals affirmed, agreeing with the parties on appeal that the trial court can take into account a defendant's mental capacity when determining whether a Measure 11 sentence violates Article I, section 16, under *Rodriguez/Buck*. The court explained: "Characteristics of either the defendant or the victim, or both, may be considered". The court also noted: "This opinion should not be taken to imply that the proper consideration of defendant's mental capacity would necessarily lead to a different sentence, nor to imply that such a sentence would or would not be a violation of Article I, section 16."

State v Johnson, 244 Or App 574 (8/03/11) (Wollheim, Schuman, Rosenblum) A sentence of 70 months for second-degree robbery was not "unconstitutionally cruel and unusual under the circumstances of this case." Defendant walked into a store wearing a ski mask, holding a gun, pointed it at a female employee, and told her to put money in a bag. She testified that she feared for her safety. The "mandatory minimum " sentence for first-degree robbery is 90 months. Defendant's lack of a criminal history (he was 17) is, alone, insufficient to render an otherwise constitutionally proportionate sentence to be disproportionate. No shock to the moral sense of a reasonable person in this sentence.

State v Chase, __ Or App __ (11/02/11), 2011 WL 5176172 (Rosenblum, Ortega, Sercombe) Defendnat was sentenced to 36 months' probation for fourth-degree assault and 18 months' probation for each of two meth convictions. He violated probation. He admitted that he had violated probation. As a sanction for violating probation for meth convictions, the trial court imposed concurrent 60-day sentences and six months for the assault conviction. He appealed arguing that the six months' incarceration violates the proportionality clause of Article I, section 16. He argued that the maximum sanction he could have received for violating probation on a felony assault would be 60 days, so the six months is disproportionate.

The Court of Appeals affirmed, without deciding that the proportionality clause required it to compare a revocation sanction for a misdemeanor with one for a felony. The court concluded that defendant failed to establish that he received a harsher revocation sanction for his

misdemeanor assault than he would have received if he violated his probation after being convicted of felony assault.

The court here recited the "shock the moral sense" test that the *State v Rodriguez/Buck* court recited, 347 Or 46 (2009). The court also cited *State v Simonson*, 243 Or App 535 (2011) [page 107], to explain the "two bases on which a particular sentence may violate the proportionality principle." Those are (1) the severity of the sentence given the criminal act and (2) the comparison to a sentence for other, related crimes. Defendant argues the second base. Here the court stated that since 1955, "Oregon's appellate courts have consistently concluded that the sentence imposed for a lesser-included offense may not exceed the maximum sentence for the greater crime," and cited several cases parenthetically. In this atypical "vertical proportionality" case, the comparison of a felony and misdemeanor "illuminat[es] a disconnect between the application of the sentencing guidelines for felony convictions and the lack of such a structure for misdemeanor convictions." But the court did not need to address that because "defendant failed to establish tha, had he originally been convicted of felony assault," the statute at issue "would have limited his revocation sanction to 60 days." Under vertical proportionality, defendant did not receive a harsher sentence for a lesser-included offense than he could have received for a greater offense because he had been convicted of felony assault – he would not have received a presumptive sentence of probation.

B. Consecutive Sentences; Judicial Factfinding

"**No law shall limit a court's authority to sentence a criminal defendant consecutively for crimes against different victims.**" – Article I, section 44(1)(b), Or Const

C. Right to Allocution

A defendant has the right to allocution (right to be heard personally) during a hearing to modify a judgment, under Article I, section 11. *State v Isom*, 201 Or App 687, 694 (2005). The statutory and constitutional rights to speak at a sentence modification proceeding are not unqualified. An enforceable right extends to changes in a sentence that are "substantive" as opposed to "administrative." *State v Rickard*, 225 Or App 488, 491 (2009).

XI. REMEDY GUARANTEE

"**[E]very man shall have remedy by due course of law for injury done him in his person, property, or reputation.**" -- Article I, section 10, Or Const

"[I]n analyzing a claim under the remedy clause, the first question is whether the plaintiff has alleged an injury to one of the absolute rights that Article I, section 10 protects. Stated differently, when the drafters wrote the Oregon Constitution in 1857, did the common law of Oregon recognize a cause of action for the alleged injury? If the answer to that question is yes, and if the legislature has abolished the common-law cause of action for injury to rights that are protected by the remedy clause, then the second question is whether it has provided a constitutionally adequate substitute remedy for the common-law cause of action for that injury." *Smothers v Gresham Transfer, Inc.*, 332 Or 83, 124 (2001).

> Oregon Supreme Court cases have left the federal courts and lower state courts "without a clear indication of how to resolve [a] dispute," over the adequacy of a capped remedy, but it distilled "certain factors that appear to bear on the adequacy of a capped remedy." Those factors are (1) the difference between the capped remedy and the common law remedy; (2) uncompensated out-of-pocket costs in a capped remedy; (3) whether the capped remedy supplants a common law cause of action; (4) whether the capped remedy is consistent with a narrow construction of sovereign immunity; and (5) the degree to which the capped remedy conforms to widespread social indicators regarding just compensation for injuries. *Ackerman v OHSU Medical Group, West, and OHSU*, 233 Or App 511 (2010); *see also Howell v Boyle*, 2011 WL 117624 (9th Cir 01/14/11) (certifying question under Article I, section 10, to the Oregon Supreme Court because that Court "has not provided a quantitative formula for determining when a remedy is so reduced as to render it constitutionally inadequate," citing "the *Ackerman* factors").

Klutschkowski v Peacehealth et al, 245 Or App 524 (9/21/11) (Haselton, Armstrong, Duncan) This is a medical negligence action. Plaintiffs are a child injured at birth during his delivery, and his parents. Defendants are several doctors and medical entities. The jury awarded plaintiffs about $557K in economic damages plus $1.375 million in noneconomic damages. Defendant moved to reduce plaintiffs' noneconomic damages award to $500K based on the statutory cap on noneconomic damages in ORS 31.710, contending that the statutory cap did not violate either Oregon's constitutional remedy clause (Article I, section 10), or the jury trial clauses (Article I, section 17, and Article VII (Amended), section 3), because a claim for prenatal injuries did not exist when the Oregon Constitution was adopted in 1857. Plaintiffs countered that the statutory cap would violate the remedy clause because theirs is a common-law negligence claim. The trial court entered general judgment consistent with the jury's verdict, without explaining its denial.

The Court of Appeals reversed the trial court's entry of general judgment on the noneconomic damages issue, concluding that the statute capping noneconomic damages does apply and does not violate the remedy clause. Under *Christiansen v Providence Health System*, 210 Or App 290 (2006), *aff'd on other grounds*, 344 Or 445 (2008), a claim for prenatal injuries—including those that occur during birth -- did not exist in 1857 when the Oregon Constitution was adopted, thus "the remedy clause does not preclude application of the statutory cap on noneconomic damages."

In addition, the two civil jury trial provisions in the Oregon Constitution do not prohibit application of the cap on damages. As the Oregon Supreme Court explained in *Lakin v Senco Products, Inc.*, 329 Or 62, *on recons*, 329 Or 369 (1999), "Article I, section 17, guarantees a jury trial in civil actions for which the common law provided a jury trial when the Oregon Constitution was adopted in 1857 and in cases of like nature." That constitutional provision is not a source of law, as recently reiterated in *Hughes v PeaceHealth*, 344 Or 142 (2008). The Court of Appeals concluded that under *Hughes* and Christiansen, a claim for prenatal injuries is not "of like nature to a negligence claim that existed in 1857." As to the other jury trial provision in the Oregon Constitution – Article VII (Amended), section 3 – it, too, "is not a source of law that creates or retains a substantive claim or theory of recovery and is like Article I, section 17, in that regard," as understood in *Voth v State of Oregon*, 190 Or App 154 (2003, rev denied 336 Or 377 (2004). A claim for prenatal injuries did not exist in 1857 when the Oregon Constitution was adopted, thus "Article VII (Amended), section 3, does not assist plaintiffs." (Note: Article VII (Amended), section 3, was adopted in 1910).

"In sum, neither the remedy clause of Article I, section 10, nor the jury trial provisions . . . preclude application of ORS 31.710 under the circumstances of this case. For that reason, the trial court erred in denying [defendant's] motion to reduce plaintiffs' award of noneconomic damages to $500,000 pursuant to ORS 31.710(1)."

Howell v Boyle and City of Beaverton, 2011 WL 117624 (9th Cir 01/14/11) A police officer hit plaintiff with his police cruiser while she crossed a highway. She sued the officer and his employer (City) for about $4.7 million in economic damages and $1 million in noneconomic damages. A jury found plaintiff and the officer to be each negligent and 50% liable for the accident and awarded plaintiff $765K in economic damages and $250k in noneconomic damages. The district court reduced the jury's award under Oregon's comparative negligence law and then awarded plaintiff $507K in damages. The officer and the City asked the court to cap damages at $200K under the Oregon Tort Claims Act (OTCA). The district court ruled that the OTCA's damages cap was unconstitutional as applied under the remedy clause in the Oregon Constitution and did not reduce plaintiff's damages. Defendants appealed with two arguments: (1) the remedy clause does not protect plaintiff's claim because at common law, her contributory negligence would have completely barred recovery of damages; and (2) even if the remedy clause does protect her claim, $200K is a constitutionally adequate substitute remedy for her $507K damages award.

The Ninth Circuit panel noted that in *Clarke v OHSU*, 343 Or 581 (2007), the Oregon Supreme Court "held that the OTCA damages cap of $200,000 was unconstitutional where the plaintiff would have recovered $17 million at common law." It also noted that in *Ackerman v OHSU Medical Group*, 233 Or App 511 (2010), "the Oregon Court of Appeals held that the $200,000 OTCA damages cap against one defendant was unconstitutional where the plaintiff would have recovered $1,212,000 at common law. [And that] court announced a list of factors . . . that a court should consider, the first and most important being the disparity between the capped damages and the damages that a plaintiff would have received at common law." The panel noted that despite "this guidance," it "cannot confidently advance past the first step of the *Ackerman* rule."

The Ninth Circuit therefore certified several questions to the Oregon Supreme Court (per ORS 28.210) because defendants' arguments "raise important questions of constitutional law that are unresolved by previous decisions of the Supreme Court or intermediate appellate courts of Oregon." Those questions are:

> (1) Is plaintiff's negligence action constitutionally protected under the remedy clause of the Oregon Constitution, "irrespective of the jury's finding of comparative negligence?" To what extent "do the common law defenses to contributory negligence of last clear chance, the emergency doctrine, and gross negligence effect [sic] this determination?"
>
> (2) If plaintiff's action is protected, "is $200,000 an unconstitutional emasculated remedy despite the jury's finding of comparative negligence? To what extent do the common law defenses to contributory negligence of last clear chance, the emergency doctrine, and gross negligence effect [sic] this determination?"

Doe v Phoenix-Talent School District, 2011 WL 704877, Case No. 10-3119-CL (02/18/11)) Guardian sued school district, school principal, school superintendent, and kindergarten teacher for claims based on teacher's sexual misconduct. School moved to dismiss individuals and to substitute the school as the sole defendant under the Oregon Tort

Claims Act. Guardian argued that it is premature at this early motion-to-dismiss stage, based on *Clarke v OHSU*, 343 Or 581 (2007), where the Oregon Court of Appeals concluded that substituting OHSU as the sole defendant (other defendants had been named, and those did not have the OTCA's $200K damages cap) deprived that plaintiff of a remedy, because limiting the recovery to less than 2% of economic damages would not restore the injured right. The court here also reviewed *Ackerman v OHSU*, 233 Or App 511 (2010), and concluded that "*Clarke* and *Ackerman* support plaintiff's argument that dismissing [the superintendent and principal] at this stage of the proceedings is premature." That is because "*Clarke* establishes that a plaintiff may raise and prevail in an as-applied challenge to the OTCA damages cap" and in *Ackerman*, the Court of Appeals did not find error for that trial court's denial of that defendant's pre-verdict motions to substitute OHSU as the sole defendant, and in its granting the motion after the jury verdict. Here, the district court reasoned that "*Ackerman* provides some indication that Oregon courts faced with this scenario will decline to substitute the public body as the sole defendant and instead reserve the determination of whether or not to dismiss defendants until damages have been awarded, thereby allowing the court to assess the merit of an as-applied challenge to the OTCA's damages cap." In sum, defendants' motion to dismiss the superintendent and principal "at this stage of the proceedings" is premature.

XII. APPELLATE REVIEW

> "**If the supreme court shall be of opinion, after consideration of all the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed, notwithstanding any error committed during the trial * * * .**" – Article VII (Amended), section 3, Or Const

Oregon Constitution

"Under Article VII (Amended), section 3, of the Oregon Constitution, an appellate court must 'affirm a conviction, notwithstanding any evidentiary error, if there is little likelihood that the error affected the verdict.'" *State v Gibson*, 338 Or 560, 576, *cert denied* 546 US 1044 (2005). The asserted error is considered in context. In determining the possible influence on the jury, courts consider whether the evidence went to "the heart of * * * the case." *State v Sanchez-Alfonso*, 239 Or App 160 (2010) (quoting *State v Davis*, 336 Or 19, 34 (2003)).

Error in admitting evidence is "harmless" under the Oregon Constitution if there is little likelihood that the admission of the evidence affected the verdict. *State v Davis*, 336 Or 19 (2003); *State v Gibson*, 338 Or 560, 576, *cert denied*, 546 US 1044 (2005). That applies whether the evidence in question is scientific or ordinary. *State v Willis*, 348 Or 566, 572 n 2 (2010) (citing *Melendez-Diaz v Massachusetts*, 129 S Ct 2527 (2009) for Sixth Amendment issue).

Federal Constitution

Oregon courts assess violations of federal constitutional rights under the federal harmless error test in *Chapman v California*, 386 US 18, 23 (1967). That is, the "deprivation of such a right is harmless error when the reviewing court, in

> examining the record as a whole, can say, beyond a reasonable doubt, that the error did not contribute to the determination of guilt." *State v Sierra-Depina*, 230 Or App 86, 93 (2009).

Statutory "harmless error"

> "Harmless error" doctrine is set out in ORS 138.230: "After hearing the appeal, the court shall give judgment, without regard to * * * technical errors, defects or exceptions which do not affect the substantial rights of the parties.")

State v Moore, 243 Or App 433 (6/15/11) (Haselton, Armstrong, Edmonds SJ) Defendant was charged with multiple counts of first-degree rape and sex abuse of his daughter. The trial court admitted evidence that, years before this rape and sex abuse, defendant had had a 14-year incestuous relationship with his brother and he also had sex with a teenage girl. Defendant argued that that evidence was not relevant and its admission was not harmless.

The Court of Appeals agreed, reversing and remanding under standards set in *State v Davis*, 336 Or 19, 32 (2003) (cited, *ante*). Under *Davis*, the Oregon constitutional test for affirmance of error consists of a single inquiry: "Is there little likelihood that the particular error affected the verdict?" Here the court noted that this case "reduced to a swearing match" and the evidence of incest and sex with a teenager was admitted to show that "he must have engaged in incest with his daughter." And the prosecutor in her closing argument, "not so subtly invited the jury to infer that, because defendant had engaged in prior misconduct, he had committed the crimes in this case." The error was not harmless.

State v Olsen, __ Or App __ (10/26/11), 2011 WL 5067113 (Haselton, Armstrong, Sercombe) Defendant was convicted of first-degree sex abuse against a young child. The state's case was based in part on the child's testimony that once defendant was naked, called her into a bathroom, grabbed her hand, and made her touch his penis while he ejaculated. Defendant admitted that the child had touched his penis but he did not state or admit that he *caused* the child to do that. An expert physician testified that the child had been sexually abused. There was no physical evidence of abuse. The child had made inconsistent statements about defendant's activities. The trial court admitted the physician's diagnosis.

The Court of Appeals reversed. The state conceded that the trial court erred in admitting the expert physician's diagnosis, but argued harmless error, on grounds that defendant had "admitted that the victim touched his erect penis." Under *Davis*, the question is whether "there is little likelihood that the particular error affected the verdict." Here, the state's case was based on the child's testimony about touching defendant's penis in the bathroom, but "[a]lthough defendant admitted that [she] had touched his penis, he did not state or 'admit' that he had caused [her] to come to the bathroom and touch his penis." Because the state's overwhelming-evidence-of-guilt proposition "rests on an admission that never occurred," the trial court's error in admitting the physician's diagnosis of abuse was not harmless. Convictions reversed; remanded.

Son v Ashland Comm Healthcare Svcs, 239 Or App 495 (12/15/10), *rev den* 350 Or 297 (5/05/11) (Sercombe, Landau, Ortega) A 16 year old girl died in a hospital's ER of an apparently intentional drug overdose. Her mother/personal representative sued the hospital and two ER doctors for malpractice. Defendant-doctors introduced evidence that the girl and her father contributed to her death (she consumed some of his leftover

drugs from his garage). Jury found for plaintiff and allocated fault among the girl, her father (15%), and the two ER doctors. The Court of Appeals reversed and reallocated the father's portion of fault among the girl and the two doctors (rather than granting a new trial as the doctors wanted). The trial court erred by allowing the jury to consider the father's fault (because his conduct contributed to the girl's need for medical treatment but was not an element in the transaction on which the malpractice claim was based). The remedy for that error is to reallocate the father's 15% fault equally among the doctors and girl, despite the doctors' argument that the jury trial provisions of Article VII (Amended), section 3, required a new trial. Court of Appeals noted, but did not discuss, defendants' constitutional argument under Article VII (Amended), section 3.

State v Brown, 241 Or App 226 (3/02/11) (Haselton, Brewer, Armstrong) Defendant was charged with, *inter alia*, several counts of first-degree sex abuse on a child. Defendant contended that he was not guilty, but if he was guilty, he was insane. He testified that he did not remember engaging in the sexual contact, and if it happened, his other personality, Josh, did it. There were no physical findings of abuse. Several of the state's witnesses testified that defendant did it. State's expert physician testified that her diagnosis was that "it was highly likely that [the victim] had experienced sexual abuse." Jury convicted defendant.

The Court of Appeals reversed. State conceded that the trial court erred in admitting the physician's diagnosis of sex abuse, but argued that the error was harmless. The Court of Appeals quoted *State v Davis*, 336 Or 19 (2003) for the "test for affirmance despite error." That is: "Is there little likelihood that the particular error affected the verdict?" Unlike other cases that the state fact-matched against, here defendant did not admit that he engaged in the sexual conduct, there was no evidence of physical abuse, and the physician's diagnosis was not merely cumulative of lay witnesses but instead was qualitatively different because it was spoken by an expert. The trial court should not have admitted the physician's diagnosis. Error was not harmless.

XIII. EQUAL PRIVILEGES AND IMMUNITIES

> "**No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.**"
> -- Article I, section 20, Or Const

Article I, section 20, proscribes two types of unequal treatment: "first, to any citizen, and second, to any class of citizens." It "may be invoked by an individual who demands equality of treatment with other individuals as well as by one who demands equal privileges or immunities for a class to which he or she belongs." *State v Clark*, 291 Or 231, 237 (1981). For individual-based claims, the question is whether the state distributed a benefit or burden "without any coherent, systematic policy." *State v Freeland*, 295 Or 367, 375 (1983).

State v Davis, 237 Or App 351 (9/22/10) (en banc) *rev allowed* 350 Or 230 (4/07/11) (Wollheim, Brewer, Haselton, Rosenblum for majority; with Sercombe and Landau concurring; with Schuman, Ortega, Armstrong, Breithaupt pro tem concurring and

dissenting) Defendant drove past a deputy. Without any suspicion that defendant was engaged in any unlawful activity, the deputy randomly entered defendant's license plate number into the DMV database. Defendant's license had been suspended, so officer stopped defendant for that reason. Defendant moved to suppress all evidence from officer's access of his DMV records, under Article I, section 9 (as an unreasonable search) and Article I, section 20 (as an unequal and standardless burden on defendant). The trial court denied his motion to dismiss and defendant was convicted of driving while suspended. Court of Appeals unanimously agreed that no Article I, section 9, violation occurred.

As to Article I, section 20, the Court of Appeals affirmed, dividing its opinions. The primary opinion (4 judges) concluded that there was no Article I, section 20, violation. The majority noted that Article I, section 20, may be invoked by an individual who demands equality of treatment with other individuals, and also by an individual who demands equal privileges or immunities for a class to which he belongs. Here, defendant argued the former, that the government has made or applied a law so as to grant or deny privileges or immunities to an individual person without legitimate reasons related to his individual situation. In other words, the state must not distribute a benefit or burden in a haphazard, random, standardless, ad hoc fashion without any coherent, systematic policy, but here, the deputy's random, suspicionless license-plate search was just that. The majority concluded that, although the deputy testified that he "randomly" ran the plates,

> "the deputy's testimony suggests that the decision to run the plates was not a haphazard or ad hoc decision at all. Instead, it was the result of a confluence of training, time, and opportunity: the deputy was trained to run plates to investigate for stolen vehicles; based on the position of defendant's vehicle, the deputy was able to see defendant's front license plate and was able to make out defendant's physical characteristics, which would have allowed him to compare the driver to the registered owner. Under those circumstances, the result was that defendant's license plates were run as part of the deputy's normal activity of investigating for stolen vehicles."

"There was nothing arbitrary or whimsical about the deputy's decision to run defendant's license plates." Defendant was not denied any privilege or immunity on the same terms as other citizens. "Article I, section 20, has never been applied to require police officers to articulate and adhere to criteria for every discretionary patrol activity that might occur in the ordinary course of a day."

Concurrence (of 2) concluded that Article I, section 20, is immaterial to the outcome of this case. A "privilege or immunity" is an advantage that is created or embellished by a constitutional or statutory policy. Here, no law creates, regulates, or authorizes the deputy to "establish the purported privilege or immunity" to be free from "license plate scrutiny." In other words, the "action of the police officer here was not taken under a law that either directly or indirectly classifies license check inquiries or creates privileges or immunities for persons affected by those inquiries." Therefore, this case does not involve a law that classifies privileges in impermissible ways or that affects an individual citizen by a delegation of authority to a government agent to offer or restrict an official privilege or immunity that is available to that person.

Dissent (of 4) When the officer ran defendant's license plate, the deputy initiated a law-enforcement investigation, which imposes a constitutionally significant burden on the investigated person. Defendant was subjected to a criminal investigation while other

similarly situated drivers are immune, simply due to the officer's exercise of discretion. This case deals with an immunity, not a privilege.

Dissent rejected the concurrence's idea that Article I, section 20, is not implicated unless the privilege or immunity at issue is either a statutory or constitutional entitlement. If that were correct, then the officer could run plates only of one ethnic minority because no law regulates one ethnic group's right to be free from license plate scrutiny. "Article I, section 20, prohibits police officers from making choices that are based either on no facts (that is, haphazard or ad hoc choices) or on impermissible facts (for example, race)." Also, Article I, section 9, cases, such as *State v Holmes* [see Searches and Seizures, ante], regarding "mere encounters" with citizens, are not relevant to Article I, section 20, analysis.

This deputy testified that "his decision to investigate defendant was *not* based on criteria or standards. It was 'random.'" Thus the officer's decision to initiate a criminal investigation of defendant was not guided by any criteria, policy, or system. It was ad hoc. If, in contrast, there was a *system* under which police officers run plates, such as every fifth car, that would not violate Article I, section 20.

State v Abbey, 239 Or App 306 (12/08/10) *rev den* 350 Or 423 (6/10/11) (Haselton, Brewer, Armstrong) Defendant was convicted of drunk bicycling. He had two prior drunk driving convictions. Under an Oregon three-strikes statute (ORS 809.235), the trial court revoked his driving privileges, over his as-applied objections under equal privileges and immunities.

The Court of Appeals affirmed under both state and federal constitutions and under his class-of-one and true-class arguments. First, Article I, section 20, guarantees equal privileges to any citizen and to citizens who belong to a class, under *State v Clark*, 291 Or 231, 239, *cert denied* 454 US 1084 (1981). Citing the concurrence/dissent of Judge Schuman in *State v Davis*, 237 Or App 351 (2010) (discussed, *ante*), the Court of Appeals here explained that defendant has not demonstrated that the state failed to apply the three-strikes statute to other similarly situated people – two prior DUII convictions including people with prior bicycling DUII convictions, "much less that any such (unproven) purported difference in treatment was 'wholly standardless' or 'haphazard.'" As to the true-class claim under Article I, section 20, that fails because although bicyclists may be a "true class," bicyclists are not bicyclists due to "some immutable trait or historical prejudice or stereotyping." To succeed, defendant would have had to show that (1) the class is a "true class" based on something other than identity based on the statute (drunk bicyclists), (2) the class is based on "immutable traits" or those subjected to adverse social or political stereotyping or prejudice, and (3) the discrimination is based on stereotype or prejudice, not some rational basis. The Court of Appeals did not address the Fourteenth Amendment.

State v Savastano, 243 Or App 584 (6/22/11) *adhered to as clarified on reconsideration*, 2011 WL 5420823 (Schuman, Wollheim, Rosenblum) Defendant stole money from her employer over a 16-month period, sometimes in small amounts, such as $50. The prosecutor had an almost limitless number of charging options for those types of acts. The prosecutor charged her with embezzlement, aggregating defendant's thefts by months to provide "a clear organizational outline for the jury." Defendant moved to dismiss the indictment as "not guided by any consistently applied policy, contrary to Article I, section 20." The prosecutor conceded that there was no policy, but that he

chose to aggregate based on "a number of factors that are as unique as defendants are unique and as particular criminal acts are unique." The trial court denied defendant's motion. Defendant pleaded guilty conditionally.

The Court of Appeals reversed and remanded, holding that the statute allowing aggregation (ORS 164.115(5)) is unconstitutionally applied in this case. It addressed this as a class-of-one discrimination case. Such discrimination occurs when "the state distributes a benefit or burden in a standardless, ad hoc fashion, without any 'coherent, systematic policy," as described in *State v Freeland*, 295 Or 367 (1983). That prohibition on ad hoc distribution of burdens or benefits reaches inequality in the administration of laws both in delegated authority, and in legislative enactment. It constrains prosecutorial discretion.

To prevail on a claim of ad hoc prosecutorial decisions, "the defendant has the burden of establishing the lack of criteria or if there are criteria, the lack of consistent enforcement," as in *City of Salem v Bruner*, 299 Or 262 (1985). There are two inquiries in cases such as this, where defendant contends that the state, either directly or by delegated authority, violated the individual-based aspect of Article I, section 20. The first asks if a state actor made a decision that confers a privilege or imposes an immunity of constitutional magnitude. The second asks that, if so, has the person claiming the violation shown that the decision did not result from the application of "sufficiently consistent standards to represent a coherent, systematic policy," as in *Freeland*. Answering those inquiries here, first, the state's decision had serious consequences: depending on how the prosecution chooses to aggregate the charges, a defendant could be burdened with a multitude of minor charges and could have faced a variety of penalties. As to the second inquiry, although defendant did not adduce evidence that the aggregation decision was unsystematic, the state conceded that it was: there was no policy. And even if there were a policy that was capable of consistent application, that would not suffice: actual consistent application would be necessary. The trial court should have granted defendant's motion to dismiss. The court noted that it is not deciding that the statute allowing for aggregation is facially unconstitutional.

State v Pettengill, 243 Or App 591 (6/22/11) (Schuman, Wollheim, Rosenblum) Defendant stole money from her employer. The state aggregated the theft charges under ORS 164.115(5) so as to aggregate three misdemeanor thefts into three felony counts. Defendant moved to prohibit the court from aggregating the counts, on grounds that aggregation was done without a systematic, consistently applied policy, thus violating her Article I, section 20, rights. The state responded with its policy that listed 26 factors it uses in its aggregation decisions. The trial court denied defendant's motion and she was convicted.

Quoting heavily from its decision of the same date, *State v Savastano* [discussed on the page 116], the Court of Appeals affirmed. Defendant did not carry her burden of establishing that the prosecution violated Article I, section 20. In this case, in contrast with *Savastano*, "defendant acknowledges the existence of a policy." To prevail, defendant must demonstrate that the policy is inconsistently applied. "She made no attempt to do so in this case." Therefore the trial court did not err.

State v Smith, __ Or App __ (10/26/11) (Brewer, Edmonds SJ) Defendant was charged with stealing computers, a DVD player, and dog food from a victim over a two-week period, which, aggregated, had a value of over $1000. That is first-degree theft, and under a statute, single thefts may be aggregated if perpetrated against the same victim

within 180 days. The parties stipulated to the facts in this case: the Coos County DA does not have a written policy related to aggregating theft charges, the DA determines the total value of the items stolen within 180 days, the DA then determines the level of offense to charge, and the individual DA assigned to the case makes the charging decision, including "the individual facts of the case," criminal history and total loss value. Defendant moved to dismiss, arguing that the practice stipulated to is not a "coherent, systematic policy" required for charging decisions and violates Article I, section 20, per *State v Freeland*, 295 Or 367 (1983). The trial court denied the motion to dismiss.

The Court of Appeals affirmed, tracking *Savastano* and *Pettengill* [discussed on page 116-117]. Defendant's argument here, that the "individual facts of the case" as a charging criterion is ad hoc and standardless, was rejected in *Pettengill*. "In order to prevail, defendant had the burden of demonstrating a 'lack of consistent enforcement.'" The court here concluded that, "as in *Pettengill*, defendant failed to demonstrate that the policy in question violated Article I, section 20," as challenged.

State v Washington, 246 Or App 1 (10/05/11), 2011 WL 458199 (Brewer, Edmonds) The Portland Police Bureau has a "Neighborhood Livability Crime Enforcement Program." That Program created a list of people who are most often arrested for low-level drug and drug-related property crimes in specific areas of Portland. Those people historically were cited and released and reoffended. Under this Program, those on the list were arrested and booked instead. The Multnomah County DA's office has a written policy providing that possession of more than residue amounts of drugs such as cocaine are prosecuted as felonies, and just residue amounts of drugs such as cocaine are prosecuted as misdemeanors except for defendants who are on the Police Bureau's list and those who have prior criminal records.

Defendant has more than 30 prior convictions, mostly for drugs, and he is on the Police Bureau's list. He was charged with possession of cocaine as a Class C felony, rather than a Class A misdemeanor. He moved to dismiss the indictment or to reduce the charge to a misdemeanor, on grounds that the Multnomah County DA's policy that disqualifies cases for misdemeanor treatment violates Article I, section 20, of the Oregon Constitution and the Due Process Clause of the Fourteenth Amendment. The trial court denied his motion.

The Court of Appeals affirmed. The court repeatedly stated that it is only "addressing the district attorney's charging policies" -- the constitutionality of the Program (the list of chronic offenders) is not at issue in this case. Quoting heavily from *Savastano* [discussed at page 116], the court here noted that defendant does not raise a class-based discrimination claim but rather this is "the other type of Article I, section 20, claim." Defendant argued that only people committing low-level drug and property offenses – rather than more serious crimes – were included on the list and that is "arbitrary." But a "great deal of testimony" about the reasons for the Program's creation was presented at the trial level. The Program "was designed to break the repetitive cycle of arrest, citation, and release." The reason for putting only low-level offenders on the list is that those people were frequently released and reoffended, in contrast with the people who committed felonies, who were not released as frequently. This is not arbitrary. Defendant also argued that only including certain geographical areas of the city for the Program is an impermissible criteria, but the court disagreed: "Nothing in the case law indicates that a geographical criterion is *per se* impermissible, and defendant has not shown that the criterion has been improperly applied."

The trial court had expressed a "distaste" for the apparent "secret" nature of the Police Bureau's list. The Court of Appeals "share[s] the unease conjured by the specter of authorities developing secret lists of people to be rounded up. In this case, however, the policies at issue" – the Program and the DA's policies – "are not secret, nor are the criteria that are used in creating the . . . list. Even though the list itself is not made public, it is based on permissible criteria" and defendant has not shown that the criteria have been improperly applied. Defendant also did not show that criminal history is improper or that the DA's office failed to follow its own policy or administers it in an *ad hoc* manner.

As for defendant's procedural due process challenge, the Court of Appeals quoted the balancing test from *Mathews v Eldridge*, 424 US 319, 335 (1976). "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." Here, the private interest is significant. Defendant argued that he has no way to challenge his inclusion on the list, but the court here repeated that is not addressing the list itself, but only the DA's charging policies. The list itself "is based on objective criteria – arrest data – and defendant has made no showing that the manner in which that data is gathered has led to anyone being erroneously included on the list." A defendant who is denied misdemeanor treatment based on an "erroneous inclusion" on the list may raise that issue at the trial court "long before the potential adverse effect – imposition of a felony." The DA's policy governing the charging of unlawful possession of controlled substances does not, in the way that defendant asserted, violate Article I, section 20, or due process.

State v Speedis, 350 Or 424 (6/30/11) (Kistler, De Muniz, Durham, Balmer, Walters, Linder) A jury convicted defendant of three crimes: first-degree burglary, second-degree assault, and third-degree assault. The jury also had been asked to determine if 4 aggravating factors were present: (1) defendant was on supervision when he committed the crimes; (2) prior criminal justice sanctions had failed to deter him; (3) defendant committed the crimes while on release status while other charges were pending and (4) defendant demonstrated a disregard for laws. Each of those factors is a nonenumerated aggravating factor (factors outside those in the sentencing guidelines; they allow courts to consider whether case-specific factors exist that warrant imposing a sentence that either departs down or up from the presumptive range). Jury found that the state proved beyond a reasonable doubt that each of those 4 aggravating factors applied to defendant. Trial court imposed on defendant upward departure sentences.

At trial, on appeal, and on review, defendant argued that relying on nonenumerated aggravating factors to impose an enhanced sentence violates the separation of powers provision of the Oregon Constitution (Article III, section 1) and also Article I, sections 20 and 21, and the Due Process Clause. Trial court disagreed and the Court of Appeals AWOP'd.

The Supreme Court affirmed. (See discussion at page 2). Defendant argued that the sentencing guidelines are vague, violating Article I, sections 20 and 21, because they do not provide "fair notice" of the circumstances resulting in an enhanced sentence. The Court held that the discretion that the sentencing guidelines give to prosecutors to identify, and courts to determine, nonenumerated aggravating factors is neither standardless nor unfettered and that aspect – "sentencing factors that bear on a

defendant's character" (relating the offender rather than the offense) – is not vague in violation of sections 20 and 21.

In so concluding, the Court recognized that its "cases have not always looked in the same direction on the question whether 'fair notice' is a component of a state constitutional vagueness analysis," contrasting *State v Graves*, 299 Or 189 (1985) with *State v Chakerian*, 325 Or 370 (1997). But in *Delgado v Souders*, 334 Or 122, 144 n 12 (2002), the Court held that "fair notice" is not an aspect of vagueness analysis under Article I, section 20, and reaffirmed that in *State v Illlig-Renn*, 341 Or 228, 239 n 4 (2006). In short, the only issue "within a state constitutional vagueness claim was whether a statute or rule gave the police, the prosecutor, or the court either 'uncontrolled discretion' or 'unbridled discretion * * * to decide what is prohibited in a given case." And that is not dicta. Thus the question is whether "the sentencing guidelines provide an ascertainable standard that guided the prosecutor in identifying which nonenumerated sentencing factors warranted imposition of a departure sentence." Here, the jury found that the state had proved the aggravating factors beyond a reasonable doubt, and the trial court determined that those factors provided a substantial and compelling reason for imposing an upward departure sentence – it had no discretion to decide whether other factors might apply.

The Due Process Clause of the Fourteenth Amendment requires a criminal statute to provide "fair warning" of the acts that will expose a person to criminal penalties; it must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly, as *Illig-Renn* quoted from *Grayned v City of Rockford*, 408 US 104 (1972). But the US Supreme Court has stated that even if an "otherwise uncertain statute" standing alone would fail to provide constitutionally adequate notice that expose a person to criminal liability, the statute satisfies due process (over a vagueness challenge) if a prior judicial decision has fairly disclosed the conduct to be within the statute's scope. Here, before defendant committed the acts that resulted in his burglary and assault convictions, the Court of Appeals had identified each of the four nonenumerated aggravating factors as permissible grounds for imposing an enhanced sentence. That satisfies due process, under *United States v Lanier*, 520 US 250 (1997), because they provided notice to defendants and guidance to prosecutors.

State v Reigard, 243 Or App 442 (6/15/11) (Wollheim, Schuman, Rosenblum) Defendant was a convicted sex offender who was required to report any "change of residence." He was paying rent at one residence but "staying with" (spending all of his nonworking hours, both day and night, every day) his girlfriend at her residence and had arranged to have his mail delivered to her house. Defendant was charged with two counts of failing to report as a sex offender. He had filed a motion in arrest of judgment contending that the statute that he violated is unconstitutionally vague under the state and federal constitutions because, as applied to his case, it would penalize an unreported change of "residence" without defining that term. Trial court denied the motion.

The Court of Appeals affirmed, parenthetically quoting *State v Graves*, 299 Or 189, 195 (1995), which provides that a "criminal statute need not define an offense with such precision that a person in every case can determine in advance that a specific conduct will be within the statute's reach. However, a reasonable degree of certainty is required by Article I, sections 20 and 21." The Court of Appeals also parenthetically referenced *State v Illig-Renn*, 341 Or 288, 240-41 (2006) ("describing vagueness challenges under state and federal constitutions"). The Court of Appeals used *Webster's Third New International Dictionary* to define the word "residence" (which the criminal statute does not define) and concluded that "a person of ordinary intelligence in defendant's position would

have had a reasonable opportunity to know that he had changed his 'residence' by actually living someplace new, regardless of whether he kept paying rent elsewhere."

Curry v Clackamas County, 240 Or App 531 (02/02/11) (Sercombe, Ortega, Landau) In this Measure 37 and 49 claim, the plaintiffs asserted that Measure 49 (which limited rights and remedies they had with Measure 37 land-use waivers) violates their Article I, section 20, and Fourteenth Amendment equal-privileges rights because plaintiffs, with their "inadequate waiver, were wholly unable to protect and preserve their rights in the way that those with adequate waivers could do." The Court of Appeals affirmed the trial court's rejection of that argument: plaintiffs did not argue that they belonged to a class distinct from the one created by Measure 49, nor did they argue that Measure 49 fails to rationally further a legitimate government interest, as the constitutions require. See *MacPherson v DAS*, 340 Or 117, 130 (2006) and *Nordlinger v Hahn*, 505 US 1, 10 (1992).

XIV. TAKINGS

"**Private property shall not be taken for public use . . . without just compensation.**" – Article I, section 18, Or Const

"**No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.**" -- Fifth Amendment, US Const

Fifth Amendment: Although the government has the power to condemn and take private property (eminent domain), the Fifth Amendment prohibits the government from taking private property without just compensation, which is measured by the market value of the property on the date of the taking. *United States v 50 Acres of Land*, 469 US 24, 25-26 (1984).

Application to the states: The Just Compensation Clause of the Fifth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. *Chicago, Burlington, Railroad v Chicago*, 166 US 226, 241 (1897).

(a) Physical takings

US Constitution on physical takings: The "rough proportionality" test from *Dolan v City of Tigard*, 512 US 374 (1994) governs a Fifth Amendment takings claim. Under that test, "the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *David Hill Development, LLC v City of Forest Grove*, 688 F Supp 2d 1193 (D Or 2010).

Oregon law on physical takings: "Oregon law is identical to Fifth Amendment 'physical' takings law." *Hoeck v City of Portland*, 57 F3d 781, 787 (9th Cir 1995) (citing *Ferguson v City of Mill City*, 120 Or App 210, 207 (1993)).

(b) Regulatory takings

US Constitution: Under the Fifth Amendment, a claim that land use laws violate the Fifth Amendment's "just compensation" clause, "must be assessed in order to determine if a regulatory taking has occurred," and that is done by assessing the "parcel as a whole." *Tahoe-Sierra Preservation Council, Inc. v Tahoe Reg. Plann. Agency*, 535 US 302, 331-32 (2002); *Coast Range Conifers v Board of Forestry*, 339 Or 136, 151-54 (2005). To establish an inverse condemnation claim under the Fifth Amendment, the claimant must plead that it has been deprived of all economically viable uses of its property, to create a per se taking under the Fifth Amendment. *Lucas v South Carolina Coastal Council*, 505 US 1003, 1015 (1992).

Oregon Constitution: "Oregon law provides less protection to property owners than the protection provided by the Fifth Amendment". *Hoeck*, 57 F3d at 788. Under the Oregon Constitution, if "a zoning designation allows a landowner *some substantial beneficial use* of his property, the landowner is not deprived of his property nor is his property 'taken.' *Dodd v Hood River County*, 317 Or 172, 182 (1993) (quoting *Fifth Avenue Corp v Washington County*, 282 Or 591, 609 (1978)) (emphasis in original).

"Oregon law dictates that a regulatory taking occurs only when a property owner is deprived of all beneficial use of its property by the government's allegedly unlawful actions." If an owner is "was able to complete the development and sell the majority of the parcels of land," the owner is "not deprived of all beneficial use of the property and, thus, [the owner's] state takings claim fails." *David Hill Development, LLC v City of Forest Grove*, 688 F Supp 2d 1193 (D Or 2010).

(c) Temporary takings under Oregon law

To assert a claim for a "temporary taking" under the Oregon Constitution, "the complaining party must allege that it has been denied all economic use of its property under a law, ordinance, regulation, or other government action that either is permanent on its face or so long lived as to make any present economic plans for the property impractical." *Boise Cascade Corp v Board of Forestry*, 325 Or 185, 199 (1997).

(d) Inverse Condemnation

Under the Oregon Constitution, a "taking" must be intentional or it isn't a "taking": "a claim for inverse condemnation requires a showing that the governmental acts alleged to constitute a taking of private property were done with the intent to take the property for a public use." *Vokoun v City of Lake Oswego*, 335 Or 19, 27 (2002). "To establish a taking by inverse condemnation, the plaintiff is not required to show that the governmental defendant deprived the plaintiff of all use and enjoyment of the property at issue." *Id*. at 26.

Mossberg v University of Oregon, 240 Or App 490 (02/02/11) (Ortega, Rosenblum, Landau) A physics professor (Mossberg) from Harvard brought lab equipment to UO. Seventeen years later, he resigned. Mossberg either wanted his lab equipment back, or was going to donate 95% of it to UO. UO told the head of the physics department not to remove any equipment. While Mossberg and UO bickered over his resignation, the chair of the physics department decided that he needed to make room for a new physics professor, so the chair instructed a physics professor and grad students to disassemble

most of the equipment, which they did under their assumption that Mossberg had donated it. But they did not document their disassembly, so much of the equipment could not be reassembled. And some pieces were distributed to other faculty members. Mossberg brought, *inter alia*, a claim for inverse condemnation of his private lab equipment, on grounds that UO's disassembly was an uncompensated "taking" for public use in violation of Article I, section 18. Trial court granted summary judgment for UO on that issue, because there was no evidence that UO intended to take Mossberg's property for a public use.

The Court of Appeals affirmed on the inverse-condemnation issue. An action to recover the value of private property that the government has taken without first filing condemnation proceedings is an action for "inverse condemnation." A plaintiff "must show that the governmental act alleged to constitute a taking was done with the intent to take the property for public use." Here, Mossberg has not established the "intended for public use" element. He first argued that the "intent" was to free up lab space for a new professor, and that's a "public use." But the Court of Appeals noted that the "notion that 'public use' equates to 'public benefit'" in an Article I, section 18, claim, has been rejected in the 1950s. "Public use" demands that the public's use and occupation of the property must be direct. "That physical space is public property, not plaintiff's private property." UO's "goal of freeing up laboratory space for use by another professor does not constitute a public use" under Article I, section 18.

Mossberg next argued that because some lab pieces were distributed to other professors, that proves that UO intended to take his property for public use. But there is no evidence to support his argument that UO took his lab pieces with the intent to improve other professors' labs. And UO administration did not authorize the disassembly or distribution – the head of the department did so in contravention of the administration's directive. UO cannot be held liable for negligent or *ultra vires* acts of its officers, under *Eminent Domain*, 27 AM JUR 2d § 250 (2004). "A government employee's negligent or intentionally tortuous conduct does not form the basis for an inverse condemnation claim." No inverse condemnation claim could be established on the facts taken in the light most favorable to Mossberg; no error on this claim.

Dunn v City of Milwaukie, 241 Or App 95 (02/23/11) (Schuman, Wollheim, Rosenblum) Defendant City high-pressure "hydrocleaned" a sewer line, causing raw sewage to shoot from plaintiff's toilets and bathroom faucets into her ceilings, walls, and 3-4 inches deep onto her floors. City workers offered her some towels in response but provided no other assistance. Workers wrote in their day's report that they "blew water out of their toilet." Plaintiff's hardwood floors later buckled, her wallpaper bubbled, her furnace was unusable, the sheetrock was saturated, and her vents blew wet smelliness into the home. She filed a claim with the city; the city denied the claim. Plaintiff filed tort claims and a claim for inverse condemnation under Article I, section 18, contending that the defendant City had "substantially constructively deprived" her of her interest in her real property. The jury awarded plaintiff $58,333 on that claim, over defendant's objections that she had not made a proper constitutional inverse-condemnation claim. (The tort claims were dismissed as untimely).

The Court of Appeals affirmed. If government, "in the process of performing some act for the benefit of the public, inflicts a substantial interference with the use and enjoyment of private property, that act can amount to a taking and give rise to a claim" for compensation, under *Morrison v Clackamas County*, 141 Or 564 (1933). To prevail, the property owner "must prove that the government intended to cause damage" and that damage was a "substantial interference with the owner's use and enjoyment of the

property," under *Volkoun v City of Lake Oswego*, 335 Or 19 (2002) and *Hawkins v City of La Grande*, 315 Or 57 (1992). The issue here is whether there is evidence that the sewage intrusion was the natural and ordinary consequence of the city's hydrocleaning. And there is: plaintiff argued that the city employees carried out the hydrocleaning "by the book." It is reasonable to infer from the evidence in this case that the sewage intrusion was the natural and ordinary consequence of high-pressure hydrocleaning – it need not be frequent to be natural and ordinary. The record contains evidence to support the jury's verdict. The city also argued that its motion for a directed verdict should have been granted because the sewage was "repairable damage" rather than a "substantial interference" with her property. The Court of Appeals rejected that claim as well, noting that Article I, section 18, does not define a "taking" as "property damage," or as one 52-year old case may indicate. Rather, more recently, in *Volkoun*, the Oregon Supreme Court summarized its prior case law: "To establish a taking by inverse condemnation, the plaintiff is not required to show that the governmental defendant deprived the plaintiff of all use and enjoyment of the property at issue . . . A 'substantial interference' with the use and enjoyment of property is sufficient." Here, experts testified as to the damage, and the significantly diminished value of her home. Plaintiff presented evidence to support the jury's finding of "substantial interference" with the use and enjoyment of her property.

***West Linn Corporate Park LLC v City of West Linn* et al,** 428 Fed Appx 700 and 2011 WL 4708774 (Case No. 05-36061) (4/18/11) (Tallman, Clifton, Korman SJ) (unpublished) Plaintiff sought development permits. Defendant City required plaintiff to construct several off-site public improvements (money, piping, sand, gravel) as conditions of development. The City did not require plaintiff to dedicate any interest in its own real property as a condition. Plaintiff claimed that the City violated the Oregon and federal constitutional protections against "takings." The magistrate judge found that those claims were not ripe.

A Ninth Circuit panel affirmed on the state takings claim "because the claim is not cognizable under the Oregon Constitution," as the Oregon Supreme Court concluded on the Ninth Circuit's certified question, see 240 P3d 29 (Or 2010). The Ninth Circuit panel affirmed on the federal takings claim under *Nollan v California Coastal Comm'n*, 483 US 825 (1987) and *Dolan v City of Tigard*, 512 US 374 (1994), because the "Supreme Court has not extended *Nollan* and *Dolan* beyond situations in which the government requires a dedication of property." (See further discussion of this case under First Amendment).

Parker v City of Albany, 239 Or App 317 (12/08/10) (Armstrong, Haselton, Rosenblum) (No Oregon constitutional issue, only Fifth Amendment). City brought a condemnation action against Parker (owners) to acquire land to develop a road and utilities. Owners and city stipulated to a general judgment for $22,500 as compensation to the owners. City constructed the road and improvements. City determined that the owners' real property was benefited by the improvements, and billed owners for their share of the costs that the city incurred to acquire the land (owners' land) for the project, which was $198.18. On a writ of review to the trial court, the trial court upheld the city's decision. Court of Appeals affirmed. The only issue, per owners, was whether requiring them to pay a share of the improvements – which included a share of the city's cost in acquiring their land – violated the "just compensation clause" of the Fifth Amendment. City countered that the stipulated judgment was "just compensation" and anyway, the Fifth Amendment does not exempt the owners from having to pay.

The Court of Appeals agreed with the city: owners received "just compensation for the property that the city acquired." The improvement process thereafter specifically

benefited owners. That improvement process "is not directed toward recapturing from a landowner whose property has been acquired by condemnation the money paid to the landowner for the property. Rather, it is directed toward determining the amount that landowners should pay a local government for the special benefit that the landowners have received from the government's construction, at the government's expense, of a public improvement, such as a road." Moreover, "the Takings Clause generally does not apply to the imposition of taxes, fees, and similar monetary assessments by the government to fund or cover the cost of its operations." Thus, if "there could be exceptions to the general inapplicability of the Takings Clause to the imposition of taxes, fees, and other monetary assessments by the government, . . . this is not a case that presents that question."

Luethe v Multnomah County, 240 Or App 263 (12/29/10) (Sercombe, Landau, Ortega) This is a Measure 49 land use case. (Measure 37 created remedies for property owners whose property value was reduced due to land use regulations. Measure 49 subsequently limited those remedies.). Plaintiffs had not received final unreviewable judgments on their Measure 37 claims when Measure 49 became effective. Plaintiffs claimed that the retroactive application of Measure 49 violates the Takings Clause of the Fifth Amendment. They argued that a "cause of action" is a constitutionally protected property right. The trial court disagreed and granted the government's motion to dismiss. The Court of Appeals affirmed: "Plaintiffs' takings argument fails because they have identified no cognizable property interest protected by the Fifth Amendment." The Court of Appeals quoted *DeMendoza v Huffman*, 334 Or 425, 449 (2002) as stating that a "vested right must be something more than a mere expectation based upon the anticipated continuance of existing laws; it must have become a title legal or equitable to the present or future enjoyment of property." Measure 27 did not create a contract between the government and plaintiffs, and plaintiffs here had no judgment when Measure 49 (limiting their remedies) became effective.

Bruner v Josephine County, 240 Or App 276 (12/29/11) (Sercombe, Wollheim, Brewer)) This is a Measure 49 land use case. (Measure 37 created remedies for property owners whose property value was reduced due to land use regulations. Measure 49 subsequently limited those remedies.). Plaintiffs received a Measure 37 waiver and then Measure 49 went into effect, limiting their remedies and compensation. Plaintiffs claimed that the legislative repeal of their Measure 37 waiver was a taking of property without just compensation under the Fifth Amendment. They did not raise an Article I, section 18, claim under the Oregon Constitution. The trial court dismissed their claims. The Court of Appeals affirmed. Although plaintiffs had not clearly articulated the property interest the alleged to be taken by Measure 49, the court noted that to determine the effect of Measure 49's limitations, plaintiffs' "entire property interest" must be assessed to determine if a regulatory taking occurred, citing *Tahoe-Sierra v Tahoe*, 535 US 302 (2002) and *Coast Range Conifers v Board of Forestry*, 339 Or 136 (2005). Plaintiffs argued that "the augmented value of their real property under Measure 37 has been diminished by the legal effect of Measure 49 in vitiating their waiver and that that loss of value is a taking under the Fifth Amendment." The court explained that plaintiffs needed to plead – but had not and could not -- that they "have been deprived of all economically viable uses of their property sufficient to recreate a *per se* taking under the Fifth Amendment," as *Lucas v South Carolina*, 505 US 1003, 1015 (1992) requires.

Curry v Clackamas County, 240 Or App 531 (02/02/11) (Sercombe, Ortega, Landau) In *Luethe v Multnomah County*, 240 Or App 263 (2010) and *Bruner v Josephine County*, 240 Or App 276 (2010) (discussed, on page 124), the Court of Appeals rejected Measure 37-claimants' theories that the retroactive application of Measure 49, to moot their Measure

37 compensation lawsuits, deprived them of a "vested right" in their cause of action so as to violate the Fifth and Fourteenth Amendments. Here, the Court of Appeals rejected that argument under Article I, section 18, of the Oregon Constitution, citing *Coast Range Conifers v Board of Forestry*, 339 Or 136, 151 (2005) (because plaintiff's property has an economically viable use, the regulation does not effect a taking). The court further rejected the argument that plaintiffs' Measure 37 waivers were constitutionally protected "vested rights" as "final judgments," because the "private property" that Article I, section 18, protects must be "something more than a mere expectation based upon the anticipated continuance of existing laws; [a vested right] must have become a title legal or equitable to the present or future enjoyment of property," citing *DeMendoza v Huffman*, 334 Or 425, 449 (2002). Further, the court explained that even if "litigation expenditures related to property development" could contribute to a "vested right" to property, none of these plaintiffs' legal fees, filing fees, consulting fees, "were made in furtherance of the physical development of plaintiffs' property," thus they are not construction work-fees. The Court of Appeals affirmed the trial court's rejection of their claims, and remanded for a proper procedural disposition (to enter judgment declaring the parties' rights, rather than dismissal). See discussion of this case under Equal Privileges and Immunities and First Amendment.

City of Bend v Juniper Utility Company, 242 Or App 9 (4/06/11) (Schuman, Wollheim, Rosenblum) The City filed a condemnation action to take ownership of defendant's water and sewer utility. The City's complaint sought to take defendant's assets (realty and personal property), a wastewater treatment facility, water rights, utility easements, etc.) for public use. The issue was the method of appraising "fair market value." There are three common methods of appraising fair market value: (1) the market approach (comparable sales data); (2) the income approach (income-generating potential); (3) the cost approach (replacement or reproduction cost of the plant minus depreciation). The trial court applied the cost approach and valued the plant at $3.3 million. The City appealed, arguing that the trial court should have applied the income approach. Defendants appealed, arguing that the award for "just compensation" was too low.

The Court of Appeals affirmed as to the cost approach and the award (reversing and remanding on some aspects of damages and fees). The court first sketched the Article I, section 18, analysis: "Private property shall not be taken for public use . . . without just compensation." Private property is "taken" for public use through "the power inherent in a sovereign state of taking or authorizing the taking of any property. . . for public use or benefit," under *Dep't of Trans v Lundberg*, 312 Or 568, *cert den* 506 US 975 (1992). Governmental units exercise that authority through condemnation proceedings, see ORS chapter 35, as the City did here, and must provide "just compensation" to the property owner based on the fair market value of the property being "taken." Here, the issue is: where there are no comparables for a property, what is the proper method of determining fair market value? All three of the common methods (noted, *ante*) apply to public utilities.

The Court of Appeals, in a detailed opinion, affirmed the trial court's use of the cost method and rejected the City's argument for the income approach, for several reasons. One of those reasons is that the City's proposed income approach "effectively equates the utilities' value for ratemaking purposes with its fair market value for purposes of just compensation. As the trial court correctly observed, courts have rejected that approach given the differences between ratemaking and condemnation proceedings. . . . . To hold otherwise would be to allow the government to confiscate public utility systems that produce little income; the Article I, section 18, guarantee of 'just compensation' does not allow that result." The Court of Appeals explained: "For purposes of Article I, section

18, it does not matter how the utility acquired the property or whether it has already recouped the cost of that property from others; what matters is that the utility receive just compensation for the property that is being taken from it."

XV. RIGHT TO BEAR ARMS

"The people shall have the right to bear arms for the defence [sic] of themselves, and the State, but the Military shall be kept in strict subordination to the civil power . . ." -- Article I, section 27, Or Const

"As a general proposition, individuals in Oregon have a right to possess firearms for defense of self and property, under Article I, section 27." *Willis v Winters*, 350 Or 299 , 302 n 1 (5/19/11) (citing *State v Hirsch/Friend*, 338 Or 622 (2005)). However statutes delineate crimes and exceptions for possession of firearms. *Ibid*.

See *Willis v Winters*, 350 Or 299 (5/19/11), discussed under Supremacy Clause, at page 130.

Note: The United States has not yet articulated a standard of review for Second Amendment cases. The Ninth Circuit has held "that only regulations which substantially burden the right to keep and to bear arms trigger heightened scrutiny under the Second Amendment." *Nordyke v King*, 644 F3d 776 (9th Cir 2011). Thus a complaint alleging a Second Amendment claim against a county ordinance that prohibits firearms on county property was properly dismissed without prejudice for failure to state a claim. *Id*. (Rather than submit a plan to the county fairground manager explaining how their gun show would comply with the ordinance, gun-show promoters instead sued the county).

XVI. SOVEREIGN IMMUNITY

"**Provision may be made by general law, for bringing suit against the State, as to all liabilities originating after, or existing at the time of the adoption of this Constitution but no special act authorizeing [sic] such suit to be brought, or making compensation to any person claiming damages against the State, shall ever be passed."** -- Article IV, section 24, Or Const

Article IV, section 24, of the Oregon Constitution "protects the state, including its political subdivisions, from 'suit' unless the legislature provides a cause of action. The courts construe the immunity of the state in Art IV, sec 24, to include immunity for the political subdivisions of the state . . . . . The courts could not judicially abolish the unpopular and often harsh doctrine of governmental tort immunity. . . . . In 1967, the Oregon legislature followed the modern trend and passed the Tort Claims Act, thus partially abolishing tort immunity for all public bodies." *Dowers Farms v Lake County*, 288 Or 669, 679-80 (1980).

Doe v Lake Oswego School District, 242 Or App 605 (5/18/11) (Ortega, Sercombe, Landau pro tem) A teacher sexually abused his fifth-grade students in the 1960s through 1980s. Students brought claims under the Oregon Tort Claims Act and federal civil rights claims and they sought a declaration that the OTCA's statute of limitations, as applied to them, is unconstitutional under Article I, section 20 and the due process and equal protection clauses of the Fourteenth Amendment. The trial court held several hearings and ultimately entered orders dismissing the declaratory relief claim with prejudice, and dismissed all the other claims as well.

The Court of Appeals vacated and remanded the statute of limitations in the OTCA is not unconstitutional as the students contend, and otherwise affirmed. The court explained that "Article IV, section 24, of the Oregon Constitution protects the state, including its political subdivisions, from 'suit' unless the legislature provides a cause of action. *Dowers Farms v Lake County*, 288 Or 669, 679 (1980)." The OTCA, however, "'abrogated, in part, the state's sovereign immunity.' *Jensen v Whitlow*, 334 Or 412, 416 (2002)." Thus under the OTCA, every public body is subject to action or suit for its – and its officers', employees', and agents' – torts, committed in the scope of employment or duties, subject to the limits in ORS 30.260 to 30.300. Those statutory limits include a notice (270 days for minors) and filing (2 years). The discovery rule applies to the OTCA, so those time periods do not begin until plaintiffs knew or should have known of the facts, see *Gaston v Parsons*, 318 Or 247 (1994), *Stephens v Bohlman*, 314 Or 344 (1992*), Duyck v Tualatin Valley Irrig Dist*, 304 Or 151 (1987), *Cooksey v Portland Public School Dist*, 143 Or App 527, *rev denied* 324 Or 394 (1996). Here, the injury was touching, and once the students knew that touching had occurred, they knew of their injury. The claims are statutorily time-barred.

The Court of Appeals rejected the students' claims of unconstitutionality as well, just noting that the Oregon state and federal appellate courts have previously addressed and rejected those claims, and string-cited cases. As to the students' section 1983 claims, those fail because the facts in the complaint do not allege a policy or custom resulted in the abuse, and did not sufficiently allege any action by an official policymaker. The court footnoted: "Although the trial court properly rejected plaintiffs' constitutional challenges to the OTCA's notice and statute of limitations provisions, plaintiffs' claim on this issue was for declaratory relief. Because plaintiffs sought declaratory relief, the trial court should have entered a judgment declaring their rights rather than simply dismissing the claim."

XVII. IMPAIRMENT OF CONTRACTS

"**No . . . law impairing the obligation of contracts shall ever be passed** . . . "
-- Article I, section 21, Or Const

Goodson* et al *v Public Employees Retirement System, 351 Or 173 (10/06/11) (De Muniz) The PERS Board promised certain benefits to petitioners after retirement and petitioners allege that they relied on that promise when they retired. The PERS Board recalculated certain benefits and sought to recoup overpayments on petitioners' retirement benefits. Petitioners challenged the PERS Board's legal authority to make those recalculations, first before an ALJ then before the PERS Board. The ALJ and the PERS Board rejected their arguments and petitioners sought judicial review. The Court of Appeals certified this matter to the Oregon Supreme Court under ORS 19.405.

The Oregon Supreme Court affirmed. Petitioners claimed that the PERS Board "unconstitutionally impaired the obligation of contract in violation of Article I, section 21" by reducing their retirement benefits. The Oregon Supreme Court called that a "false premise" because "PERB had no authority to make or change" the statutory contract terms between the

state and its retirees. PERB's alleged promise of certain benefits "is a promise that PERB could not lawfully make." That argument thus fails. So too does petitioners' argument that "PERB violated procedural due process when it failed to give them notice of the pending litigation challenging" certain earnings credits. The Court here concluded that the state did not deprive petitioners of a protected interest in property because "no source of law gave petitioners a legitimate claim of entitlement to a 20 percent earnings credit" for the year they sought.

Smejkal v State of Oregon, 239 Or App 553 (12/15/10) (Sercombe, Landau, Ortega) Measure 37 was codified in 2005. It required state and local governments to provide "just compensation" to a property owner when a governmental entity enacted or enforced a land use regulation that restricted the use of property so that its fair market value was reduced. The property owner could demand just compensation, and the government could either pay the owner the reduced value or exempt the property from the land use regulation in what was known as a "waiver." Plaintiff received Measure 37 waivers for his properties. Measure 37 was revised in 2007 by Measure 49, which changed the adjudicatory process, approval standards, and the extent of relief for Measure 37 claimants. After Measure 49 was adopted, the state and county did not recognize plaintiff's Measure 37 waivers, and confined him to Measure 49 procedures. Plaintiff claimed that Measure 37 contains a contractual commitment to not regulate his properties in the way that Measure 49 does. In other words, he claimed that the state and county formed agreements with him not to regulate his properties in the future except under regulations in place at the time he purchased his properties. He claimed that the state and county breached those agreements and that is unconstitutional under Article I, section 21, of the Oregon Constitution. Plaintiff also claimed that his Measure 37 waiver decisions were akin to judicial judgments and thus were protected from subsequent legislation, which would violate separation of powers principles under Article III, section 1, of the Oregon Constitution. The trial court concluded that plaintiff had failed to state a claim.

The Court of Appeals concluded that plaintiff is not entitled to relief. First it recited the two-part test from *Hughes v State of Oregon*, 314 Or 14 (1992), to determine if a claim of contractual impairment or breach arises under Article I, section 21. That is: (1) "it must be determined whether a contract exists to which the person asserting an impairment is a party" and (2) "it must be determined whether a law of this state has impaired an obligation of that contract." Ordinarily, a statutory duty is not contractual. The court noted that statutory obligations can become contractual when the statute announces "clearly and unmistakably" that the obligation is immune from statutory change, citing *Campbell v Aldrich*, 159 Or 208, *appeal dismissed*, 305 US 559 (1938). The court cited *FOPPO v State of Oregon*, 144 Or App 535 (1996), to explain that where the legislation does not show a legislative commitment not to repeal or amend the statute in the future, "a statutory contract probably cannot be found."

Here, the court reasoned that: Measure 37 lacks a commitment not to repeal or amend waivers in the future, it says nothing about the state's authority to impose future regulations on land development, and it "did not inhibit the Legislative Assembly or the people from enacting regulations on the use of plaintiff's properties." In short, no contract was formed by the issuance of any Measure 37 waiver.

See **Distribution of Power**, *ante*, for discussion of separation of powers.

XVIII. UNITED STATES CONSTITUTION

A. Federalism

1. Due Process

"Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State. This is consistent with the premises and unique genius of our Constitution. Ours is a 'legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.' *US Term Limits, Inc. v Thornton*, 514 US 779, 838 (1995) (Kennedy, J., concurring)." *J. McIntyre Machinery, Ltd. v Nicastro*, 131 S Ct 2780, 2789 (2011).

2. Supremacy

The laws of the United States "**shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding**." -- Article VI, clause 2, US Const

"The Supremacy Clause, on its face, makes federal law 'the supreme Law of the Land' even absent an express statement by Congress." *Pliva, Inc. v Mensing*, 131 S Ct 2567, 2579 (2011).

i. Preemption

State laws that conflict with federal law are "without effect." *Altria Group, Inc. v. Good*, 129 S Ct 538 (2008) (quoting *Maryland v Louisiana*, 451 US 725, 746 (1981)). The "purpose of Congress is the ultimate touchstone" in every preemption determination. *Ibid*.; *Wyeth v Levine*, 129 S Ct 1187 (2009). Congress may indicate preemptive intent through a statute's express language or through its structure and purpose. Preemptive intent may be inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field, or if there is an actual conflict between state and federal law. *Altria*. An actual conflict will exist either when it is impossible to comply with both state and federal law or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Wyeth*, 129 S Ct at 1196-1200 (quoting *Hines v Davidowitz*, 312 US 52, 67 (1941)).

"The question for 'impossibility' is whether the private party could independently do under federal law what the state law requires of it." *Pliva, Inc. v Mensing*, 131 S Ct 2567, 2579 (2011). "The *Wyeth* Court held that, because federal law accommodated state law duties, 'the possibility of impossibility' was 'not enough.' . . . But here, 'existing' federal law directly conflicts with state law. . . . The question in these cases is not whether the possibility of *impossibility* establishes pre-emption, but rather whether the possibility of *possibility* defeats pre-emption." *Id*. at 2581 n 8 (emphasis in original) (held: plaintiffs' state tort claims against drug companies are preempted because it was "impossible" for drug manufacturers to comply with both state and federal drug-labeling laws).

In all preemption cases, particularly those where Congress has legislated in a field traditionally occupied by the States, preemption analysis begins with the assumption that the historic police powers of the States were not to be

superseded by a federal act unless that was the clear and manifest purpose of Congress. *Wyeth*.

Willis v Winters, 350 Or 299 (5/19/11) (De Muniz) The Oregon Supreme Court held that the Federal Gun Control Act does not preempt the state's concealed handgun licensing statute; thus sheriffs must issue /renew plaintiffs' concealed handgun licenses despite their regular use of medical marijuana under the Oregon Medical Marijuana Act.

In *Crosby v Nat'l Foreign Trade Council*, 530 US 363 (2000), the US Supreme Court identified three circumstances where federal law preempts state law: (1) when federal law expressly says so; (2) when federal law completely occupies the field so that intent to preempt is inferred; and (3) the federal and state laws conflict. The third category exists when it is physically impossible to comply with the state and federal law and also when the state law is an obstacle to the execution of the federal law, see *Hines v Davidowitz*, 312 US 52 (1941). Only the "obstacle" preemption in that third type of preemption (actual conflict) is relevant to this case, because the federal law at issue here expressly renounces Congressional intent to preempt state law unless the law is in "direct and positive" conflict with the federal law.

The federal law makes it a federal crime for a person who uses marijuana, in violation of federal law, to possess a firearm. Another federal law makes marijuana users "unlawful users" – a class of persons whom Congress wishes to keep guns away from. But "Congress did not choose to effectuate its policy by enacting a law governing the conduct of state sheriffs – by, for example, prohibiting state law enforcement officers from issuing gun licenses to marijuana users. Consequently, there is no direct conflict between the federal and state statutes under consideration, in the sense of it being impossible to comply with both."

Having disposed of a "direct conflict" issue, the Oregon Supreme Court then turned back to "obstacle preemption." The Court reasoned that the state law "is not directly concerned with the possession of firearms, but with the concealment of firearms in specified locations." The state law is not "an obstacle to Congress's purposes in the sense that it interferes with the ability of the federal government to enforce the policy that the [federal] law expresses." The Court concluded "that Congress did not intend to achieve [the result of keeping guns out of marijuana-users hands] by making it illegal for medical marijuana users to possess guns." The Court concluded: "the sheriffs in this case are not excused from their duty under ORS 166.291 (1) to issue [concealed handgun licenses] to qualified applicants, without regard to the applicant's use of medical marijuana, on the ground that issuance of [concealed handgun licenses] would violate a federal prohibition on making false statements about the lawfulness of transferring firearms to such persons. Neither are the sheriffs excused from that statutory duty on the ground that it is preempted by federal law."

See ***State v Marsh & McLennan Co., Inc.* et al**, 241 Or App 107 (02/23/11) (Schuman, Wollheim, Rosenblum) (discussed under Commerce Clause, *post*).

ii. Supremacy and Intergovernmental Immunity

The "states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government. *McCulloch v Maryland*, 17 US (4 Wheat) 316, 436 (1819). A state or local law is invalid (thus violating intergovernmental immunity) in either of two ways:

"only if it regulates the United States directly or discriminates against the Federal Government or those with whom it deals." *North Dakota v United States*, 495 US 423, 435 (1990).

3. Necessary and Proper

See ***Friends of Yamhill County et al v City of Newberg***, 240 Or App 738 (2/16/11), *rev allowed*, 349 Or 602 (2011) (Schuman, Wollheim, Rosenblum) On review of a LUBA decision, where the parties' dispute focused on the term "necessary" in an administrative rule (OAR 660-009-0005(11)), the Court of Appeals parenthetically recited numerous prior Oregon appellate cases interpreting the word "necessary," from Article I, section 8, of the United States Constitution, Article I, section 18, of the Oregon Constitution, and state statutes.

4. Commerce Clause

"The Congress shall have Power To * * * regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . ." -- Article I, section 8, US Const

There are three commerce clauses in Article I, section 8, of the US Constitution: Interstate, Indian, and Foreign. "Early opinions of the Court suggest that the three subparts of the Commerce Clause should be interpreted similarly." *United States v Pendleton*, 636 F3d 78, __ (3d Cir 2011), 2011 WL 390712 at *5 (quoting *Gibbons v Ogden*, 22 US 1, 194 (1824)); *see also United States v Seveloff*, 27 F Cas 1021, 1024 (D Or 1892) ("The power to regulate commerce is conferred upon the national government by the constitution (article I, §8), in the same language, and upon the same terms in the case of 'foreign nations,' the 'several states,' and the 'Indian tribes.'"). But despite *Gibbons*, "the three subclauses of Article I, section 8, clause 3 have acquired markedly different meanings over time." *Id*.

i. The Interstate Commerce Clause

Article I, section 8, of the Constitution confers upon Congress only discrete enumerated governmental powers. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people. *Printz v United States*, 521 US 898, 919 (1997).

***State v Marsh & McLennan Co., Inc.* et al**, 241 Or App 107 (02/23/11) (Schuman, Wollheim, Rosenblum) This case did not hinge on a constitutional issue. But defendant had moved to dismiss, arguing *inter alia* that the state failed to plead and prove scienter, and if Oregon's security-regulation statutes (see ORS 59.137) did not require reliance or scienter, Oregon's securities statutes were unconstitutional because they imposed more onerous duties on stock issuers than federal and other states' securities laws imposed. Trial court denied that motion, agreeing with the state that the state did not need to plead and prove scienter, but agreed with defendant that the state did have to plead reliance but had not adequately done so. The state repleaded. The trial court ultimately ruled in favor of defendant on the constitutional and reliance issues. The Court of Appeals affirmed on subconstitutional issues, concluding that ORS 59.137 contains a reliance requirement based on Oregon securities law (not on federal law). But as to the constitutional issue, the Court of Appeals footnoted this statement:

> "Throughout this litigation, the parties have presented the constitutional question as though it implicates on the so-called 'dormant' commerce clause. That clause has no bearing on defendant's argument that Oregon's laws conflict with federal law. An argument that a state law conflicts with federal law, intrudes into an exclusively federal subject, or stands as an impediment to achieving the purpose of the federal law is a *preemption* argument based on an asserted violation of the Supremacy Clause, Article VI of the United States Constitution, an applying an analysis to which neither party refers. *E.g., Pacific Gas & Elec. Co. v State Energy Resources Comm'n*, 461 US 190 (1983). The dormant commerce clause, on the other hand, prohibits states from enacting laws that impinge on the free trade values embodied in the Commerce Clause, where Congress has *not* exercised its commerce power – that is, when the power is present but 'dormant.'" (Emphasis in original).

ii. The Foreign Commerce Clause

> A principal reason for assembling the Constitutional Convention of 1787 was "to require uniformity in [the United States'] commercial regulations . . . " *Gibbons v Ogden*, 22 US 1, 225 (1824) (Johnson, J., concurring, quoting the preamble of James Madison's draft resolution at the Virginia Ratifying Convention). The purpose of the Foreign Commerce Clause was to establish national uniformity over commerce with foreign nations. *Japan Line, Ltd. v County of Los Angeles*, 441 US 434, 448 (1979).
>
> "Although the Constitution, Art. I, sec. 8, cl. 3, grants Congress power to regulate commerce 'with foreign Nations' and 'among the several States' in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be the greater." *Japan Line, Ltd. v County of Los Angeles*, 441 US 434, 448 (1979).

See ***United States v Pendleton***, __ F3d __ (3d Cir 9/07/11) (Note: This is one of the "few and far between" cases involving Congress's reach to regulate Americans' conduct abroad. It expressly disagrees with *United States v Clark*, 435 F3d 1100 (9th Cir 2006)).

Defendant has a long and globetrotting history of child sex abuse convictions: Michigan, New Jersey, Latvia. About a year after he was released from a Latvian prison, defendant flew from New York to Germany, where he sexually abused a child. A German jury convicted him for those sex acts. On his release from a German prison, he returned to Delaware, where he was arrested and indicted by a grand jury in Delaware for "engaging in noncommercial illicit sexual conduct in a foreign place" in violation of federal law called the PROTECT Act (Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act). In the PROTECT Act, Congress's intent was to close "significant loopholes in the law that persons who travel to foreign countries seeking sex with children are currently using to their advantage in order to avoid prosecution," having found that American citizens were using the channels of foreign commerce to travel to countries where dire poverty and lax enforcement would allow them to escape prosecution for child sex abuse.

Defendant moved to dismiss the indictment, arguing that Congress exceeded its authority to regulate noncommercial activity outside of the United States, under the Foreign Commerce Clause and the Due Process Clause of the Fifth Amendment. The

district court denied the motion under both constitutional provisions. A jury convicted defendant and he was sentenced to 30 years imprisonment.

The Court of Appeals affirmed. First, venue was proper in Delaware because it is "the district of arrest." Second, defendant raised a facial challenge to the statute, which the court would invalidate only if it finds that "no set of circumstances exists under which the Act would be valid, i.e., that the law is unconstitutional in all of its applications," citing *Washington State Grange v Washington State Republican Party*, 552 US 442, 449 (2008) and *United States v Salerno*, 481 US 739, 745 (1987).

Turning to the facial challenge to the statute under the Commerce Clause, the Court of Appeals observed that there are three subparts to the Commerce Clause in Article I, section 8, of the US Constitution: Interstate, Indian, and Foreign. "Early opinions of the Court suggest that the three subparts of the Commerce Clause should be interpreted similarly," quoting *Gibbons v Ogden*, 22 US 1, 194 (1824). Despite *Gibbons*, though, the court noted that "the three subclauses of Article I, section 8, clause 3 have acquired markedly different meanings over time." *Id*. The outlined three "categories of regulation" where Congress is authorized to use its interstate commerce power: (1) use of channels of interstate commerce; (2) instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) activities that substantially affect commerce, citing *Gonzales v Raich*, 545 US 1, 5 (2005), *United States v Lopez*, 514 US 549, 558 (1995), and *United States v Morrison*, 529 US 598, 617 (2000).

The court then observed that the "Supreme Court has yet to determine whether this framework applies to cases involving Congress's power to regulate pursuant to the Foreign Commerce Clause." There is "precious little case law on how to establish the requisite link to commercial interests in the United States." The Foreign Commerce Clause has been used to limit the States' ability to "intervene in matters affecting international trade," such as *in Japan Line, Ltd. v County of Los Angeles*, 441 US 434 (1979) (California cannot tax Japanese shipping containers stored temporarily in California because that could restrict the federal government's ability to "speak with one voice" in foreign affairs). In *Japan Line*, the Supreme Court held that the Commerce Clause "grants Congress power to regulate commerce 'with foreign Nations' and 'among the several States' in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be the greater."

The Third Circuit panel noted that in the absence of Supreme Court precedent, the Ninth Circuit determined that the *Lopez* framework has little analytical value in the Foreign Commerce Clause context, in *United States v Clark*, 435 F3d 1100 (9th Cir 2006). Rather than apply *Lopez*, the Third Circuit observed that the Ninth Circuit "claims to borrow" from *Gonzales v Raich* a "global, commonsense approach" that considers "whether the statute bears a rational relationship to Congress's authority under the Foreign Commerce Clause."

The Third Circuit declined to follow the Ninth Circuit's reasoning, citing among other cases, *Heart of Atlanta Motel, Inc. v United States*, 379 US 241, 256 (1964) ("the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question."). The Third Circuit panel concluded that the statute at issue "is a valid congressional enactment under the narrower standard articulated in *Lopez*." Congress enacted this statute to regulate persons who use the channels of commerce to circumvent local laws that criminalize child abuse and molestation. "And just as Congress may cast a wide net to stop sex offenders from traveling in interstate commerce to evade state registration

requirements, so too may it attempt to prevent sex tourists from using the channels of foreign commerce to abuse children. In sum, because the jurisdictional element in [the statute] has an 'express connection' to the channels of foreign commerce . . . we hold that it is a valid exercise of Congress's power under the Foreign Commerce Clause," under "the first prong of *Lopez*."

5. Tenth Amendment

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." -- Tenth Amendment, US Const

"If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." *New York v United States*, 505 US 144, 156 (1992).

Bond v United States, 131 S Ct 2355 (6/16/11) (Kennedy, with Ginsburg and Breyer concurring) Bond discovered that her husband had impregnated her close friend. She sought revenge. She harassed her friend with letters and phone calls. After being convicted of a minor state crime for those acts, she, a microbiologist, put caustic poison 24 times on her friend's mailbox, car door, and front doorknob, causing the friend to have minor burns on her hand. The US Attorney's office indicted her for, among other things, two counts under the Chemical Weapons Convention Implementation Act of 1998, for possessing a chemical that can cause death or permanent harm to humans or animals without a peaceful purpose. Bond moved to dismiss, on grounds that the statute was beyond Congress's constitutional authority to enact. The district court denied the motion, Bond pleaded conditionally guilty, and was sentenced to 6 years in prison. She appealed, citing the Tenth Amendment as an authority, and the Third Circuit asked for further briefing as to her standing to raise the Tenth Amendment as a ground for invalidating a federal statute in the absence of a State's participation in the proceeding. The federal government argued that Bond did not have standing. Relying on a single sentence from *Tennessee Electric Power Co v TVA*, 306 US 118 (1939), the Third Circuit panel agreed with the federal government. She petitioned for cert. The federal government advised that it changed its position and that Bond does have standing. The US Supreme Court granted cert and appointed an amicus curiae to defend the Third Circuit's position (who filed an amicus brief and presented oral argument "that have been of considerable assistance to the Court").

The US Supreme Court concluded that Bond does have standing to address the Tenth Amendment issue, although it expressly did not address the Tenth Amendment issue. First, the "requirement of Article III standing . . . had no bearing upon Bond's capacity to assert defenses in the District Court." "One who seeks to initiate or continue proceedings in federal court must demonstrate, among other requirements, both standing to obtain the relief requested . . . and, in addition, an 'ongoing interest in the dispute' on the part of the opposing party that is sufficient to establish 'concrete adverseness'". (Citing *Camreta v Greene*, 131 S Ct 2020 (2011) and *Lujan v Defenders of Wildlife*, 504 US 555 (1992)). *Tennessee Electric Power Co v TVA*, 306 US 118 (1939) is "irrelevant with respect to prudential rules of standing as well."

Amicus (defending the Third Circuit's position) then contended that federal courts should not adjudicate a claim like Bond's due to prudential concerns that a party "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of

third parties," as stated in *Warth v Seldin*, 422 US 490, 499 (1975) and *Kowalski v Tesmer*, 543 US 125 (2004). But here, Bond sought to vindicate her own constitutional interests: "The individual, in a proper case, can assert injury from governmental action taken in excess of the authority that federalism defines. Her rights in this regard do not belong to a State."

The Court explained that the "federal system rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.' *Alden v Maine*, 527 US 706, 758 (1999)." "Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." "In the precedents of this Court, the claims of individuals – not of the Government departments – have been the principal source of judicial decisions concerning separation of powers and checks and balances. " "Just as it is appropriate for an individual, in a proper case, to invoke separation-of-powers or checks-and-balances constraints, so too may a litigant, in a proper case, challenge a law as enacted in contravention of constitutional principles of federalism. That claim need not depend on the vicarious assertion of a State's constitutional interests, even if a State's constitutional interests are also implicated."

Here, Bond asserts that her conduct was "local in nature" and "should be left to local authorities" to prosecute and that "congressional regulation" of that conduct "signals a massive and unjustifiable expansion of federal law enforcement into state-regulated domain." She may not have been prosecuted if the matter were left to the state, and if it had been a state prosecution, her maximum sentence was just more than 1/3 of her federal sentence. "Impermissible interference with state sovereignty is not within the enumerated powers of the National Government . . . and action that exceeds the National Government's enumerated powers undermines the sovereign interests of States. . . . . The unconstitutional action can cause concomitant injury to persons in individual cases." "Whether the Tenth Amendment is regarded as simply a 'truism' . . . or whether it has independent force of its own, the result here is the same."

In short, there "is no basis in precedent or principle to deny petitioner's standing to raise her claims. The ultimate issue of the statute's validity turns in part on whether the law can be deemed 'necessary and proper for carrying into Execution' the President's Article II, section 2 Treaty Power, see U.S. Const., Art. I, section 8, clause 18." This Court expresses no view on the merits of that argument."

Ginsburg and Breyer concurred to note: "In short, a law 'beyond the power of Congress,' for any reason, is 'no law at all. *Nigro v United States*, 276 US 332, 341 (1928). The validity of Bond's conviction depends upon whether the Constitution permits Congress to enact [the section of the Act at issue]."

B. Full Faith and Credit

"**Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State.**" -- Article IV, section 1, US Const

The Full Faith and Credit Clause requires (at most) that a state give effect to rights established between parties that arise from judgments, agreements, or statutes originating in other states. *State v Berringer*, 234 Or App 665, *rev denied* 348 Or 669 (2010).

C. Contracts Clause

"**No State shall . . . pass any . . . Law impairing the Obligation of Contracts.**" Article I, section 10, clause 1, US Const

A court's task is "to reconcile the strictures of the Contract Clause with the essential attributes of sovereign power necessarily reserved by the states to safeguard the welfare of their citizens." *United States Trust Co. of New York v New Jersey*, 431 US 1, 20 (1977).

See ***United Automobile v Fortuño***, 633 F3d 37 (1st Cir 1/27/11) on pleading and proof in the federal circuits.

D. First Amendment

"**Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.**" –US Const, amend I

Application to the States:
"The term 'liberty' in the Fourteenth Amendment to the Constitution makes the First Amendment applicable to the States." *McIntyre v Ohio Elections Comm'n*, 514 US 33, 336 n 1 (1995). The rights in the First Amendment apply to the states through the Fourteenth Amendment's due process clause: *Everson v Board of Education of Ewing*, 330 US 1 (1947) (establishment); *Cantwell v Connecticut*, 310 US 296 (1940) (free exercise); *De Jonge v Oregon*, 299 US 353 (1940) (assembly); *Gitlow v New York*, 268 US 652 (1925) (speech); *Near v Minnesota ex rel Olson*, 283 US 697 (1931) (press), *McDonald v City of Chicag*o, 130 S Ct 3016, 3034 n 12 (2010) (so reciting).

Application only to state actors:
State action is subject to Fourteenth Amendment scrutiny but private conduct is not. State "action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" *Brentwood Academy v Tennessee Secondary School*, 531 US 288, 295 (2001). A "host of facts" can bear on whether action may be state action: when the state exercises its coercive power or significant encouragement; when a private actor is a willful participant in joint activity with the state; when an entity is controlled by the state or an agency; when an entity has been delegated a public function by the state; when an actor is entwined with governmental policies; or when the government is entwined in the entity's management or control. *Id*. at 296.

Speech unprotected by the First Amendment:
The First Amendment "has no application when what is restricted is not protected speech." *Nevada Comm'n on Ethics v Carrigan*, 131 S Ct 2343 (2011). Examples of speech unprotected by the First Amendment:

- A legislator's vote is not protected speech (his legislative power is not personal to him but belongs to the people. *Nevada Comm'n on Ethics v Carrigan*, 131 S Ct 2343 (2011).

- Lewd, obscene, profane, libelous, and fighting words are categories of speech wholly outside the protections of the First Amendment. *Chaplinsky v. New Hampshire*, 315 US 568, 571-72 (1942); *Brown v Entertainment Merchants Ass'n*, 131 S Ct 2729 (6/27/11) (obscenity, incitement, and fighting words "have never been thought to raise any Constitutional problem"); *United States v Stevens*, 130 S Ct 1577, 1584 (2010) (certain categories of speech fall outside First Amendment protection precisely *because of* their content: obscenity, defamation, fraud, incitement, and speech integral to criminal conduct).
- Knowingly communicating an intentional lie may also be regulated without regard to the substance of that speech as long as the government is not favoring or disfavoring certain messages, see *United States v Gilliland*, 312 US 86, 93 (1941), *Gertz v Robert Welch, Inc.*, 418 US 323, 340 (1974), and *R.A.V. v City of St. Paul*, 505 US 377, 391-92 (1992).
- Pornography produced with real children (as with defamation, incitement, obscenity) also is not protected by the First Amendment. *Ashcroft v Free Speech Coalition*, 535 US 234, 245-46 (2002).

See ***Clear Channel Outdoor, Inc. v City of Portland***, 243 Or App 133 (5/25/11) (Sercombe, Wollheim, Riggs SJ), discussed *ante* under Free Expression, Article I, section 8, Oregon Constitution.

Nevada Comm'n on Ethics v Carrigan, 131 S Ct 2343 (6/13/2011) (Scalia) Nevada's ethics laws provide that public officers shall not vote on matters in which their independent judgment may be materially affected due to private interests. The state ethics commission concluded censured Carrigan, an elected city councilman, because had voted to approve a casino project that his longtime friend/campaign manager was a paid consultant for. Carrigan petitioned for review in the state court. The state supreme court held that voting was protected by the First Amendment, and applying strict scrutiny, concluded that part of the state ethics laws were unconstitutionally overbroad.

The US Supreme Court reversed: the First Amendment "has no application when what is restricted is not protected speech." For example, laws "punishing libel and obscenity are not thought to violate the 'freedom of speech' to which the First Amendment refers because such laws existed in 1791 and have been in place ever since. The same is true of legislative recusal rules. . . . [Conflict-of-interest recusal rules] have been commonplace for over 200 years." The "dispositive" evidence in this case is early congressional enactments that provide contemporaneous and weighty evidence of the Constitution's meaning. "Within 15 years of the founding, both the House of Representatives and the Senate adopted recusal rules." Thomas Jefferson adopted the Senate recusal rule when he was President of the Senate. And federal "conflict-of-interest rules applicable to judges also date back to the founding. In 1792, Congress passed a law requiring district court judges to recuse themselves if they had a personal interest in a suit or had been counsel to a party appearing before them." And the "Nevada Supreme Court's belief that recusal rules violate legislators' First Amendment rights is also inconsistent with long-standing traditions in the States."

But the Court asked and answered this question: "But how can it be that restrictions upon legislators' voting are not restrictions upon legislators' protected speech? The answer is that a legislator's vote is the commitment of his apportioned share of the legislature's power to the passage or defeat of a particular proposal. The legislative power thus committed is not personal to the legislator but belongs to the people; the legislator has no personal right to it." Reversed.

Brown v Entertainment Merchants Ass'n, 131 S Ct 2729 (6/27/11) (Scalia, with Alito and Roberts concurring in the judgment, and Thomas and Breyer dissenting separately) California law prohibited the sale or rental of "violent video games" to minors. Software and video industries brought a preenforcement challenge to that law under the First Amendment. The district court concluded that the Act violated the First Amendment. The Ninth Circuit affirmed.

The US Supreme Court affirmed: Besides "well-defined and narrowly limited classes of speech" such as obscenity, incitement, and fighting words, the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." The holding in *United States v Stevens*, 130 S Ct 1577 (2010) "controls this case." "Our cases have been clear that the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of 'sexual conduct." Here, as in *Stevens*, a state attempted "to shoehorn speech about violence into obscenity." Speech "about violence is not obscene." And the fact that the Act was directed at protecting minors is of no merit: "High-school reading lists are full of similar fare" such as Odysseus blinding Polyphemus the Cyclops by grinding out his eye with a heated stake, and Dante and Virgil watching corrupt politicians struggle to stay submerged beneath a lake of boiling pitch, and Piggy in *Lord of the Flies* is savagely murdered by other children. The majority eviscerated Justice Alito's concurrence, which described the "astounding" violence in the children's videos (in which children participate), as intended to "disgust us – but disgust is not a valid basis for restricting expression" and Alito's ire at the video games based on "ethnic cleansing" of African Americans, Latinos, and Jews is based on the videos' messages, which "highlights the precise danger posed by the California Act: that the *ideas* expressed by speech – whether it be violence, or gore, or racism – and not its objective effects may be the reason for governmental proscription." This Act restricts content and fails to pass strict scrutiny.

Thomas dissented: the Framers could not possibly have understood 'the freedom of speech' to include an unqualified right to speak to minors."

Breyer dissented: he would uphold the statute as constitutional on its face and would reject the industries' facial challenge. "Video games combine physical action with expression. Were physical activity to predominate in a game, government could appropriately intervene, say by requiring parents to accompany children when playing a game involving actual target practice, or restricting the sale of toys presenting physical dangers to children." And this statute is "modest at most" in its restriction on speech.

***Cf. Glik v Cunniffe* et al**, 655 F3d 78 (1st Cir 2011) Glik was walking through the Boston Common (the oldest city park) and saw three officers (defendants) arresting a young man. A bystander said, "You're hurting him, stop." Glik began videotaping the arrest on his cell phone from 10 feet away. An officer said, "I think you've taken enough pictures." Glik said, "I'm recording you, I saw you punch him." The officer handcuffed Glik for "unlawful audio recording" under a state wiretap statute. Glik was arrested and charged with disturbing the peace, aiding the escape of a prisoner, and wiretap violations. The municipal court dismissed the charges. Glik filed an internal-affairs complain with the Boston PD, which never investigated or took any other action. Glik filed a §1983 action against the police officers, who moved to dismiss on grounds that the police officers were entitled to qualified immunity. The district court denied defendants' motion because the First Amendment right to publicly record police officers on public business is clearly established.

The First Circuit affirmed, in accordance with the Ninth and other circuits: the press and private persons "unambiguously" have "a constitutionally protected right to videotape police carrying out their duties in public." The press and the people have a First Amendment "right to film government officials or matters of public interest in public space." The nature of that right is "fundamental and virtually self-evident." This right may be subject to reasonable time, place, and manner restrictions, a qualification that is not at issue in this case. In short: no qualified immunity to the officers here. The officers also lacked probable cause to arrest Glik under the state's wiretap statute, because his cell phone recording was not "secret," which is an element of that state crime, thus Glik's Fourth Amendment rights also were violated.

Curry v Clackamas County, 240 Or App 531 (02/02/11) (Sercombe, Ortega, Landau) In this Measure 37 and 49 claim, the plaintiffs asserted that Measure 49 (which limited rights and remedies they had with Measure 37 land-use waivers) violates their First Amendment rights because it creates an "unconstitutional condition." (In *Dolan v City of Tigard*, 512 US 374, 385 (1994), the Court held that under the doctrine of unconstitutional conditions, "the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government."). The Court of Appeals affirmed the trial court's rejection of this claim, because plaintiffs were not forced to forego any constitutional right or anything of value, to obtain a government benefit.

Hope Presbyterian Church of Rogue River v Presbyterian Church (U.S.A.), 242 Or App 485 (4/27/11) (Landau pro tem, Ortega, Armstrong) This is a case about how to resolve disputes of church property, specifically a church building and its contents. Plaintiff is a church (Hope Presbyterian) that sought to separate from its denomination (PCUSA) and presbytery. Governance within the PCUSA is set out in a constitution called the "Book of Confessions" and the "Book of Order" which describes the hierarchical nature of the church. The "Book of Order" provides that all property is held in trust for PCUSA. Hope's deed to the real property did not mention any trust for PCUSA. Hope's bylaws state that it is governed by the constitution of PCUSA. It later amended the bylaws to state that it holds all property as trustee for PCUSA. Hope sought a judgment quieting title and declaring that it is the sole owner. PCUSA contended that its "Book of Order," the general church's organizational constitution, declares that local congregations hold property in trust for PCUSA and that the First Amendment requires civil courts to give effect to that book. Both sides moved for summary judgment.

The trial court granted Hope's motion for summary judgment, concluding that the First Amendment authorizes civil courts to resolve church disputes by applying neutral secular principles of law, without referencing the "Book of Order." The trial court did not consider the "Book of Order" or Hope's amended articles (which declared that the property is held in trust for PCUSA).

The Court of Appeals reversed in a detailed opinion, first noting that a civil court attempting to resolve property disputes between churches and their denominational authorities "runs a risk of civil interference with the churches' free exercise of their faiths, as guaranteed by the First Amendment," citing *Presbyterian Church v Hull Church*, 393 US 440, 449 (1969) and *Tubra v Cooke*, 233 Or App 339, 350 *rev den* 348 Or 621 (2010), *cert den*, 131 S Ct 1569 (2011). The court noted that Oregon courts have not explicitly adopted a particular way of deciding how to resolve disputes over church property in ways that are consistent with First Amendment guarantees of religious freedom.

But under *Watson v Jones*, 80 US 679 (1871), the US Supreme Court declared that, when asked, civil courts have authority to resolve secular church disputes over property, and a key factor in doing so is to distinguish between "congregational"/"independent" churches (that have little oversight from superiors and thus are governed by ordinary principles of law) and "hierarchical" churches (that are part of a larger organization under its governance and control and thus are bound by its orders). In *Presbyterian Church*, the Supreme Court noted that "there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded." In *Jones v Wolf*, 443 US 595 (1979), the Supreme Court cautioned that the First Amendment requires civil courts to defer to the resolution of issues of religious doctrine "by the highest court of a hierarchical church organization." A state may adopt any one of various approaches for settling church property disputes as long as it "involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith." The Court of Appeals recited numerous state-court decisions attempting to resolve the dilemma of resolving church property disputes within the First Amendment.

With that First Amendment background, the Court of Appeals concluded that "under either the hierarchical-deference or the neutral-principles approach to the resolution of church property disputes, the record in this case is clear that Hope Presbyterian held its property in trust for PCUSA."

The Court of Appeals noted that one Oregon Supreme Court case resolved a church-property dispute by invoking the hierarchical-deference approach under *Watson*, and that here the Court of Appeals "must follow the same course," as it is precedent. The US Supreme Court has characterized the Presbyterian Church as "hierarchical." Here, the "Book of Order" declares that local churches hold property in trust for PCUSA, and Hope Presbyterian amended its own bylaws to expressly state that it is bound by the "Book of Order" and amended its bylaws to state that it held "all property as trustee" for PCUSA. The trial court erred in denying PCUSA's motion for summary judgment and by granting Hope's motion. Remanded for a judgment declaring the property to be held in trust for PCUSA.

***West Linn Corporate Park LLC v City of West Linn* et al,** (Case No. 05-36061) (4/18/11) (Tallman, Clifton, Korman SJ) (unpublished) Plaintiff refused to convey a disputed intersection to defendant City for its public improvements. A City employee consequently refused to release a $264K performance bond plaintiff had posted. Plaintiff contended that the its refusal to convey the disputed intersection was an act of petitioning the government for redress, and the City employee violated its First Amendment rights by refusing to release its bond. The magistrate ordered the City to release the bond and awarded $13K in damages to plaintiff, plus $165K in attorney fees.

The Ninth Circuit panel reversed: "The First Amendment protects only conduct that is 'inherently expressive.' *Rumsfeld v Forum for Academic and Institutional Rights, Inc*., 547 US 47, 66 (2006)." Here, the magistrate judge found that the City employee had retaliated against plaintiff because it refused to dedicate its interest in a disputed intersection to the City. The Ninth Circuit panel concluded: "Even assuming this is true, [plaintiff's] refusal to convey the disputed intersection was not 'inherently expressive.' *See id*. It did not convey any 'particularized message.' *See Texas v Johnson*, 491 US 397, 404 (1989). Contrary to [plaintiff's] arguments, refusing to convey the disputed intersection did not equate to petitioning the government for redress." Plaintiff was simply asserting its

property rights. Reversed as to this aspect of the judgment, and for reapportionment of attorney fees.

E. Fourth Amendment

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." – Fourth Amendment, US Const

Application to the states: The rights in the Fourth Amendment apply to the states through the due process clause of the Fourteenth Amendment, see *Aguilar v Texas*, 378 US 108 (1964) (warrants); *Mapp v Ohio*, 367 US 643 (1961) (exclusionary rule); *Wolf v Colorado*, 338 US 25 (1949) (unreasonable searches and seizures). *McDonald v City of Chicago*, 130 S Ct 1316, 3034 n 12 (2010) (so stating).

Kentucky v King, 131 S Ct 1849 (5/16/11) "The text of the [Fourth] Amendment . . . expressly imposes two requirements. First, all searches and seizures must be reasonable. Second, a warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity. See *Payton v New York*, 445 US 573, 584 (1980)." See discussion of searches of houses, *ante*.

United States v Warshak, 631 F 3d 266 (6th Cir 12/14/10) *reh'g en banc denied* 3/07/11 (Note: This is a Sixth Circuit case involving the Fourth Amendment. It contrasts with Ninth Circuit precedent.).

Defendant owned a small company that sold "nutraceutical" products, particularly "Enzyte," which was an expensive herbal pill ($1.50 per pill) purported to increase penis size. Within a few years of its launch, the company ballooned from employing a few family members to 1500 employees, and its annual sales topped $250 million. The company used aggressive television spots featuring a fictitious character called "Smilin' Bob," and fictitious data, such as a fake survey that said the pill increased penis size from 12-31% and a fake 96% customer-satisfaction rating, and fictitious inventors (two Ivy League doctors that did not exist). The company used an auto-ship method of keeping customers on the hook – each month they received a bill and pills and could not stop those billings unless they provided defendant's company with a notarized document stating that Enzyte provided them with "no size increase." And there was no refund policy. The BBB attempted to get defendant to clean up his company's act, to no avail.

Without a warrant, the government requested defendant's Internet Service Providers to preserve defendant's future emails, as the Stored Communications Act (18 USC §2701 *et seq*) allows. The government instructed the ISPs to not inform defendant that his messages were being archived. Several months later, the government obtained a subpoena and compelled an ISP to turn over defendant's emails. Several months later, the government served the ISP with an *ex parte* court order requiring the ISP to surrender any additional email messages in defendant's account. About 27,000 of his private emails were produced from the ISP. Defendant did not receive notice of either the subpoena or the order until a year after his ISP received the order.

Some of defendant's emails showed an "enduring nature of the corruption." For example, defendant implored his then-sales manager to "emulate the creative process that led to Samuel Taylor Coleridge's 'Kubla Khan.' To wit, [defendant suggested]:

> 'THROW A SALES COPY PARTY --- GET 3-4 BOTTLES OF WINE, A LARGE BONG, AND AN [8]-BALL ---- THEN SIT AROUND AND MAKE SHIT UP!! – THAT'S WHAT I DO…. BUT WRITE IT ALL DOWN OR YOU'LL FORGET IT THE NEXT DAY." *Id*. at n 76.

At trial, defendant moved to suppress the emails as the product of Fourth Amendment violations. The trial court denied the motion. Defendant and his mother were convicted of numerous crimes, including money laundering. Defendant was sentenced to 25 years in prison, $44 million in money-laundering judgment forfeiture, and about a half-million dollars in money-laundering proceeds forfeiture.

The Sixth Circuit observed about the company: "the very nucleus of its business model remained rotten and malignant." The Sixth Circuit, in a lengthy and detailed opinion, concluded that the email-search did violate the Fourth Amendment, but the exclusionary rule did not apply:

"We find that the government *did* violate [defendant's] Fourth Amendment rights by compelling his Internet Service Provider ("ISP") to turn over the contents of his emails. However, we agree that agents relied on the [Stored Communications Act] in good faith, and therefore hold that reversal is unwarranted." (Emphasis in original).

The Sixth Circuit panel specifically held:

> "we hold that a subscriber enjoys a reasonable expectation of privacy in the contents of emails that are stored with, or sent or received through, a commercial ISP. The government may not compel a commercial ISP to turn over the contents of a subscriber's emails without first obtaining a warrant based on probable cause. Therefore, because they did not obtain a warrant, the government agents violated the Fourth Amendment when they obtained the contents of [defendant's] emails. Moreover, to the extent that the SCA purports to permit the government to obtain such emails warrantlessly, the SCA is unconstitutional."

In so holding, the Sixth Circuit reasoned that "the ISP is the functional equivalent of a post office or a telephone company," which people have a reasonable expectation of privacy in. *Katz v United States*, 389 US 347 (1967) (public telephone booth) and *United States v Jacobsen*, 466 US 109, 113 (1984) (letters and sealed packages). In other words, "trusting a letter to an intermediary does not necessarily defeat one's reasonable expectation that the letter will remain private." And "people seldom unfurl their dirty laundry in plain view."

In holding that the good-faith exception to the exclusionary rule applies, the Sixth Circuit panel rejected defendant's reliance on a Ninth Circuit case, *Theofel v Farey-Jone*s, 359 F3d 1066, 1071 (9th Cir 2004). The Sixth Circuit first stated the obvious, that "decisions of the Ninth Circuit are not binding on courts of this circuit," second, it noted that at least one academic has criticized the Ninth Circuit's decision as "quite implausible," third, it cited a district court decision in the Seventh Circuit to the contrary, and fourth, it "note[d] that the Fourth Amendment violation was likely harmless."

But the Court noted: "Of course, after today's decision, the good-faith calculus has changed, and a reasonable officer may no longer assume that the Constitution permits warrantless searches of private emails." *Id*. at n 17.

Chism v Washington State, 655 F3d 1106 (9th Cir 8/25/11). A firefighter's wife's credit card had been stolen, they reported it to their bank, and they reported false charges on it. Years later, Yahoo! reported a "cybertip" to police that child porn was being downloaded multiple times from two sources in South America with "Mr. Nicole Chism" as the registered user and with their credit card paid to host both sites. (Proxy software allows an unknown individual to log on to the internet under another person's IP address). Police never traced the IP address that was used to log in to the websites. Detectives in Washington falsely stated in their application for search warrants that Mr. Chism had downloaded child porn. A search warrant issued, Mr. Chism's home and home computer was searched, and his fire station computer was searched, and he was arrested. No child porn was found, he was never charged. He and his wife brought a section 1983 claim against the state and officers. The district court granted summary judgment to the state officers on qualified immunity. Ninth Circuit panel reversed and remanded: officers were not entitled to qualified immunity: every reasonable officer would have understood that the Chisms had a constitutional right to not be searched and arrested as a result of judicial deception. Notably, Judge Ikuta dissented, first by quoting Deep Throat in *All the President's Men*: if one wants to find the truth, then "follow the money." This holding "defies common sense," and officers should be entitled to qualified immunity, based on *United States v Gourde*, 440 F3d 1065 (9th Cir 2006) (en banc).

F. Fifth Amendment

"**No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation**." -- Fifth Amendment, US Const

Application to the states: Most of the rights in the Fifth Amendment apply to the states through the due process clause of the Fourteenth Amendment, see *Benton v Maryland*, 395 US 784 (1969) (double jeopardy); *Malloy v Hogan*, 378 US 1 (1964) (privilege against self-incrimination); *Chicago, B&Q R. Co. v Chicago*, 166 US 226 (1897) (just compensation). *McDonald v City of Chicago*, 130 S Ct 1316, 3034 n 12 (2010) (so reciting). The Fifth Amendment's grand-jury indictment requirement has not been fully incorporated to the states but the "governing decisions regarding the Grand Jury Clause of the Fifth Amendment . . . long predate[s] the era of selective incorporation." *McDonald*, 130 S Ct 1316, 3034-35 n 12 and 13 (so stating, without citing any cases).

See also Fourteenth Amendment, *post*.

Redwine v Starboard LLC and Sawyer, 240 Or App 673 (02/16/11) (Haselton, Armstrong, Duncan) Plaintiffs obtained a money judgment for over 900K against defendant LLC. Defendant Sawyer and her husband had publicly stated that they were involved with the LLC. Plaintiffs initiated a judgment debtor exam against the LLC and Sawyer and her husband were ordered to produce documents regarding the LLC's finances. The IRS and the FBI were investigating the LLC and Sawyer; this was publicly known. At the debtors' exam, the Sawyers invoked the privilege against self-incrimination under the state and federal constitutions. Plaintiffs initiated contempt proceedings. At that proceeding, the trial court continued the matter so it could preside over the debtors' exam and rule on the privilege issue on a question-by-question basis. During the ensuing debtors' exam, the Sawyers invoked the state and federal constitutional

protections against self-incrimination. The Sawyers would not produce documents or answer questions, such as "What has been your past and your present connection with Starboard LLC?" Plaintiffs' counsel argued that the answer was public record and public knowledge, so the privilege should not apply. Trial court agreed, ordered the Sawyers to testify, and held them in contempt when they continued to refuse to testify. Trial court thereafter issued a judgment holding Mrs. Sawyer in summary contempt and ordered her to surrender her passport and report to custody. She filed a NOAP the same day. She moved for a stay, which the court denied after a hearing. Court of Appeals granted a temporary stay. Husband did not appeal.

The Court of Appeals reviewed the determination of the privilege's applicability for errors of law and reversed the judgment of contempt: "so long as that proximate exposure to criminal liability remains, Sawyer's invocation of the privilege against self-incrimination as to the inquiries at issue here cannot be contravened." The parties here "conflated their analyses" under the two constitutional provisions (state and federal) and focused more on the Fifth Amendment. The Court of Appeals decided that "accordingly," it would "focus on the privilege as it applies under the Fifth Amendment" because the parties did so, and because they did not propose separate analyses, or argue "against our adoption of the federal standard"). (Note that under that reasoning, the parties can control the Court of Appeals' analysis away from state constitutional analysis just by focusing on the federal provision). The Court of Appeals made these points of law:

> —The Fifth Amendment privilege protects a person from being compelled to testify in any proceeding when the answers may incriminate him in a future criminal prosecution. *Maness v Meyers*, 419 US 449, 464 (1975).
>
> — The privilege protects testimony that would "furnish a link in the chain of evidence" needed to prosecute a crime. *Hoffman v. United States*, 341 US 479, 486 (1951).
>
> — The inquiry is whether the testimony "would provide evidence of a particular crime." *Empire Wholesale Lumber Co. v Meyers*, 192 Or App 221, 226-27 (2004).
>
> — The privilege is not abrogated just because the government may have access from another source to the same information. *Grunewald v United States*, 353 US 391, 421-22 (1957).
>
> — The privilege can extend to documentary production if there is a "protected testimonial aspect" to the documents such as where by producing documents pursuant to a subpoena, "the witness would admit that the papers existed, were in his possession or control, and were authentic." *United States v Hubbell*, 530 US 27, 36 n 19 (2000).
>
> — The witness claiming the privilege bears the burden of establishing that an answer could be injurious, and the court must construe the privilege liberally in favor or the right it is intended to secure. *Hoffman*, 341 US at 486.

Here, by answering the question posed, Sawyer risked disclosing the nature, duration, and degree of her involvement with and authority (if any) over the affairs of the LLC, evidence that "might well be used" against her by the FBI and IRS. Some information may be publicly available but by answering the question, she may have disclosed inculpatory information that was only available from Sawyer. Same as to the documents. Trial court erred in judging Sawyer in contempt.

State v Anderson, 243 Or App 222 (5/22/11) (Nakamoto, Schuman, Wollheim) Defendant entered into a plea agreement. The trial court looked to the plea agreement and held defendant

to the sanction that he had agreed would be imposed if he violated the terms of his probation sentence. On appeal, defendant argued that the trial court improperly used his assault conviction against him when applying his criminal history score from an original sentencing to determine his probation revocation sanction under an administrative rule. The Court of Appeals cited *United States v Broce*, 488 US 563, 573 (1989) and *State v Young*, 188 Or App 247, 252 n 5, *rev den* 336 Or 125 (2003), and concluded that by knowingly and voluntarily entering into the plea agreement, and stipulating to the term of imprisonment he ultimately received as a sanction if he violated his probation, "defendant relinquished any objection he had based on the guarantee against double jeopardy." (Note that defendant cited the federal constitution only, but the court cited cases under the state constitution as well).

See ***State v Barrett***, 350 Or 390 (2011), discussed under Victims' Rights, at page 103.

F. Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." -- Sixth Amendment, US Const

Application to the states:
Most – but not all -- of the rights in the Sixth Amendment apply to the states through the due process clause of the Fourteenth Amendment: *Duncan v Louisiana*, 391 US 145 (1968) (trial by jury in criminal cases); *Washington v Texas*, 388 US 14 (1967) (compulsory process); *Klopfer v North Carolina*, 386 US 213 (1967) (speedy trial); *Pointer v Texas*, 380 US 400, 403 (1965) (right to confront adverse witnesses); *Gideon v Wainwright*, 372 US 335 (1963) (assistance of counsel); *In re Oliver*, 333 US 257 (1948) (right to a public trial). *McDonald v City of Chicago*, 130 S Ct 1316, 3034 n 12 (2010) (so reciting those cases).

Jury:
A person charged with a serious offense has a fundamental right to a trial by jury. *Duncan v Louisiana*, 391 US 145, 157-58 (1968). That includes the right to trial by a jury that is drawn from a fair cross-section of the community. *Taylor v Louisiana*, 419 US 522, 530 (1975). But although the Sixth Amendment requires a unanimous jury verdict in federal criminal trials, it does not require a unanimous jury verdict in state criminal trials, see *Apodaca v Orego*n, 406 US 404 (1972) and *Johnson v Louisiana*, 406 US 356 (1972). *McDonald*, 130 S Ct at 3035 n 14 (so stating).

Cross-Examination:
The Sixth Amendment protects defendant's opportunity to engage in effective cross-examination, which may not necessarily be defendant's desired cross-examination. *Delaware v Van Arsdall*, 475 US 673, 679 (1986).

Confrontation:

The Confrontation Clause prohibits the admission of out-of-court statements that are "testimonial" unless the declarant is unavailable and defendant has had a prior opportunity to cross-examine the declarant about the statements. *Crawford v Washington*, 541 US 36, 59, 68 (2004).

A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. *Melendez-Diaz v Massachusetts*, 129 S Ct 2527 (2009) (quoting *Crawford v Washington*, 541 US 36, 54 (2004)). This includes a lab report showing the results of a forensic analysis performed on a seized substance, *id*., and a forensic lab report with a testimonial certification made to prove a fact at a criminal trial, through the in-court testimony of an analyst who neither signed the certification nor personally performed or observed the performance of the test reported in the certification, *Bullcoming v New Mexico*, 131 S Ct 2705 (2011).

Note: The *Melendez-Diaz* majority, 129 S Ct at 2538-39 (citing *Palmer v Hoffman*, 318 US 109 (1943), wrote that, in contrast with a clerk or custodian's certificate attesting to a fact, business and public records are generally admissible because (if) they were created for administrative purposes, rather than to establish some fact for a criminal trial; those are not testimonial under the Sixth Amendment. But the majority in *Bullcoming v New Mexico*, 131 S Ct 2705, 2714 n 6 (2011), did not agree on defining a "testimonial report" based on the primary purpose of its creation.

State v Tryon, 242 Or App 51 (4/06/11) (Rosenblum, Wollheim, Brewer) Defendant was charged with contempt for violating a restraining order. The trial court admitted an unsworn "return of service" in which a deputy sheriff stated that he had served defendant with the restraining order. The state used that evidence to prove defendant's knowledge that she had a restraining order against her. Defendant objected that the admission violated her confrontation rights under the US Constitution. The Court of Appeals affirmed, discussing *Crawford v Washington*, 541 US 36 (2004) (Confrontation Clause prohibits out-of-court "testimonial" statements unless the witness appears at trial or if the witness is unavailable the defendant had a prior opportunity for cross-examination) and *Melendez-Diaz v Massachusetts*, 129 S Ct 2527 (2009) (sworn certificates prepared by law enforcement to show the forensic results of seized substances are "testimonial") and *Michigan v Bryant*, 131 S Ct 1143 (2011) (a statement made in response to interrogation is subject to confrontation if the primary purpose of the statement was to create "an out-of-court substitute for trial testimony"). The only issue here is whether the return of service was "testimonial." The Court of Appeals concluded that the deputy's return of service was not testimonial: it was not made under oath, did not include any sworn testimony (so it was not an affidavit), nor was it prepared in response to a request by law enforcement to create an out-of-court substitute for trial testimony. Instead, the deputy's proof of service was made for the purpose of "administration of the entity's affairs." Because the return of service was not "testimonial," its admission did not violate defendant's Sixth Amendment confrontation rights.

State v Haugen, 349 Or 174 (11/04/10) (Balmer) On automatic and direct review of defendant's death sentence, the Oregon Supreme Court affirmed the conviction and sentence. The trial court had excluded a non-English-speaking prospective juror and did not provide that prospective juror with an interpreter. Defendant argued that that exclusion violated his Sixth Amendment right to have a jury drawn from a fair cross-section of the community and his Fourteenth Amendment right to equal protection of the laws. The Court concluded that the state's "decision not to provide funding for interpreters for jurors who are not proficient in English does not violate the Sixth or Fourteenth Amendments to the United States Constitution." The Court also noted that "every state court that has considered whether a requirement that jurors be proficient

in English violates the Sixth Amendment, the Due Process Clause, or the Equal Protection Clause has concluded that it does not."

State v Lafferty, 240 Or App 564 (02/26/11) (Brewer, Haselton, Armstrong) Defendant pleaded guilty to assault in one case and burglary in another case. Neither the plea agreement nor the plea colloquy said anything about sentencing enhancement facts and did not specify what "open sentencing" was. The DA intended to use defendant's juvenile adjudication in sentencing, to increase his criminal history score, arguing that under a statute, it had provided sufficient notice to defendant that it intended to do so, and under the statute (ORS 136.776), when a defendant waives his right to a jury trial, he also waives the right to a jury trial on all enhancement facts, thus, guilty pleas equal a waiver of jury-trial rights on sentencing enhancement facts. Defendant objected, citing *State v Harris*, 339 Or 157 (2005), which provides that the trial court cannot use defendant's juvenile adjudication in calculating his criminal history score because he had not knowingly relinquished his right to a jury determination regarding that juvenile adjudication. The trial court concluded that, under *State v Harris*, it could not use defendant's juvenile adjudication in calculating his criminal history, because defendant did not knowingly relinquish his right to a jury determination regarding that juvenile adjudication. The state appealed.

The Court of Appeals affirmed: under the circumstances here, when pleading guilty to the offenses, defendant did not waive his Sixth Amendment right to a jury determination of sentencing enhancements. The "necessary information for defendant to intentionally relinquish his right to a jury determination of sentencing enhancement facts was not included in the plea offer or agreement, nor was it imparted to him during the plea colloquy. In fact, the references to 'open sentencing,' and the court's statement to defendant that 'at least as to the charges to which you're pleading, you're giving up your right to have a trial,' may well have conveyed the opposite impression – that defendant had not relinquished any of his constitutional rights in regard to sentencing."

As the US Supreme Court stated in *Blakely v Washington*, 542 US 296 (2004), "When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding." The question here "reduces to whether defendant 'consent[ed] to judicial factfinding.'" The Court of Appeals traced through numerous US Supreme Court cases to establish that "a defendant's right to have a jury determine sentencing enhancement facts must be personally waived by the defendant with knowledge of the right being relinquished." Here, although defendant did not dispute the existence of the juvenile adjudication, and although the state gave defendant proper notice that it intended to use his prior juvenile adjudication in sentencing as required by ORS 136.765, trial courts must secure written jury waivers for both guilt-phase and sentencing-enhancement facts, under ORS 136.776. "To the extent that the trial court erred, it did so by accepting a jury waiver that pertained to guilt or innocence but did not address sentencing enhancement factors."

H. Eighth Amendment

"**Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted**." -- Eighth Amendment, US Const

Application to the states: The cruel and unusual punishment prohibition in the Eighth Amendment applies to the states through the due process clause of the Fourteenth Amendment, see *Robinson v California*, 370 US 660 (1962), and the prohibition against excessive bail likewise applies to the states, see *Schilb v Kuebel*, 404 US 357 (1971). *McDonald v City of Chicago*, 130 S Ct 1316, 3034 n 12 (2010). But the US Supreme Court

has not decided whether the Eighth Amendment's prohibition on excessive fines applies to the states through the Fourteenth Amendment. *McDonald v City of Chicago*, 130 S Ct 1316, 3035 n 13 (2010) (citing *Browning-Ferris Indust. v Kelco Disposal, Inc.*, 492 US 257, 276 n 22 (1989)).

"The Cruel and Unusual Punishments Clause prohibits the imposition of inherently barbaric punishments under all circumstances. See, *e.g., Hope v Pelzer*, 536 US 730 (2002). '[P]unishments of torture,' for example, 'are forbidden.' *Wilkerson v Utah*, 99 US 130, 136 (1879). These cases underscore the essential principle that, under the Eighth Amendment, the State must respect the human attributes even of those who have committed serious crimes. For the most part, however, the Court's precedents consider punishments challenged not as inherently barbaric but as disproportionate to the crime. The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.' *Weems v United States*, 217 US 349, 367 (1910)." *Graham v Florida*, 130 S Ct 2011, 2021 (2010).

I. Due Process – Fourteenth Amendment

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." -- Fourteenth Amendment, US Const

Application to the states: The Fifth Amendment's due process clause applies to the federal government. The Fourteenth Amendment's due process clause applies to the states. *See Dusenbery v United States*, 534 US 161, 167 (2002).

In *McDonald v City of Chicago*, 130 S Ct 3016, 3034-35 n 12-14 (2010), the Court recited the provisions of the first eight amendments in the Bill of Rights that have been selectively incorporated to apply to the states through the Fourteenth Amendment's Due Process Clause. The only rights not fully incorporated are the Sixth Amendment right to a unanimous jury verdict, the Third Amendment's protection against quartering of soldiers (has not been decided), the Fifth Amendment's grand jury indictment requirement ("predates the era of selective incorporation"), the Seventh Amendment's civil jury requirement ("predates the era of selective incorporation"), and the Eighth Amendment's prohibition on excessive fines (has not been decided).

Procedural versus Substantive Due Process:

Interpreted by the U.S. Supreme Court: "This Court has held that the Due Process Clause protects individuals against two types of government action. So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' *Rochin v California*, 342 US 165, 172 (1952), or interferes with rights 'implicit in the concept of ordered liberty,' *Palko v Connecticut*, 302 US 319, 325-26 (1937). When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. *Mathews v Eldridge*, 424 US 319, 335 (1976). This requirement has traditionally been referred to as 'procedural' due process." *United States v Salerno*, 481 US 739, 746 (1987) (describing due process under the Fifth Amendment).

Interpreted by Oregon courts: A procedural due process claim "acknowledges that the state's objective is within its lawful authority, but that the process of achieving that objective does not afford the person who is the subject of the state's action with adequate procedural safeguards such as prior notice and a meaningful hearing. *E.g., Goldberg v Kelly*, 397 US 254 (1970). . . . . An argument grounded in substantive due process, on the other hand, asserts that the state's objective is simply beyond its power to achieve, regardless of how many procedural safeguards it might provide. Thus, for example, the state cannot punish a person for using contraception. *Griswold v Connecticut*, 381 US 479 (1965)." *Powell v DLCD*, 238 Or App 678, 682 (2010).

1. Punitive Damages

Punitive damages awards that are "grossly excessive" violate the Due Process Clause of the Fourteenth Amendment because excessive punitive damages serve no legitimate purpose and constitute arbitrary deprivations of property. *BMW of North America, Inc. v Gore*, 517 US 559, 568 (1996); *State Farm Mut. Auto. Ins. Co. v Campbell*, 538 US 408, 417 (2003). Excessive punitive damages also implicate the fair-notice requirement in the Due Process Clause. *Gore*, 517 US at 574.

Oregon courts' review of punitive damages awards involves three stages. First, is there a factual basis for the punitive damages award. Second, does the award comport with due process when the facts are evaluated under the three *Gore* guideposts ((1) degree of reprehensibility; (2) disparity between the actual or potential harm plaintiff suffered and the punitive damages award; and (3) difference between the punitive damages award and civil penalties authorized or imposed in comparable cases). Third, if the punitive damages exceed that permitted under the Due Process Clause, then what is the "highest lawful amount" that a rational jury could award consistently with the Due Process Clause. *Goddard v Farmers Ins Co.*, 344 Or 232, 261-62 (2008).

"The Due Process Clause of the Fourteenth Amendment prohibits a jury from imposing punitive damages to punish a defendant directly for harm caused to nonparties. However, a jury may consider evidence of harm to others when assessing the reprehensibility of the defendant's conduct and the appropriate amount of punitive damages verdict. *Philip Morris USA v Williams*, 549 US 346, 356-57 (2007)." *Schwarz v Philip Morris, Inc*., 348 Or 442 (2010).

Oregon courts consider punitive-damages review to be for "substantive" due process. *Schwarz v Philip Morris, Inc*., 348 Or 442, 458-59 (2010) (substantive due process places limits on punitive damages award).

Strawn v Farmers Ins. Co., 350 Or 336 (5/16/11), *on recons* 350 Or 521 (2011) (Linder, with Balmer dissenting) Plaintiff filed a class action against Farmers in 1999, contending that Farmers failed to comply with the Personal Injury Protection statute (ORS 742.524) and Farmers' insurance contract by failing to pay all medical expenses it was required to pay. Plaintiff and the class contended that Farmers reduced its payments by a process that was a breach of their contracts, was a breach of implied duty of good faith and fair dealing, and was fraudulent. The jury rendered a verdict for plaintiffs on those three theories for $757K in compensatory damages, $742K in prejudgment interest, and $8 million in punitive damages for fraud.

Plaintiffs then moved, under ORS 31.730, for the court to affirm the punitive damages award. Farmers opposed that motion and moved for remittitur on excessiveness grounds, citing *BMW v Gore* and *State Farm Mut. v Campbell*, 538 US 408 (2003). Plaintiffs responded that Farmers had waived its constitutional objections: first, Farmers should have asked to have the jury instructed that any punitive damages award it may make could not exceed a certain constitutional limit. Second, plaintiffs argued that after the jury did return its verdict, Farmers should have objected and requested that the jury "deliberate further" within the constitutional limit. They also argued that Farmers failed to move for a directed verdict against the punitives. Farmers countered that motions for remittitur or a new trial were the proper procedural mechanisms for federal due process objections. The trial court concluded that Farmers had waived its constitutional objections but also concluded that, on the merits, the $8 million was not excessive. The trial court entered judgment for $900K in compensatory damages and $8 million in punitives.

The Court of Appeals affirmed, except for the punitive damages award, which it deemed constitutionally excessive (more than 4:1), and thus required a new trial to determine punitive damages (unless plaintiffs on remand agreed to a remittitur). The Court of Appeals addressed the excessiveness claim "without acknowledging or addressing the waiver and procedural grounds on which the trial court" had ruled, as the Oregon Supreme Court later phrased it. Both sides petitioned for review.

The Oregon Supreme Court affirmed in part, and reversed in part. It concluded, *inter alia*, that the Court of Appeals should not have reached Farmers' constitutional challenge to the amount of the punitive damages award. The Court reasoned that the trial court had ruled on the parties' motions. On appeal, "Farmers failed to preserve any challenge to the waiver and other procedural grounds on which the trial court's order was alternatively based. Any error by the trial court concerning the constitutionality of the punitive damages award therefore was necessarily harmless. The Court of Appeals should have affirmed the trial court's order denying the motion for new trial." The Court further stated that it does "not decide whether the trial court's alternative grounds for its ruling were sound. The correctness of the trial court's waiver and other procedural analyses are not before us, just as those issues were not before the Court of Appeals. Indeed, it is precisely because the trial court's alternative grounds for ruling were not challenged by Farmers that the issue of excessiveness of the punitive damages award was not before the Court of Appeals for its determination. Likewise, whether that award was constitutionally excessive is not before us. For that reason, the punitive damages award must be affirmed."

Balmer dissented. He agreed that Farmers had not preserved "a variety of otherwise potentially meritorious arguments" but disagreed with the majority's conclusion that evidence supported the jury's finding that plaintiffs relied on Farmers' alleged misrepresentations. He would have concluded that plaintffs failed to offer sufficient evidence of reliance for the fraud claim to go to the jury. Justice Balmer did not specifically disagree with the majority's conclusion on the issue of Farmers' waiver of its constitutional claims to the punitive-damages award.

On reconsideration, Farmers contended that the Court's conclusion was a "novel state law procedural bar that is neither firmly established nor regularly followed." The Court responded that (1) its decision was not "novel" and "simply was an answer to a procedural question that had not been raised or resolved before;" and (2) Farmers failed to assign error to one of the two grounds on which the trial court had ruled that Farmers

had waived its constitutional challenge to the punitive damages. Balmer and Landau dissented for the reasons expressed in the previous opinion.

Hamlin v Hampton Lumber Mills, Inc., 349 Or 526 (01/06/11) (Walters, with Gillette and Balmer dissenting) Plaintiff's thumb was mangled in his employer's lumber mill. After his hospitalization and rehab, his employer falsely and with "intentional malice, trickery, or deceit," asserted that he was a "safety risk" and refused to hire him back. A jury awarded him $6,000 in lost wages and $175K in punitives. The employer filed a motion for judgment notwithstanding the verdict or for a new trial, on grounds that the punitives were a 30:1 ratio and thus excessive under *BMW v Gore*, 517 US 559 (1996). Plaintiff countered that the US Supreme Court expressly declined to impose a strict ration. The trial court agreed and entered judgment. The Court of Appeals held that the punitive damages were grossly excessive under the due process clause and reduced the award to 4:1 (four times the compensatory damages).

The Supreme Court reversed the Court of Appeals' decision and reinstated the jury's award. The award was a 22:1 ratio between the punitives and compensatories. The Court outlined the three *Gore* guideposts: (1) the degree of defendant's reprehensible conduct; (2) the ratio between the punitive and compensatory damages awards; and (3) the comparison to the punitive damages award to legislatively prescribed and criminal penalties for similar misconduct. The Court focused on the second guidepost (the ratio). The Court cited a law review article that compiled cases showing "that courts generally hold that, in instances in which compensatory awards are $12,000 or less, awards in excess of single-digit ratios are not 'grossly excessive.'" It concluded that "when the compensatory damages award is small and does not already serve an admonitory function, the second guidepost – the ratio between punitive and compensatory damages – is of limited assistance in determining whether the amount of a jury's punitive damages award meets or exceeds state goals of deterrence and retribution." As to the first *Gore* guidepost (reprehensibility), the Court stated: "we think that the Oregon legislature's affirmative action to protect similar state interests [in ORS 659A.043] permits us to consider defendant's statutory violation in our reprehensibility analysis." Here, the employer's conduct was "more than minimally reprehensible" and "sufficiently reprehensible" so that "defendant's conduct may justify an award of punitive damages in excess of a single-digit multiplier." As for the third guidepost (comparable criminal or civil sanction), it did not "play a significant role" in the Court's analysis. The Court of Appeals erred in reversing the jury's punitive damages verdict.

Gillette, pro tem, and Balmer dissented. The dissent's "disagreement with the majority is based on . . . its failure to apply [the second] of those guideposts because of what it views as an exception to the guidepost." The dissent reasoned that the US Supreme Court "has expressly stated 'that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.' *Campbell*, 538 US at 425." The dissent continued: when the US Supreme Court "states that specific numerical rations should be applied to determine whether a punitive damages award exceeds constitutional limits, those statements are not mere dicta, but rather constitute binding precedent that we are obliged to follow. Our federal system requires us to do what the Court says, not only what the Court does." *Campbell* and *Gore* list three exceptions to the second guidepost, and the one relevant here states that "low awards of compensatory damages may properly support a higher ratio than high compensatory awards if, for example, a particularly egregious act has resulted in only a small amount of economic damages." The majority here "truncates that exception" by dropping the "particularly egregious misconduct" element. "We do need a solution to that quandary," the dissent noted, but the "majority's solution is effectively to presume

that the Supreme Court did not mean what it said." The dissent added a post script to the US Supreme Court: "we deserve . . . further guidance that only the Court can provide."

2. Fair Trial or Fair Proceeding

State v Lawson, 239 Or App 363 (12/15/10) (Brewer and Wollheim; with Sercombe dissenting) Defendant was convicted of 5 counts of aggravated murder and other crimes. The victims, a husband and wife, were camping. Defendant moved into their tent. No one else was at the campground. They told defendant the tent was theirs. Defendant gathered his belongings and moved to another campsite near the victims' campsite. Defendant left the site in his truck. Later, defendant, from outside, shot the wife in the chest while she was in the camper. She remained conscious. Husband called 911, told the operator his wife had been shot by poachers, and described their location. Husband then was shot, fell to the ground, and died. Wife was paralyzed when defendant entered their trailer. He demanded her truck keys, engaged in brief conversation about the keys and whether he was going to kill the couple, and he put a cushion over her face after she confirmed to him that she had not seen him. She got a brief glimpse as he left. The 911 operator called and emergency personnel arrived. She told EMT that she did not know who shot her but he wore a black shirt and baseball cap with white letters, he had a loping walk, and that the shooter said he would not kill her because she had not seen his face.

During a life-flight to the hospital, wife apparently stated that she believed the life-flight helicopter pilot was the man who shot her. Wife was hospitalized for over a month. She mentioned a yellow truck (defendant had a yellow truck), she was unable to speak and her eyes were watery, and an investigator asked her leading questions while showing her defendant's photo. Police detectives returned to the hospital and led her with questions indicating that defendant was the man who shot her. Defendant admitted that he had been in the campground, and said he discovered the victims' tent, but it was abandoned. An injury on defendant's hand was consistent with an injury from ejecting a shell casing. When defendant was told that the female victim survived, he expressed disbelief that she had survived. At trial, wife testified that she did not tell EMT that the shooter was the same man who had earlier been at the campground because, she said, she had been afraid of defendant and thought he was still there. Experts for the defense, at trial, concluded that the wife did not know what the truth was because she had been so contaminated by police. The basic issue was that wife should not have been permitted to make an in-court identification of defendant because of the "unduly suggestive" pretrial identification procedures that police used.

Trial court used defendant's instruction to the jury about eyewitness identifications. The trial court concluded that the process leading to the identification was suggestive and that issue was not contested on appeal. Thus the issue became whether the identification had a source separate from the suggestive identification procedures, or other aspects of the identification, substantially exclude the risk that the identification resulted from the suggestive procedure. The state bears that burden of proof, and *State v Classen*, 285 Or 221, 232 (1979) sets out criteria required to prove it, based on *Manson v Brathwaite*, 432 US 98, 115 (1977). The trial court concluded that wife's in-court identification of defendant was based on her personal observations of him at the crime scene, and her in-court identification was allowed into evidence.

The Court of Appeals affirmed, noting that in-court identification of defendants by witnesses after unduly suggestive identification procedures may violate due process, citing *Classen* and US Supreme Court cases on which *Classen* is based. Court of Appeals applied the *Classen* criteria to the facts of this case ((1) the opportunity that the witness had at the time to get a clear view; (2) the timing and completeness of the description given by the witness after the event; and (3) the certainty expressed by the witness in making the description and in making the subsequent identification) and noted that the *Classen* criteria is nonexclusive. Defendant here had ample opportunity to controvert the challenged identification during trial, including defense counsel's methodical cross-examination of the wife and police investigators, and his expert witness. Also the trial court gave defendant's requested jury instruction regarding the reliability of eyewitness identification. "Due process should require no more."

State v Cazares-Mendez/Reyes-Sanchez, 350 Or 491 (7/08/11) (Balmer) A woman was killed in her apartment from 29 stab wounds. Two men – defendants in these cases – were separately convicted of aggravated murder and sentenced to life without parole. During their separate trials, the trial court refused to allow them to present hearsay evidence from four different witnesses that another person (Tiffany) had confessed to the murder on four separate occasions. Some of Tiffany's confessions were striking, such as her description that the victim had a seizure while Tiffany stabbed her. The victim had epilepsy. The trial court kept those hearsay confessions from the jury because the "corroborating circumstances" did not clearly indicate the trustworthiness of the statements, and Tiffany (who confessed to the murder) was not unavailable to testify, as required by OEC 804(3)(c) (statement against penal interest) and OEC 803(28)(a) (residual exception for hearsay that has "equivalent circumstantial guarantees of trustworthiness" among other elements).

The Court of Appeals reversed both cases, holding that the due process clause is violated by prohibiting defendant from presenting trustworthy evidence merely because the declarant was available. The Court of Appeals held that, under *Chambers v Mississippi*, 410 US 284 (1973) a state court violated a defendant's due process rights when, among other things, it refused to allow three witnesses to testify that another person had admitted committing the crime, and this case met the requirements of *Chambers*.

The Oregon Supreme Court affirmed the Court of Appeals' decision. It first traced the background of the general rule barring hearsay: "The reason for the exclusion is that hearsay statements are generally considered to be untrustworthy." But that "rule against the admission of hearsay statements . . . is not absolute." The exceptions to the rule generally involve a statement that is "made under circumstances calculated to give some special trustworthiness to it." That emphasis on "trustworthiness" is at issue in this case. "The relevant 'trustworthiness' is not that of the witnesses who testify that the statement was made; it refers to whether the statement *by the declarant* has sufficient indicia of reliability. In considering 'trustworthiness' for purposes of determining whether a hearsay exception applies, the credibility of the relating *witnesses* – the individuals who testify as to what the declarant said – is not the issue." (Emphasis in original). The Court concluded that OEC 803(28)(a) does not apply and the hearsay statements were not admissible under OEC 804(3)(c) because the declarant -- Tiffany -- was available to testify. But due process, through *Chambers* and more recently *Holmes v South Carolina*, 547 US 319 (2006), requires a trial court to allow a defendant to introduce trustworthy hearsay testimony that another person had committed a crime. In short, "the Due Process Clause . . . required the trial court to disregard the 'unavailability' requirement of OEC 804(3)(c) and permit the testimony" of the four witnesses who heard Tiffany confess to the murder defendants were charged with.

State v Leistiko, 240 Or App 338 (01/05/11), *rev allowed*, 350 Or 532 (7/22/11) (Brewer, Haselton, Armstrong) Defendant was convicted for first-degree rape, first-degree sex abuse, and prostitution (also strangulation, kidnapping, stalking, furnishing drugs and alcohol to a minor, and other crimes, against three women). Under OEC 404(3), the trial court had admitted evidence of uncharged conduct involving defendant's sexual assault of a fourth victim to show that defendant had intentionally raped the three named victims, over defendant's "generalized due process objection" that the evidence was unfairly prejudicial. Court of Appeals affirmed: "Because the challenged evidence was relevant to rebut defendant's theory that the victims in this case consented to sexual activity with defendant," the "trial court was not required, in response to defendant's generalized due process objection, to engage in the balancing provided for by OEC 403." The court referenced *State v Momeni*, 234 Or App 193, *rev den* 348 Or 523 (2010) for the evidentiary ruling. As for the due process challenge, the court explained: "we have previously rejected arguments that such balancing is required by due process under the Fifth and Fourteenth Amendments to the United States Constitution. Under OEC 404(3), in a criminal case, a trial court cannot engage in OEC 403 balancing unless such balancing is required by the state or federal constitution," under *State v Wyant*, 217 Or App 199 (2007) *rev den* 344 Or 558 (2008), *State v Pitt*, 236 Or App 657 (2010), and *State v Coen*, 231 Or App 280 (2009), *aff'd sub nom* 349 Or 371 (2010). (Note: the Fourteenth Amendment, not the Fifth, requires due process from the states).

State v Moore/Coen, 349 Or 371 (12/16/10) *cert denied sub nom, Coen v Oregon*, 131, S Ct 2461 (2011) (De Muniz) (See discussion of this case under *Miranda*, *ante)*. This is an issue of first impression for the Oregon Supreme Court. Defendant was arrested for DUII and manslaughter for a head-on collision. He tested with a blood alcohol content of .25%. He testified at trial that he had had 15 or 16 beers before the fatal accident and that he was an alcoholic. The state offered evidence at trial that defendant had been in a DUII diversion program in 1992, then he was convicted of DUII in 1997, to prove that defendant acted with a "reckless" mental state – that he knew of the potential risks of drunk driving. The trial court admitted the diversion-program evidence but excluded the prior conviction for DUII. On appeal, the state argued that Under OEC 404(4) (other wrongs, acts) does not allow the trial court to engage in any balancing analysis under OEC 403. Defendant countered that OEC 404(4) is facially unconstitutional because it limits application of OEC 403 in a way that only benefits the prosecution, and to comply with due process, OEC 404(4) must be construed to allow OEC 403 balancing. The Court of Appeals rejected that claim and held that evidence of a prior DUII is relevant to prove state of mind for vehicular manslaughter.

The Oregon Supreme Court affirmed: the fact that a state may introduce evidence of other crimes, wrongs, or acts by a defendant under OEC 404(4) does not prevent a defendant from presenting a complete defense, as required under *Wardius v Oregon*, 412 US 470 (1973). And as for an as-applied challenge, the US Supreme Court has rejected a similar due process claim in *Spencer v Texas*, 385 US 554 (1967): No due process violation.

State v Jones, __ Or App __ (11/09/11), 2011 WL 5386653 (Brewer, Haselton, Armstrong) A jury convicted defendant of numerous crimes for assaulting and strangling his wife. The prosecution introduced evidence that defendant had beaten his former girlfriend, under *State v Johns*, 301 Or 535 (1986) to show "hostile motive." Defendant argued that the trial court must apply the OEC 403 balancing test despite OEC 404(4) that allows evidence of other acts unless the constitutions prohibit it, and his "due process" rights prohibit it. The trial court admitted the evidence as relevant to show "hostile motive"

and concluded that it was not constitutionally required to conduct the OEC 403 balancing test.

The Court of Appeals affirmed: "OEC 404(4) bars trial courts from excluding evidence under OEC 403 'unless the court is constitutionally required to weigh the probative value of the proffered evidence against its danger of unfair prejudice.' *State v Chavez*, 229 Or App 1, 7, *rev den*, 347 Or 365 (2009)." Moreover, "defendant's categorical argument that OEC 404(4) violated his right to due process by preventing the trial court from engaging in OEC 403's balancing test is foreclosed by the Supreme Court's holding" in *State v Moore/Coen*, 329 Or 371, 387-92 (2010), *cert denied sub nom, Coen v Oregon*, 131, S Ct 2461 (2011). [discussed on the preceding page].

3. Procedural Due Process

> Fourteenth Amendment procedural due process analysis has two steps: "the first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *Kentucky Dep't of Corrections v Thompson*, 490 US 454, 460 (1989).
>
> "It is axiomatic that due process 'is flexible and calls for such procedural protections as the particular situation demands.'" *Greenholtz v Nebraska Penal Inmates*, 442 US 1, 12 (1979) (citation omitted).

State v Wibbens, 238 Or App 737 (11/17/11) (Sercombe, Landau, Ortega) In an earlier proceeding, defendant pleaded no contest to possession of meth, but as a first-time drug offender, entry of judgment was suspending pending completion of probation (as ORS 475.245 describes). Defendant then was charged with using alcohol in violation of probation. At his probation-revocation hearing, the state had only one witness, a probation officer. That probation officer testified – over defendant's hearsay objection -- that a *not*-present deputy called the probation officer, told him defendant smelled of alcohol and appeared to be intoxicated, and was transported to jail. The state "did not make even a perfunctory showing of why the declarant [deputy] could not be produced at the hearing" and there "is no basis to infer any excuse for his absence." Defendant did on testify or present any evidence, but at the close of the hearing, he argued that the evidence was insufficient and stated that there was "perhaps, a constitutional issue as to accepting the evidence." Trial court entered judgment of conviction for the underlying meth-possession charge.

Court of Appeals reversed and remanded, explaining that:

> "Although a probationer is afforded fewer procedural safeguards than a defendant in a criminal trial, some due process protections attach to probation violation proceedings. *Morrissey v Brewer*, 408 US 471, 489 (1972); *Gagnon v Scarpelli*, 411 US 778, 782 (1973). Those protections include 'the right to confront and cross-examine adverse witnesses,' unless the government shows good cause for not producing the witnesses. *Morrissey*, 408 US at 489." In *Gagnon*, 411 US at 782 n 5, the US Supreme Court noted, "[w]hile in some cases there is simply no adequate alternative to live testimony, we emphasize that we did not in Morrissey intend to prohibit use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence."

To determine whether hearsay evidence at a probation-revocation hearing violates a probationer's right to confrontation in violation of the Due Process Clause of the Fourteenth Amendment, the Oregon Court of Appeals has, as defendant here argued, "adopted the Ninth Circuit's balancing approach, which weighs the probationer's interest in confrontation against the government's good cause for denying it. *State v Johnson*, 221 Or App 394, 401, 404, *rev den* 345 Or 418 (2008)." Relevant factors include: (1) the importance of the evidence to the court's finding; (2) the probationer's opportunity to refute that evidence; (3) the difficulty and expense of obtaining witnesses; and (4) traditional indicia of reliability borne by the evidence." Here, due to defendant's important interest in confrontation, the absence of good cause for denying it, the balance weighs in favor of confrontation. Based on the four *Johnson* factors, the admission of the hearsay evidence violated defendant's due process right to confront an adverse witness.

State v Terry, 240 Or App 330 (01/05/11) (Brewer, Haselton, Armstrong) Defendant's probation was revoked after the trial court denied his motion to exclude hearsay evidence from his probation officer. He allegedly violated a "no contact" order. At the probation-revocation hearing, his probation officer testified that police called him and said that defendant had been involved in a domestic dispute with the victim he had been ordered not to contact, and that he admitted to violating the "no contact" order. His attorney objected to the hearsay testimony as violating his right to confront witnesses against him and thus the due process clause of the Fourteenth Amendment would be violated by its admission.

The Court of Appeals reversed, quoting heavily from *State v Wibbens*, 238 Or App 737 (2010). *Wibbens* classified the probationer's right as a "procedural safeguard" to which "some due process protections attach" per *Morrissey v Brewer*, 408 US 471 (1972) and *Gagnon v Scarpelli*, 411 US 778 (1973). Those protections include "the right to confront and cross-examine adverse witnesses" unless the government shows good cause for not producing the witness. The Court of Appeals has adopted the Ninth Circuit's balancing test to determine the confrontation rights against the government's good cause, see *State v Johnson*, 211 Or App 394, *rev den* 345 Or 418 (2008): "Here, as in *Wibbens*, the challenged evidence consisted of unsworn oral assertions that constituted hearsay and, as in *Wibbens*, we conclude that those assertions did not bear adequate characteristics of reliability. Those assertions were not 'contained in a report, affidavit, or other documentary substitute for live testimony' and did not satisfy any recognized exception to the hearsay rule." Unsworn statements under the public records exception to the hearsay rule do not qualify. And the state failed to show why the police officers could not have been called to testify. As to the probationer's alleged admission that he'd violated the "no contact" order, the court again quoted the Ninth Circuit, footnoting that "the due process right of a probationer to confront witnesses against him requires that a probationer 'receive a fair and meaningful opportunity to refute or impeach the evidence against him in order to "assure that the finding of a [probation] violation will be based on verified facts.'"

State v Monk, 244 Or App 152 (7/13/11) (Brewer, Edmonds SJ) Defendant's probation was extended after the trial court concluded that he had violated a condition of probation (possession of controlled substances). The sole evidence offered against him was by his probation officer, who testified that she had received a police report that an officer had searched defendant and found marijuana. The prosecutor said that the police officer who wrote the report was unavailable because she was in training at a police academy, but offered no explanation about why the officer who actually found the marijuana was

unavailable. Over his due process objections, the trial court entered judgment against him.

The Court of Appeals reversed and remanded, quoting from its recent *Wibbens* and *Terry* decisions. Under the Ninth Circuit's four-factor test (that the Court of Appeals adopted in *Johnson*), the hearsay was the state's only evidence that the probation violation occurred, defendant had no meaningful opportunity to cross-examine anyone (except a probation officer's statement that she had read a police report), no details were given about the circumstances, nothing about being at an "academy" indicated why the report's author could not appear, and nothing indicated why the officer who found the drugs was not called to testify. No police report was admitted into evidence in this case.

The court noted: "Neither the rules of evidence nor the state or federal constitutions provide a *per se* bar to the use of hearsay evidence at certain types of proceedings that are collateral to criminal convictions. . . . . The constitution does not bind a court in a probation violation proceeding to follow the standard rules of evidence. Rather, a court may consider 'conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence. . . . . However, in such proceedings, a defendant does have a right under the Due Process Clause 'to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation).'" (Quoting *Morrissey v Brewer*, 408 US 471, 489 (1972)).

Miller v Oregon Bd of Parole, 642 F3d 711 (9th Cir 4/25/11) Miller was convicted for hiring someone to kill his wife so he could collect life insurance. Twenty years in to his 30-year sentence, his first "murder review hearing" was held, in which an Oregon statute allowed him an opportunity to try to show that he had a likelihood of being rehabilitated. "To be clear, these particular [statutes] speak only to *early eligibility* for a parole hearing for persons convicted of aggravated murder; they promise nothing as far as actually being paroled after the hearing." (Emphasis in original). A Ninth Circuit panel affirmed the district judge's denial of his habeas petition, and held that Oregon's murder-review statute "creates a liberty interest in early eligibility for parole" and following *Swarthout v Cooke*, 131 S Ct 859 (2011), the Oregon Board of Parole and Post-Prison Supervision did not violate Miller's due process rights when it denied him that eligibility. The Ninth Circuit panel reasoned as follows: "The Constitution does not, itself, guarantee a liberty interest in parole, but a state's substantive parole scheme may create on that is enforceable under the Due Process Clause." "A state parole statute establishes a protected liberty interest in parole when it uses language that creates a presumption that the prisoner will be paroled if certain conditions are satisfied." "The Oregon murder review statute provides for early eligibility for a parole hearing if a prisoner shows a likelihood of being rehabilitated within a reasonable amount of time." "We therefore conclude that Oregon's aggravated murder review statute 'creates a presumption' in favor of early eligibility for a parole hearing 'when or unless certain designated findings are made, and thereby gives rise to a constitutional liberty interest.'" Here, following *Swarthout v Cooke*, 131 S Ct 859 (2011), the Parole Board's denial of habeas corpus relief at the conclusion of a prisoner's murder review hearing does not violate his due process rights, because such denial was not an unreasonable application of clearly established federal law.

Fisher v Oregon Bd of Parole, (Case No. 07-36096) (9th Cir 4/25/11) (unpublished) The district court denied Fisher's petition for habeas relief, which he filed alleging that the Parole Board violated his due process rights for refusing to grant him early parole eligibility. The Ninth Circuit panel affirmed. Fisher had "a constitutionally protected liberty interest in early parole eligibility, of which he cannot be deprived without due

process" as explained in *Miller v Oregon Board of Parole* (discussed, *ante*). In *Swarthout v Cooke*, 131 S Ct 859 (2011), the due process required for parole is "minimal" and that is: access to records, notice and opportunity to be heard, and a statement of the reasons why parole is denied is all that is required. Here "Fisher concedes he was afforded these minimum required procedural due process protections" so that is all.

Houff v Blacketter, (Case No. 09-35853) (9th Cir 5/18/11) (unpublished) "Oregon's dangerous offender parole release statute . . . creates a liberty interest in parole," see *Miller v Oregon Bd of Parole* (discussed, *ante*). If "a state prisoner has a liberty interest in parole, due process only requires that the prisoner be afforded an opportunity to be heard and be informed of the reasons parole is denied." Houff had that, and therefore the Board did not deny his due process rights when it denied him parole.

State v Weller, 241 Or App 690 (03/30/11) (Duncan, Haselton, Gillette SJ) (Note: This case does not identify whether it addresses substantive or procedural rights, but appears to assess procedural rights.). An officer observed defendant driving 121 miles per hour over a bridge between Astoria, Oregon and Pacific County, Washington. That bridge has two lanes, no shoulder, and nowhere to pull over without obstructing traffic. While on the Oregon side of the bridge, the officer activated his lights. Defendant pulled over on the Washington side. Officer called an Oregon deputy DA to ask if he could bring defendant back to Oregon. DA said yes. Officer brought defendant to Oregon and booked him in jail and released him. DA charged defendant with reckless driving and other related crimes. Defendant moved to suppress evidence and to dismiss the case. He argued that Washington law allowed the Oregon officer to pursue him into Washington and arrest him for reckless driving but also required the officer to bring him before a Washington magistrate for a hearing to determine the lawfulness of the arrest. If the arrest is deemed lawful then Washington law required him to "await for a reasonable time the issuance of an extradition warrant by the governor" of Oregon. Defendant argued that the officer denied him due process and essentially kidnapped him back to Oregon. Trial court agreed and dismissed the charges. State appealed.

Court of Appeals reversed and remanded. No one argued that the officer violated the Washington law when he brought defendant back to Oregon without first taking him to a Washington magistrate for a hearing on the lawfulness of the arrest. But that does not constitute a due process violation since *Ker v Illinois*, 119 US 436, 444 (1886) and through *State v Aydiner*, 228 OR App 282, 208, *rev den* 347 Or 259 (2009), *cert denied* 131 S Ct 530 (2010). The Court of Appeals reasoned, "If, as *Ker* establishes, forcibly abducting a person from Peru to face criminal charges does not constitute a due process violation that requires dismissal of criminal charges, we cannot say that bringing a person back across the Astoria-Megler Bridge does." Defendant does not argue that the officer lacked authority to stop him, or that Oregon lacked authority to charge him. And prior Oregon case law has held that violations of statutes requiring a timely arraignment before a magistrate do not result in dismissal.

Baize v Board of Parole and Post-Prison Supervision, 242 Or App 217 (4/20/11) (Brewer, Gillette SJ) In 1983 defendant was convicted of aggravated murder, receiving a life sentence with a minimum 20-year term. He requested a murder review hearing before the board (defendant) to determine if he could receive a work release. Baize presented evidence at that hearing. Then the board allowed the DA who had prosecuted him to testify. After the DA concluded, Baize asked if he could cross-examine the DA. The board said no but allowed Baize to make a rebuttal statement in response to the DA's statements. The board concluded that Baize was not likely to be rehabilitated. Baize sought judicial review on various grounds including the board's decision not to allow

him to cross-examine the DA. The DA was not a "witness" under the Court of Appeals' interpretation of the applicable administrative rules. Court of Appeals also concluded that Baize had not been denied procedural due process under the Fourteenth Amendment. Due process regarding the deferral of a parole release date (unlike revocation of release) is analyzed under the general three-part procedural due process test in *Mathews v Eldridge*, 424 US 319 (1976). Here, Baize did not argue that the process was unconstitutional under that test. Baize cited no authority and the Court of Appeals found none that would indicate that "a process that permits a petitioner to adduce rebuttal after a district attorney's remarks, as does the process at issue here, is insufficient to satisfy the Due Process Clause."

See ***State v Speedis***, 350 Or 424 (6/30/11), under Article I, section 20, at page 118.

State v Washington, 246 Or App 1 (10/05/11) (Brewer, Edmonds) The Portland Police Bureau has a "Neighborhood Livability Crime Enforcement Program." That Program created a list of people who are most often arrested for low-level drug and drug-related property crimes in specific areas of Portland. Those people historically were cited and released and reoffended. Under this Program, those on the list were arrested and booked instead. The Multnomah County DA's office has a written policy providing that possession of more than residue amounts of drugs such as cocaine are prosecuted as felonies, and just residue amounts of drugs such as cocaine are prosecuted as misdemeanors except for defendants who are on the Police Bureau's list and those who have prior criminal records.

Defendant has more than 30 prior convictions, mostly for drugs, and he is on the Police Bureau's list. He was charged with possession of cocaine as a Class C felony, rather than a Class A misdemeanor. He moved to dismiss the indictment or to reduce the charge to a misdemeanor, on grounds that the Multnomah County DA's policy that disqualifies cases for misdemeanor treatment violates Article I, section 20, of the Oregon Constitution and the Due Process Clause of the Fourteenth Amendment. The trial court denied his motion.

The Court of Appeals affirmed. The court repeatedly stated that it is only "addressing the district attorney's charging policies" -- the constitutionality of the Program (the list of chronic offenders) is not at issue in this case. Quoting heavily from *Savastano* [discussed on the preceding page herein], the court here noted that defendant does not raise a class-based discrimination claim but rather this is "the other type of Article I, section 20, claim." Defendant argued that only people committing low-level drug and property offenses – rather than more serious crimes – were included on the list and that is "arbitrary." But a "great deal of testimony" about the reasons for the Program's creation was presented at the trial level. The Program "was designed to break the repetitive cycle of arrest, citation, and release." The reason for putting only low-level offenders on the list is that those people were frequently released and reoffended, in contrast with the people who committed felonies, who were not released as frequently. This is not arbitrary. Defendant also argued that only including certain geographical areas of the city for the Program is an impermissible criteria, but the court disagreed: "Nothing in the case law indicates that a geographical criterion is *per se* impermissible, and defendant has not shown that the criterion has been improperly applied."

The trial court had expressed a "distaste" for the apparent "secret" nature of the Police Bureau's list. The Court of Appeals "share[s] the unease conjured by the specter of authorities developing secret lists of people to be rounded up. In this case, however, the policies at issue" – the Program and the DA's policies – "are not secret, nor are the

criteria that are used in creating the . . . list. Even though the list itself is not made public, it is based on permissible criteria" and defendant has not shown that the criteria have been improperly applied. Defendant also did not show that criminal history is improper or that the DA's office failed to follow its own policy or administers it in an *ad hoc* manner.

As for defendant's procedural due process challenge, the Court of Appeals quoted the balancing test from *Mathews v Eldridge*, 424 US 319, 335 (1976). "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." Here, the private interest is significant. Defendant argued that he has no way to challenge his inclusion on the list, but the court here repeated that is not addressing the list itself, but only the DA's charging policies. The list itself "is based on objective criteria – arrest data – and defendant has made no showing that the manner in which that data is gathered has led to anyone being erroneously included on the list." A defendant who is denied misdemeanor treatment based on an "erroneous inclusion" on the list may raise that issue at the trial court "long before the potential adverse effect – imposition of a felony." The DA's policy governing the charging of unlawful possession of controlled substances does not, in the way that defendant asserted, violate Article I, section 20, or due process.

4. Other Substantive Due Process

The substantive component of the due process clause of the Fourteenth Amendment "forbids the government to infringe certain fundamental [rights] *at all*, no matter what process is provided." *Reno v Flores*, 507 US 292, 302 (1993) (emphasis in *Reno*). A "fundamental right" is one that is "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id*. at 303. Substantive due process rights are created only by the Constitution. *Regents of Univ of Michigan v Ewing*, 474 US 214, 229 (1985).

But see *Papachristou v City of Jacksonville*, 405 US 156 (1972), wherein the Court struck down a statutory prohibition against nightwalking. The Court noted that persons "'wandering or strolling' from place to place have been extolled by Walt Whitman and Vachel Lindsay," they may be sleepless, loafers, married to "rich wives," or may be "casing" a place for a holdup. But "the difficulty is that these activities are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. Theses amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged the lives of high spirits rather than hushed, suffocating silence." *Id*. at 164. The Court stated that "the due process implications] are equally applicable to the States and to this vagrancy ordinance." *Id*. at 165. The Court did not identify its analysis as procedural or substantive due process right but rather characterized it as void for vagueness as incompatible with "the rule of law" (a phrase the Court used four times).

Kinkel v Lawhead, 240 Or App 403 (01/12/11) (Landau pro tem, Ortega, Sercombe) Defendant was 15 years old when he murdered his parents then the next day, in a

shooting rampage, killed two people at his high school and injured nearly two dozen students. He pleaded guilty and was sentenced to 100 years' imprisonment. He then initiated the present action for post-conviction relief on grounds that he received constitutionally inadequate assistance of counsel and among other things he had not been using antipsychotic medications in the weeks before the negotiation of the plea agreement, thus he did not have the ability to waive his constitutional rights. Trial court concluded, among other things, that his guilty plea was voluntary, and he received adequate assistance of counsel.

The Court of Appeals affirmed. The legal standard is: "A guilty plea is voluntary for purposes of due process if entered by one who is fully aware of the direct consequences without being induced by fraud or improper threats. *Brady v United States*, 397 US 742, 755 (1970)). The standard of review for guilty pleas, in post-conviction proceedings, is that the appellate courts are bound by the trial court's findings of fact if there is any evidence in the record to support them. Here, Kinkel doesn't contest that evidence supports the trial court's findings that Kinkel's condition did not interfere with his ability to make a knowing and voluntary decision. He also waived his right to a jury trial and accepted a plea bargain, a right that an Oregon juvenile possesses, and can waive, if the waiver is knowing and voluntary. Here, Kinkel's lawyers at the plea-bargain stage had not requested Kinkel's guardian's consent to the plea agreement, but that was reasonable, and the trial court did not err in so concluding.

Powell v DLCD, 238 Or App 678 (11/17/10) (Schuman, Wollheim, Rosenblum) Plaintiff argued that if Measure 49 is retroactive and replaces her Measure 37 compensation remedies, it violates the Due Process Clause of the Fourteenth Amendment. The circuit court dismissed her complaint. The Court of Appeals affirmed. The Court of Appeals interpreted her argument as a substantive due process claim; she contended that she is deprived of a "vested right" to a judicial proceeding. The court explained that for at least the past three-quarters of a century, the US Supreme Court's substantive due process analysis in the area of economic regulation is framed in terms of "rationality" rather than "vested rights," which dates to the *Lochner* era and is "dead." The court declined plaintiff's invitation to rouse the "ghost of *Lochner*" through a "vested rights" analysis.

Under the modern substantive due process framework, the issue is whether the statute and its retroactive application have a "legitimate legislative purpose furthered by rational means." And Measure 49 "plainly passes muster." After Measure 37 was enacted, Oregonians questioned whether they had struck a proper balance between property owners' rights and societal interests protected by land use regulation. Measure 49 was enacted to rebalance public and private land use interests. It was not irrational to do so retroactively given the cost of Measure 37 claims. "Simply put, the retroactive application of Measure 49 was a rational response to the legitimate governmental concerns posed by Measure 37." Also, Measure 49 and its retroactive application is not "so harsh and oppressive as to transgress the constitutional limitation," as the US Supreme Court framed the issue in *United States v Hemme*, 476 US 558 568-69 (1986). The relevant standard for determining whether retroactive legislation is "arbitrary" or "irrational" is whether the legislation and its retroactive application further a legitimate legislative purpose by rational means.

Luethe v Multnomah County, 240 Or App 263 (12/29/10) (Sercombe, Ortega, Landau) This is a Measure 49 (land use) case. (Measure 37 created remedies for property owners whose property value was reduced due to land use regulations. Measure 49 subsequently limited those remedies.). Plaintiffs had not received final unreviewable judgments on their Measure 37 claims when Measure 49 became effective. Plaintiffs

argued that *Powell v DLCD* (see *ante*, in which the Court of Appeals rejected that plaintiff's contention that retroactive application of Measure 49 would deprive her of a "vested right in her Measure 37 litigation") did not address *Fisk v Leith*, 137 Or 459 (1931) in its due process analysis. The trial court dismissed plaintiffs' claims. The Court of Appeals affirmed. The court observed that *Fisk* is more than 75 years old, it was based on the much-maligned *Lochner* era, it was a narrow holding, it was a tort claim, and as in *Powell*, the court here declined to disinter *Lochner* and instead used the modern substantive due process framework, as stated in *Powell*, to conclude that Measure 49 and its retroactive application have a legitimate legislative purpose furthered by rational means.

Goodyear Dunlop Tires Operations v Brown, 131 S Ct 2846 (6/17/11) (Ginsburg for a unanimous court). (Note: the Court did not specify if this is "procedural" or "substantive" due process). Two boys from North Carolina died in a bus accident in Paris. The accident was allegedly caused by a defective tire made in Turkey at Goodyear Tire's subsidiary plant. The boys' parents commenced action in North Carolina state court. The North Carolina courts exercised general jurisdiction over Goodyear under the frequently invoked "stream-of-commerce metaphor."

The US Supreme Court reversed. It held that the "North Carolina court's stream-of-commerce analysis elided the essential difference between case-specific and all-purpose (general) jurisdiction." "A corporation's 'continuous activity of some sorts within a state,' *International Shoe* instructed, 'is not enough to support the demand that the corporation be amenable to suits unrelated to that activity." Here, "North Carolina is not a forum in which it would be permissible to subject petitioners to general jurisdiction," based on the only two cases post-*International Shoe* that the US Supreme Court has discussed general jurisdiction, *Helicopteros Nacionales de Columbia v Hall*, 466 US 408 (1984) and *Perkins v Benguet Consol Mining Co*, 342 US 437 (1952). As in *Helicopteros*, here, the "mere purchases" made in a forum state, even if occurring at regular intervals, are not enough to warrant a State's assertion of general jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions."

In so holding, the US Supreme Court reviewed that the "Due Process Clause of the Fourteenth Amendment sets the outer boundaries of a state tribunal's authority to proceed against a defendant. *Shaffer v Heitner*, 433 US 186, 207 (1977). The canonical opinion in this area remains *International Shoe [v Washington*, 326 US 310 (1945)], in which we held that a State may authorize its courts to exercise personal jurisdiction over an out-of-state defendant if the defendant has 'certain minimum contacts with [the State] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."'". (Citations omitted). There are two kinds of jurisdiction: case-specific and general. Most of the US Supreme Court's decisions have been based on case-specific jurisdiction. This case is only the third to address general jurisdiction.

5. <u>Right to Interstate Travel</u>

Oregon courts have observed that the constitutional right of interstate travel is not named, and its source is not identified, but it "undoubtedly exists" in the Privileges and Immunities Clause of Article VI, section 2, or the Equal Protection Clause, or somewhere else. *State v Berringer*, 234 Or App 665, *rev denied*, 348 Or 669 (2010).

Federal courts have established that the right to travel is a fundamental right under the Due Process Clauses of the Fifth and Fourteenth Amendments; infringements are subject to strict scrutiny. *Shapiro v Thompson*, 394 US 618 (1969); *United States v Bredimus*, 352 F3d

200, 209-10 & n 12 (5th Cir 2003). The right to travel internationally is a recognized liberty interest in the Fifth Amendment, *Kent v Dulles*, 357 US 117, 127 (1958), although that right has less stature than the right to travel interstate (within the United States), *Haig v Agee*, 453 US 280, 306 (1981). *Bredimus*, 352 F3d at 209-10 & n 12.

J. Equal Protection -- Fourteenth Amendment

"**No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.**" -- Fourteenth Amendment, US Const

The Fourteenth Amendment "was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation." *Strauder v West Virginia*, 100 US 303, 306-07 (1879).

"All equal protection claims, regardless of the size of the disadvantaged class, are based on the principle that, under 'like circumstances and conditions,' people must be treated alike, unless there is a rational reason for treating them differently. See *Engquist v Oregon Dep't of Agriculture*, 553 US 591, 601-02 (2008) (quoting *Hayes v Missouri*, 120 US 68, 71-72 (1887)." *LaBella Winnetka, Inc. v Village of Winnetka*,628 F3d 937, 941 (7th Cir 12/29/10).

State v Haugen, 349 Or 174 (11/04/10) (Balmer) On automatic and direct review of defendant's death sentence, the Oregon Supreme Court affirmed defendant's conviction and sentence. The trial court had excluded a non-English-speaking prospective juror and did not provide that prospective juror with an interpreter. Defendant argued that that exclusion violated his Sixth Amendment right to have a jury drawn from a fair cross-section of the community and his Fourteenth Amendment right to equal protection of the laws. The Court concluded that the state's "decision not to provide funding for interpreters for jurors who are not proficient in English does not violate the Sixth or Fourteenth Amendments to the United States Constitution." The Court also noted that "every state court that has considered whether a requirement that jurors be proficient in English violates the Sixth Amendment, the Due Process Clause, or the Equal Protection Clause has concluded that it does not."

K. Sovereign Immunity

"**The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.**" - Eleventh Amendment, US Const

"Despite the narrowness of its terms, since *Hans v. Louisiana,* 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty . . . and that a State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the 'plan of the convention.'" *Blatchford v Native Village of Noatuk* et al, 501 US 775, 779 (1991) (citations omitted).

In *Chisolm v Georgia*, 2 Dall. 419 (1793), the US Supreme Court asserted jurisdiction in a case brought by a South Carolina citizen against the State of Georgia, reasoning that Article III, section 1, clause 1, extending the federal judicial power to controversies "between a State and Citizens of another State," qualified Georgia's sovereign immunity. *Chisolm* created a "shock of surprise" and prompted the immediate adoption of the Eleventh Amendment. Though its precise terms bar only federal jurisdiction over suits brought against one State by citizens of another State or foreign state, the Eleventh Amendment repudiated *Chisholm*'s premise that Article III superseded the sovereign immunity that the States had before entering the Union. While immunity from suit is not absolute, the US Supreme Court has "recognized only two circumstances in which an individual may sue a State. First, Congress may authorize such a suit in the exercise of its power to enforce the Fourteenth Amendment – an Amendment enacted after the Eleventh Amendment and specifically designed to alter the federal-state balance. *Fitzpatrick v Bitzer*, 427 US 445 (1976). Second, a State may waive its sovereign immunity by consenting to suit. *Clark v Barnard*, 108 US 436, 447-48 (1883)." *College Savings Bank v Florida Prepaid*, 527 US 666, 670 (1999).

"'Dual sovereignty is a defining feature of our Nation's constitutional blueprint.' *Federal Maritime Comm'n v South Carolina Ports Authority*, 535 US 743, 751 (2002). Upon ratification of the Constitution, the States entered the Union 'with their sovereignty intact.' *Ibid*." *Sossamon v Texas*, 131 S Ct 1651, 1657 (2011). A waiver of sovereign immunity must be expressly and unequivocally stated in the text of the relevant statute. *Id.* (held: "States, in accepting federal funding, do not consent to waive their sovereign immunity to private suits for money damages under RLUIPA because no statute expressly and unequivocally includes such a waiver.").