Oregon State Bar

Annual Constitutional Law Section CLE

2.5 General CLE Credits

December 5, 2014 • 1:00 to 4:15 p.m.

Stoel Rives, LLP
900 SW Fifth Avenue, 19th Floor
Portland, OR 97204

Annual Constitutional Law Section CLE

December 5, 2014

Stoel Rives, LLP, 900 SW Fifth Avenue, 19th Floor

1:00 to 1:30 Registration

1:30 to 2:45 Are There Limits to Executive Power?

2:45 to 3:00 Break

3:00 to 4:15 Oregon Constitutional Law Update

CLE Planning Committee: Erin Snyder, Office of Public Defense Services
Alycia Sykora, Alycia N. Sykora, PC
Matt Kalmanson, Hart Wagner, LLP
Kevin Diaz, Compassion and Choices
Judge Erin Lagesen, Oregon Court of Appeals

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Special thanks to our host Stoel Rives, LLP and to our cosponsors, The Federalist Society-Portland Lawyers' Chapter and The American Constitution Society.

Contents

Speaker Biographies

Professor Nicholas Quinn Rosenkranz teaches constitutional law and federal jurisdiction at Georgetown Law School. He is currently developing a new theory of constitutional interpretation and judicial review, and his recently published article on that subject, *The Subjects of the Constitution* in the Stanford Law Review (May 2010), is the single most downloaded article about constitutional interpretation, judicial review, or federal courts in the history of SSRN. Professor Rosenkranz clerked for Justice Anthony M. Kennedy at the U.S. Supreme Court and Judge Frank H. Easterbrook on the U.S. Court of Appeals for the Seventh Circuit. He has served as an Attorney-Advisor at the Office of Legal Counsel in the U.S. Department of Justice. He often testifies before Congress as a constitutional expert. He has also filed briefs and presented oral argument before the U.S. Supreme Court. Professor Rosenkranz is co-Chair of the Board of Visitors of the Federalist Society and a Senior Fellow at the Cato Institute. See www.cato.org/people/nicholas-quinn-rosenkranz and www.law.georgetown.edu/faculty/rosenkranz-nicholas-quinn.cfm.

Professor Garrett Epps of the University of Baltimore teaches courses in Constitutional Law, First Amendment, and Fiction and Non-Fiction Writing for Law Students. He is a contributing writer to The Atlantic Online and serves as the magazine's Supreme Court correspondent. He is also a contributing editor of *The American Prospect*. His books include *Wrong and Dangerous: Ten Right-Wing Myths about Our Constitution*. Professor Epps's most recent book, *American Justice 2014: Nine Clashing Visions on the Supreme Court*, was published by the University of Pennsylvania Press. Professor Epps's previous book, *American Epic: Reading the U.S. Constitution*, was published in 2013 by Oxford University Press. *American Epic* was named a finalist for the American Bar Association's Silver Gavel Book award. Two of his previous books, *Democracy Reborn: The Fourteenth Amendment and the Fight for Equal Rights in Post-Civil War America* (2006) and *To an Unknown God: Religious Freedom on Trial* (2001), were both also Silver Gavel finalists. See www.theatlantic.com/garrett-epps/ and http://law.ubalt.edu/faculty/profiles/epps.cfm.

Matt Kalmanson is a partner at Hart Wagner, LLP. After graduating from Yale Law School, he clerked for Justice James Coleman of the New Jersey Supreme Court and Judge Susan Graber on the Ninth Circuit Court of Appeals. He is former counsel for the Oregon Legislature's Judiciary Committees.

Justice Jack Landau has been an Associate Justice on the Oregon Supreme Court since January 2011. Before his election to the Oregon Supreme Court, he was appointed to the Oregon Court of Appeals where he served for 18 years. In 1989, he left private practice and joined the Oregon Department of Justice, becoming Deputy Attorney General, where he represented state agencies at trial and on appeal, including arguing in the United States Supreme Court. Justice Landau has been an adjunct faculty member at Willamette University College of Law for 22 years, teaching Legislation. He is the author of numerous law review articles on statutory interpretation and state constitutional law. He holds an LL.M. from the University of Virginia School of Law.

Senior Judge David Schuman clerked for Oregon Supreme Court Justice Hans Linde, taught Constitutional Law and Administrative Law at the University of Oregon School of Law, and served as Associate Dean for Academic Affairs at the University of Oregon School of Law for four years. He received the Ersted Award for Distinguished Teaching and has published scholarly law review articles. Before joining the Oregon Court of Appeals in 2001, he was an Assistant Attorney General, then Deputy Attorney General, in the Oregon Department of Justice. In early 2014, he became a Senior Judge and will rejoin the faculty at the University of Oregon Law School in January 2015. He holds a Ph.D. in English Literature from the University of Chicago and is the 2014 recipient of the Frohnmayer Award for Public Service.

Alycia Sykora clerked for Oregon Supreme Court Justice George A. Van Hoomissen, served as an Honors Attorney for the Oregon Department of Justice, and has been in private practice in Bend since 2002. She serves as a circuit court judge pro tem in Deschutes County, has taught Introduction to Comparative Politics at Central Oregon Community College, and coordinates the American Constitution Society's Constitution in the Classroom Project in Central Oregon

Are There Limits to Executive Power?

This session is cosponsored by the American Constitution Society and The Federalist Society.

1:30 p.m. to 2:45 p.m.

- How are limits to executive power under the U.S. Constitution determined?
- When have limits on executive power been exceeded?

Nicholas Quinn Rosenkranz, Georgetown Law School
Garrett Epps, University of Baltimore School of Law
Moderator: **Matt Kalmanson**, Hart Wagner, LLP

THE FEDERALIST SOCIETY
PORTLAND LAWYERS' CHAPTER

AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY

U.S. House of Representatives
Committee on the Judiciary

Hearing:
The President's Constitutional Duty to Faithfully Execute the Laws

December 3, 2013

Prepared Statement
of

NICHOLAS QUINN ROSENKRANZ
PROFESSOR OF LAW
GEORGETOWN UNIVERSITY LAW CENTER
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Mr. Chairman, Representative Conyers, Members of the Committee: I thank you for the opportunity to express my views about the President's constitutional duty to "take Care that the Laws be faithfully executed."[1]

This is a timely and important hearing, because many of the legal controversies of the day implicate this Presidential duty. In areas as important and diverse as healthcare, immigration, nuclear waste storage, tax enforcement, military action, and foreign aid, there has been an inchoate sense that the Administration has overstepped its authority. But the criticism has generally been issue-specific, and it has often conflated policy objections with constitutional objections. There has been very little systematic analysis of this behavior *as a pattern*. And more to the point, there has been very little analysis of the particular constitutional clause at issue.

The relevant clause of the Constitution, which should be the lodestar of this discussion, is the Take Care Clause: "*The President … shall take Care that the Laws be faithfully executed.*"[2] To put these recent controversies in constitutional context, it is essential to understand the meaning and purpose of this Clause. As always, it is best to begin by parsing the constitutional text.

First, notice that this Clause does not grant power but rather imposes a duty: "The President … *shall* take Care…"[3] This is not optional; it is mandatory. Second, note that the duty is personal. Execution of the laws may be delegated, but the duty to "*take Care* that the Laws be faithfully executed"[4] is the President's alone. Third, notice that the

[1] U.S. CONST. art. II, § 3.
[2] *Id.* (emphasis added).
[3] *Id.* (emphasis added).
[4] *Id.* (emphasis added).

President is not required to take care that the laws be "completely" executed; that would be impossible given finite resources. The President does have power to make enforcement choices—however, he must make them "faithfully." Finally, it is important to remember the historical context of the clause: English kings had claimed the power to suspend laws unilaterally,[5] but the Framers expressly rejected that practice. Here, the executive would be obliged to "take Care that the Laws be faithfully executed."[6]

With these principles in mind, it is possible to view recent controversies through the proper constitutional lens. For this purpose, I shall focus on three recent examples—though, sadly, there are many others that one could choose. I shall focus on the President's unilateral decision to suspend certain provisions of the Affordable Care Act, on the President's unilateral abridgement of the Immigration and Nationality Act, and on the IRS's targeting of the President's political adversaries.

I. ObamaCare Suspension

On July 2, 2013, just before the long weekend, the Obama Administration announced via blog post that the President would unilaterally suspend the employer mandate of ObamaCare[7]—notwithstanding the unambiguous command of the law. The statute is perfectly clear: It provides that these provisions become effective on January 1, 2014.[8] The blog post—written under the breezy Orwellian title "Continuing to Implement the ACA in a Careful, Thoughtful Manner"—makes no mention of the statutory deadline.[9]

This blog post raises the question of what it means to "take Care that the Laws be faithfully executed." Certainly, the adverb "faithfully" gives the President broad discretion about how best to deploy executive resources and how best to execute the laws. And the precise scope of this discretion may be the subject of legitimate debate. But this breathtaking blog post was not a mere exercise of prosecutorial discretion or a necessary calibration of executive resources. This was a wholesale suspension of law, in the teeth of a clear statutory command to the contrary. Whatever it may mean to "Take Care that the Laws be faithfully executed," it simply cannot mean declining to execute a law at all.

As if the suspension weren't enough, President Obama's comments about it on August 9, 2013—claiming that "the normal thing [he] would prefer to do" is seek a

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[5] F.W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND: A COURSE OF LECTURES DELIVERED, 302–03 (1st ed. 1908 & reprint 1919).
[6] U.S. CONST. art. II, § 3. *See also* Michael W. McConnell, *Op-Ed: Obama Suspends the Law*, WALL ST. J. (July 8, 2013), http://online.wsj.com/article/SB10001424127887323823004578591503509555268.html.
[7] Mark J. Mazur, *Continuing to Implement the ACA in a Careful, Thoughtful Manner*, U.S. DEP'T OF THE TREASURY (July 2, 2013), http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner-.aspx. The Obama Administration suspended implementation of 26 U.S.C. § 6055, 26 U.S.C. § 6056, and 26 U.S.C. § 4980H.
[8] The Patient Protection and Affordable Care Act, Pub.L. 111-148, § 1502(e), 124 Stat. 119, 252 (March 23, 2010) ("The amendments made by this section shall apply to calendar years beginning after 2013."); *id.* § 1513(d), 124 Stat. at 256 ("The amendments made by this section shall apply to months beginning after December 31, 2013.").
[9] *See* Mazur, *supra* note 7.

"change to the law"[10]—added insult to constitutional injury. Indeed, the President seemed annoyed when *The New York Times* dared to ask him the constitutional question.[11] As for Republican congressmen who questioned his authority, Mr. Obama said only: "I'm not concerned about their opinions—very few of them, by the way, are lawyers, much less constitutional lawyers."[12] Mr. Obama made no mention of, for example, Iowa Sen. Tom Harkin—a Democrat, a lawyer and one of the authors of ObamaCare—who asked exactly the right question: "This was the law. How can they change the law?"[13] Senator Harkin's point, of course, is that a change like this is inherently legislative; it requires an amendment to the statute itself.

But the President has been distinctly ambivalent about any such amendment. A few months ago, he said that he would like to "simply call up the Speaker" of the House to request a "change to the law" that would achieve his desired delay.[14] But the truth, as the President knows, is that he wouldn't even need to pick up the phone: On July 17, 2013, the House of Representatives passed the Authority for Mandate Delay Act (with 229 Republicans and 35 Democrats voting in favor).[15] This would have authorized President Obama's desired suspension of the law.[16]

But President Obama did not actually welcome this congressional ratification. To the contrary, this bill—which stood to fix the constitutional problem that he himself had created—the President deemed "unnecessary".[17] Indeed, he actually threatened to veto it.[18] In this case, it appeared that the President would actually prefer to flout the law as written, rather than support a statutory change that would achieve his desired result. This seems an almost willful violation of the Take Care Clause.

II. Immigration and Nationality Act Suspension

The second example, immigration, is almost an exact mirror of the first. In the ObamaCare context, the President suspended an Act of Congress—a statute that was duly

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[10] President Barack Obama, Remarks by the President in a Press Conference, (Aug. 9, 2013), http://www.whitehouse.gov/the-press-office/2013/08/09/remarks-president-press-conference.
[11] *See* Jackie Calmes & Michael D. Shear, *Interview with President Obama*, N.Y. TIMES (July 27, 2013), http://www.nytimes.com/2013/07/28/us/politics/interview-with-president-obama.html?pagewanted=all&_r=0.
[12] *Id.*
[13] Jonathan Weisman & Robert Pear, *Seeing Opening, House G.O.P. Pushes Delay on Individual Mandate in Health Law*, N.Y. TIMES (July 9, 2013), http://www.nytimes.com/2013/07/10/us/politics/house-gop-pushes-delay-on-individual-mandate-in-health-law.html.
[14] President Barack Obama, Remarks by the President in a Press Conference, (Aug. 9, 2013), http://www.whitehouse.gov/the-press-office/2013/08/09/remarks-president-press-conference.
[15] *See* Authority for Mandate Delay Act, H.R. 2667, 113th Cong. (2013). For final vote results for H.R. 2667, see http://clerk.house.gov/evs/2013/roll361.xml.
[16] *See* Authority for Mandate Delay Act, H.R. 2667, 113th Cong. (2013).
[17] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY, (July 16, 2013), http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/113/saphr2668r_20130716.pdf.
[18] *Id.*

passed by both Houses of Congress, and which he himself had signed into law. In the immigration context, the situation is the opposite. Rather than declining to comply with a duly enacted statute, the President is complying meticulously—with a bill that never became a law.

Congress has repeatedly considered a statute called the DREAM Act, which would exempt a broad category of aliens from the Immigration and Nationality Act (INA).[19] The President favored this Act, but Congress repeatedly declined to pass it.[20] So, on June 15, 2012, the President announced that he would simply not enforce the INA against the precise category of aliens described in the DREAM Act.[21] He announced, in effect, that he would behave as though the DREAM Act had been enacted into law, though it had not.[22]

Once again, the President does have broad prosecutorial discretion and broad discretion to husband executive resources. But in this case, it is quite clear that the President is not merely trying to conserve resources. After all, his Solicitor General recently went to the Supreme Court to forbid Arizona from helping to enforce the INA.[23] And exempting as many as 1.76 million people from the immigration laws goes far beyond any traditional conception of prosecutorial discretion.[24] More to the point, this exemption has a distinctly legislative character. It is not a decision, in a particular case, that enforcement is not worth the resources; rather it is a blanket policy which exactly mirrors a statute that Congress declined to pass.[25] To put the point another way, the President shall "take Care that the *Laws*"—capital "L"—"be faithfully executed"—not

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[19] *See* Elisha Barron, *The Development, Relief, and Education for Alien Minors (Dream) Act*, 48 HARV. J. ON LEGIS. 623, 633 (2011); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the Dream Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 783-784, 789 (2013).

[20] The Dream Act of 2011 did not move past the committee stage in either the House or the Senate. *See* Development, Relief, and Education for Alien Minors Act of 2011, H.R. 1842, 112th Congress (2011); Development, Relief, and Education for Alien Minors Act of 2011, S. 952, 112th Congress (2011).

[21] President Barack Obama, Remarks by the President on Immigration (June 15, 2012), http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration.

[22] *See id.*; Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs. & John Morton, Dir., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (June 15, 2012), http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

[23] *See* Brief for Respondent United States at 26, Arizona v. United States, 132 S. Ct. 2492 (2012) (No. 11-182). The Solicitor General argued that "Arizona's attempt to punish violations of federal law intrudes on exclusive federal authority."

[24] JEANNE BATALOVA & MICHELLE MITTELSTADT, MIGRATION POLICY INST., RELIEF FROM DEPORTATION: DEMOGRAPHIC PROFILE OF THE DREAMERS POTENTIALLY ELIGIBLE UNDER THE DEFERRED ACTION POLICY 1 (2012), *available at* http://www.migrationpolicy.org/pubs/FS24_deferredaction.pdf.

[25] *See* Memorandum from Janet Napolitano, *supra* note 22. *See also In re Aiken Cnty.*, 725 F.3d 255 (D.C. Cir. 2013) (Kavanaugh, J.) ("[T]he President may not decline to follow a statutory mandate or prohibition simply because of policy objections. Of course, if Congress appropriates no money for a statutorily mandated program, the Executive obviously cannot move forward. But absent a lack of funds or a claim of unconstitutionality that has not been rejected by final Court order, the Executive must abide by statutory mandates and prohibitions.").

those bills which fail to become law. Here, in effect, the President is faithfully executing the DREAM Act, which is not law at all, rather than the Immigration and Nationality Act, which is supreme law of the land. The President cannot enact the DREAM Act unilaterally, and he cannot evade Article I, section 7,[26] by pretending that it passed when it did not.

Indeed, the President himself made this exact point, eloquently, only 20 months ago:

> America is a nation of laws, which means I, as the President, am obligated to enforce the law…. With respect to the notion that I can just suspend deportations through executive order, that's just not the case, because there are laws on the books that Congress has passed… There are enough laws on the books by Congress that are very clear in terms of how we have to enforce our immigration system that for me to simply through executive order ignore those congressional mandates would not conform with my appropriate role as President.[27]

And just last week, in response to a heckler, the President expressly denied that he has "a power to stop deportation for all undocumented immigrants in this country."[28] He reiterated:

> [W]e're also a nation of laws. That's part of our tradition. And so the easy way out is to try to yell and pretend like I can do something by violating our laws. And what I'm proposing is the harder path, which is to use our democratic processes to achieve the same goal that you want to achieve.[29]

What the President did not explain is how his current immigration policy is consistent with that principle.

III. IRS Targeting

The third example is troubling in a different way. As is now well known, the IRS subjected Tea Party organizations to Kafkaesque scrutiny and delay, particularly in the run-up to the last election. A few months ago, a House Oversight Committee hearing revealed that the IRS Chief Counsel's Office had played a key role.[30] The Committee rightly zeroed in on this fact, because the Chief Counsel is one of only two political

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[26] U.S. CONST. art. I, § 7 (requiring bicameralism and presentment for a bill to become a law).
[27] President Barack Obama, Remarks by the President at Univision Town Hall (Mar. 28, 2011), http://www.whitehouse.gov/the-press-office/2011/03/28/remarks-president-univision-town-hall.
[28] President Barack Obama, Remarks by the President on Immigration Reform—San Francisco, CA (Nov. 25, 2013), http://www.whitehouse.gov/the-press-office/2013/11/25/remarks-president-immigration-reform-san-francisco-ca.
[29] *Id.*
[30] Written Testimony of Carter Hull, Before the House Oversight and Gov't Reform Comm. (July 18, 2013), http://oversight.house.gov/wp-content/uploads/2013/07/Hull-Testimony-Final.pdf.

appointees at the IRS,[31] appointed by President Obama[32] and confirmed by the Senate.[33] But what was missing from the hearing—and what has been missing from the commentary throughout—is the constitutional context of this scandal.

The President has, of course, been at pains to distance himself from this scandal. But, again, recall that the duty to "take Care" is personal. Execution of the laws may be delegated; indeed, the Clause clearly contemplates that other officers—like the IRS Chief Counsel—will do the actual executing. But the duty to "*take Care* that the Laws be faithfully executed" is the President's alone. For this reason, what the President knew and when he knew it is, in a certain sense, beside the point; the right question is what he *should* have known. It will not do for the President to say (erroneously) that the IRS is an "independent agency" or to say (implausibly) that he learned about IRS targeting "from the same news reports" as the rest of us.[34] Not knowing what an executive agency is up to—let alone not knowing that the IRS is, in fact, a bureau of an executive agency that answers to the President—is not taking care that the laws be faithfully executed. If the President was negligent in his supervision of the IRS (or somehow unaware that it was subject to his supervision), then he failed in his duty to take care.

Now, again, it is true that the President is not required to take care that the laws be "completely" executed; that would be impossible given finite resources. The President does have power to make enforcement choices—however, he must make them "faithfully." If the President lacks the resources to prosecute all bank robbers, he may choose to prosecute only the violent bank robbers; but he cannot choose to prosecute only the Catholic bank robbers.[35] Invidious discrimination is not faithful execution.

Discriminatory enforcement on the basis of religion would have horrified the Framers of the Constitution. But there is one kind of discrimination that would have worried them even more—the one kind that could undermine the entire constitutional structure: political discrimination. *The single most corrosive thing that can happen in a democracy is for incumbents to use the levers of power to stifle their critics and entrench themselves*.[36] This is devastating to a democracy, because it casts doubt on the legitimacy of all that follows. Ensuring that this does not happen is perhaps the single most important imperative of the President's duty to take care that the laws be faithfully

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[31] *See* 26 U.S.C. § 7803(b)(1).
[32] Press Release, The White House: Office of the Press Sec'y, President Obama Announces More Key Treasury Appointments (Apr. 17, 2009), http://www.whitehouse.gov/the-press-office/president-obama-announces-more-key-treasury-appointments.
[33] Press Release, U.S. Dep't of the Treasury, William J. Wilkins Confirmed as Chief Counsel for the Internal Revenue Service, Assistant General Counsel for Treasury (July 28, 2009), http://www.treasury.gov/press-center/press-releases/Pages/tg245.aspx.
[34] *See* President Barack Obama, Remarks by President Obama and Prime Minister Cameron of the United Kingdom in Joint Press Conference, (May 13, 2013), http://www.whitehouse.gov/the-press-office/2013/05/13/remarks-president-obama-and-prime-minister-cameron-united-kingdom-joint-. The IRS is part of the Department of Treasury, not an independent agency. *See* 26 USC § 7803 (placing the IRS Commissioner in the Department of the Treasury, and making him removable at the will of the President).
[35] *See Smith v. Meese*, 821 F.2d 1484, 1492 (11th Cir. 1987).
[36] *See* John Hart Ely, *Gerrymanders: The Good, the Bad, and the Ugly*, 50 STAN. L. REV. 607, 621 (1998).

executed. If he gives only one instruction to his political appointees, it should be this: *do not discriminate on the basis of politics in your execution of the laws*.

This, sadly, is the gravamen of the IRS scandal. Congress enacted a neutral provision of the tax code, but an executive agency enforced it non-neutrally, discriminating on invidious grounds. It discriminated against the Tea Party,[37] the most potent political force that the President's party faced in the mid-term elections. It discriminated against those who "criticize how the country is being run."[38] For good measure, it reportedly discriminated against those "involved in … educating on the Constitution and the Bill of Rights."[39] And it did all this while an embattled incumbent President was running for re-election.[40]

The President may, alas, urge his supporters to "punish our enemies"[41]; but he cannot stand oblivious while the IRS does just that. He may, alas, berate the Supreme Court for protecting political speech[42]; but he cannot turn a blind eye while the IRS muzzles his critics with red tape. He may, alas, call right-leaning groups a "threat to our democracy"[43]—but the real, cardinal threat is unfaithful execution of the laws.

Conclusion

The President has a personal obligation to "take Care that the Laws be faithfully executed."[44] The word "faithfully" is, perhaps, a broad grant of discretion, but it is also a real and important constraint. The President cannot suspend laws altogether. He cannot favor unenacted bills over duly enacted laws. And he cannot discriminate on the basis of politics in his execution of the laws. The President has crossed all three of these lines.

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[37] TREASURY INSPECTOR GEN. FOR TAX ADMIN., INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW 5 (May 14, 2013), https://docs.google.com/viewer?url=http://www.washingtonpost.com/blogs/wonkblog/files/2013/05/201310053fr-revised-redacted-1.pdf&chrome=true.

[38] *Id.* at 6, 35.

[39] *Id*. at 30, 38.

[40] *See id*. at 6–10.

[41] Eddie Sotelo, *Interview with the President of the United States Barack Obama*, UNIVISION RADIO (Oct. 25, 2010), *transcript available at* http://latimesblogs.latimes.com/washington/2010/10/transcript-of-president-barack-obama-with-univision.html.

[42] President Barack Obama, Remarks by the President in State of the Union Address (Jan. 27, 2010), http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address.

[43] President Barack Obama, Remarks by the President and the Vice President at a DNC 'Moving America Forward' Rally in Philadelphia, Pennsylvania (Oct. 10, 2010), http://www.whitehouse.gov/the-press-office/2010/10/10/remarks-president-and-vice-president-a-dnc-moving-america-forward-rally-.

[44] U.S. CONST. art. II, § 3.

The Founders' Great Mistake

WHO IS RESPONSIBLE FOR THE PAST EIGHT YEARS OF DISMAL AMERICAN GOVERNANCE? "GEORGE W. BUSH" IS A DECENT ANSWER. BUT WE SHOULD RESERVE SOME BLAME FOR THE FOUNDING FATHERS, WHO CREATED A PRESIDENTIAL OFFICE THAT IS ILL-CONSIDERED, VAGUELY DEFINED, AND RIPE FOR ABUSE. HERE'S HOW TO FIX WHAT THE FOUNDERS GOT WRONG—BEFORE THE NEXT G. W. BUSH ENTERS THE OVAL OFFICE.

By Garrett Epps

ILLUSTRATION BY STEVE BRODNER

FOR THE PAST eight years, George W. Bush has treated the White House much as Kenneth Grahame's Mr. Toad treated a new automobile—like a shiny toy to be wrecked by racing the motor, spinning smoke from the tires, and smashing through farmyards until the wheels come off. Bush got to the Oval Office despite having lost the popular vote, and he governed with a fine disdain for democratic and legal norms—stonewalling congressional oversight; detaining foreigners and U.S. citizens on his "inherent authority"; using the Justice Department as a political cudgel; ordering officials to ignore statutes and treaties that he found inconvenient; and persisting in actions, such as the Iraq War, that had come to be deeply unpopular in Congress and on Main Street.

Also see:

Time capsule: The Bush Files
Readers are invited to submit mementos—from quotes to videos to books to movies—that best capture the essence of the Bush years.

Understandably, most Americans today are primarily concerned with whether Barack Obama can clean up Bush's mess. But as Bush leaves the White House, it's worth asking why he was able to behave so badly for so long without being stopped by the Constitution's famous "checks and balances." Some of the problems with the Bush administration, in fact, have their source not in Bush's leadership style but in the constitutional design of the presidency. Unless these problems are fixed, it will only be a matter of time before another hot-rodder gets hold of the keys and damages the country further.

The historian Jack N. Rakove has written, "The creation of the presidency was [the Framers'] most creative act." That may be true, but it wasn't their best work. The Framers were designing something the modern world had never seen—a republican chief executive who would owe his power to the people rather than to heredity or brute force. The wonder is not that they got so much wrong, but that they got anything right at all.

According to James Madison's *Notes of Debates in the Federal Convention of 1787*, the executive received surprisingly little attention at the Constitutional Convention in Philadelphia. Debate over the creation and workings of the new Congress was long and lively; the presidency, by contrast, was

fashioned relatively quickly, after considerably less discussion. One important reason for the delegates' reticence was that George Washington, the most admired man in the world at that time, was the convention's president. Every delegate knew that Washington would, if he chose, be the first president of the new federal government—and that the new government itself would likely fail without Washington at the helm. To express too much fear of executive authority might have seemed disrespectful to the man for whom the office was being tailored.

Washington's force of personality terrified almost all of his contemporaries, and although he said little as presiding officer, he was not always quiet. Once, when an unknown delegate left a copy of some proposed provisions lying around, Washington scolded the delegates like a headmaster reproving careless prep-schoolers, and then left the document on a table, saying, "Let him who owns it take it." No one did.

Even when Washington remained silent, his presence shaped the debate. When, on June 1, James Wilson suggested that the executive power be lodged in a single person, no one spoke up in response. The silence went on until Benjamin Franklin finally suggested a debate; the debate itself proceeded awkwardly for a little while, and was then put off for another day.

Many of the conversations about presidential authority were similarly awkward, and tended to be indirect. Later interpreters have found the original debates on the presidency, in the words of former Supreme Court Justice Robert H. Jackson, "almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh."

In the end, the Framers were artfully vague about the extent and limits of the president's powers. Article I, Section 8 of the Constitution, which empowers Congress, runs 429 words; Article II, Section 2, the presidential equivalent, is about half as long. The powers assigned to the president alone are few: he can require Cabinet members to give him their opinions in writing; he can convene a special session of Congress "on extraordinary occasions," and may set a date for adjournment if the two houses cannot agree on one; he receives ambassadors and is commander in chief of the armed forces; he has a veto on legislation (which Congress can override); and he has the power to pardon.

The president also *shares* two powers with the Senate—to make treaties, and to appoint federal judges and other "officers of the United States," including Cabinet members. And, finally, the president has two specific *duties*—to give regular reports on the state of the union, and to "take care that the laws be faithfully executed."

All in all, the text of Article II, while somewhat ambiguous—a flaw that would be quickly exploited—provided little warning that the office of president would become uniquely powerful. Even at the convention, Madison mused that it "would rarely if ever happen that the executive constituted as ours is proposed to be would have firmness enough to resist the legislature." In fact, when citizens considered the draft Constitution during the ratification debates in 1787 and 1788, many of their concerns centered on the possibility that the Senate would make the president its cat's-paw. Few people foresaw the modern presidency, largely because the office as we know it today bears so little relation to that prescribed by the Constitution.

The modern presidency is primarily the intellectual handiwork not of "the Framers" but of one Framer—Alexander Hamilton. Hamilton's idea of the presidency can be found in a remarkable speech he gave to the convention, on June 18, 1787. In it, Hamilton argued that the president should serve for life, name Cabinet members without Senate approval, have an absolute veto on legislation, and have "the direction of war" once "authorized or begun." The president would be a monarch, Hamilton admitted, but an "elective monarch."

Hamilton's plan was so far from the mainstream of thought at the convention that none of its provisions was ever seriously discussed. Nonetheless, Hamilton was and remains the chief theorist of the presidency, first in writing his essays for *The Federalist* and then in serving as George Washington's secretary of the Treasury. In this latter role, acting as Washington's de facto prime minister, Hamilton took full advantage of the vagueness and brevity of Article II, laying the groundwork for an outsize presidency while the war-hero Washington was still in office.

In *The Federalist*, Hamilton had famously proclaimed that "energy in the executive is a leading character in the definition of good government." Just how much energy he favored became clear during America's first foreign crisis, the Neutrality Proclamation controversy of 1793. When Britain and France went to war, many Americans wanted to aid their Revolutionary ally. But Washington and the Federalists were rightly terrified of war with the powerful British Empire. Washington unilaterally proclaimed that the United States would be neutral.

France's American supporters, covertly aided by Thomas Jefferson, fiercely attacked Washington for exceeding his constitutional authority. The power to make treaties, they said, was jointly lodged in the president and the Senate; how could Washington unilaterally interpret or change the terms of the treaty of alliance with France?

Under the pen name "Pacificus," Hamilton wrote a defense of Washington's power to act without congressional sanction. The first Pacificus essay is the mother document of the "unitary executive" theory that Bush's apologists have pushed to its limits since 2001. Hamilton seized on the first words of Article II: "The executive power shall be vested in a President of the United States of America." He contrasted this wording with Article I, which governs Congress and which begins, "All legislative powers herein granted shall be vested in a Congress of the United States." What this meant, Hamilton argued, was that Article II was "a general grant of … power" to the president. Although Congress was limited to its enumerated powers, the executive could do literally anything that the Constitution did not expressly forbid. Hamilton's president existed, in effect, outside the Constitution.

That's the Bush conception, too. In 2005, John Yoo, the author of most of the administration's controversial "torture memos," drew on Hamilton's essay when he wrote, "The Constitution provides a general grant of executive power to the president." Since Article I vests in Congress "only those legislative powers 'herein granted,'" Yoo argued, the more broadly stated Article II must grant the president "an unenumerated executive authority."

Hamilton's interpretation has proved durable even though there is little in the record of constitutional framing and ratification to suggest that anyone else shared his view. In times of crisis, power flows to the executive; too rarely does it flow back. And while Washington himself used his power wisely (Jeffersonians found out in 1812 that pulling the British lion's tail was poor policy), it was during his administration that the seeds of the "national-security state" were planted.

THE SYSTEM THAT the Framers developed for electing the president was, unfortunately, as flawed as their design of the office itself. When Madison opened discussion on presidential election in Philadelphia, he opined that "the people at large" were the "fittest" electorate. But he immediately conceded that popular election would hurt the South, which had many slaves and few voters relative to the North. To get around this "difficulty," he proposed using state electors. Electoral-vote strength was based on a state's total population, not on its number of voters—and the South received representation for three-fifths of its slaves both in the House of Representatives and in the Electoral College.

Scholars still debate whether the Framers foresaw the prospect of a contested presidential election, followed by a peaceful shift of power. (Remember that, as Shakespeare pointed out in *Richard II*, kings

left office feet first.) Some members of the founding generation believed that a duly elected president would simply be reelected until his death, at which point the vice president would take his place, much like the Prince of Wales ascending to the throne.

Perhaps as a result, the mechanics of presidential election laid out in the Constitution quickly showed themselves to be utterly unworkable. The text of Article II contained no provision for a presidential ticket—with one candidate for president and one for vice president. Instead, each elector was supposed to vote for any two presidential candidates; the candidate who received the largest majority of votes would be president; the runner-up would be vice president. In 1800, this ungainly system nearly brought the country to civil war. Thomas Jefferson and Aaron Burr ran as a team; their electors were expected to vote for both of them. Jefferson assumed that one or two would drop Burr's name from the ballot. That would have given Jefferson the larger majority, with Burr winning the vice presidency. But due to a still-mysterious misunderstanding, all the electors voted for both candidates, producing a tie in the electoral vote and throwing the election to a House vote.

The ensuing drama lasted six days and 36 ballots before Hamilton threw Federalist support to Jefferson (as much as he despised Jefferson, he regarded Burr as "an embryo-Caesar"). This choice began the chain of events that led to Hamilton's death at Burr's hands three years later. More important, the imbroglio exposed the fragility of the election procedure.

In 1804, the Electoral College was "repaired" by the Twelfth Amendment; now the electors would vote for one candidate for president and another for vice president. This was the first patch on Article II, but far from the last—the procedures for presidential election and succession were changed by constitutional amendment in 1933, 1951, 1961, and 1967. None of this fine-tuning has been able to fix the system. In 1824, 1876, 1888, and 2000, the Electoral College produced winners who received fewer popular votes than the losers, and it came startlingly close to doing so again in 2004; in 1824, 1876, and 2000, it also produced prolonged uncertainty and the prospect of civil unrest—or the fact of it.

Even when the election system works passably, a president-elect must endure another indefensible feature of the succession process. In England, a new prime minister takes office the day after parliamentary elections; in France, a newly elected president is inaugurated within a week or two. But when Americans choose a new leader, the victor waits 11 weeks—nearly a quarter-year—to assume office. The presidential interregnum is a recurrent period of danger.

Originally, a new president didn't take office until March 4. This long delay nearly destroyed the nation after the 1860 election. During the disastrous "secession winter," Abraham Lincoln waited in Illinois while his feckless predecessor, James Buchanan, permitted secessionists to seize federal arsenals and forts. By March 1861, when Lincoln took office, the Civil War was nearly lost, though officially it had not even begun.

In 1932, Franklin Roosevelt crushed the incumbent, Herbert Hoover, but had to wait four months to take office. During that period, Hoover attempted to force the president-elect to abandon his proposals for economic reform. Roosevelt refused to commit himself, but the resulting uncertainty led the financial system to the brink of collapse.

The Twentieth Amendment, ratified in 1933, cut the interregnum nearly in half, but 11 weeks is still too long. After his defeat in 1992, President George H. W. Bush committed U.S. troops to a military mission in Somalia. The mission turned toxic, and Bill Clinton withdrew the troops the following year. Clinton was criticized for his military leadership, perhaps rightly—but the Constitution should not have permitted a repudiated president to commit his successor to an international conflict that neither the new president nor Congress had approved.

As the elder Bush did, an interregnum president retains the power of life or death over the nation. As Clinton did, an interregnum president may issue controversial or corrupt pardons. In either case, the voters have no means of holding their leader accountable.

THE MOST DANGEROUS presidential malfunction might be called the "runaway presidency." The Framers were fearful of making the president too dependent on Congress; short of impeachment—the atomic bomb of domestic politics—there are no means by which a president can be reined in politically during his term. Taking advantage of this deficiency, runaway presidents have at times committed the country to courses of action that the voters never approved—or ones they even rejected.

John Tyler, who was never elected president, was the first runaway, in 1841. William Henry Harrison had served only a few weeks; after his death, the obscure Tyler governed in open defiance of the Whig Party that had put him on the ticket, pressing unpopular proslavery policies that helped set the stage for the Civil War.

Andrew Johnson was the next unelected runaway. Politically, he had been an afterthought. But after Lincoln's assassination, Johnson adopted a pro-Southern Reconstruction policy. He treated the party that had nominated him with such scorn that many contemporaries came to believe he was preparing to use the Army to break up Congress by force. After Johnson rebuffed any attempt at compromise, the Republican House impeached him, but the Senate, by one vote, refused to remove him from office. His obduracy crippled Reconstruction; in fact, we still haven't fully recovered from that crisis.

American political commentators tend to think loosely about exertions of presidential authority. The paradigm cases are Lincoln rallying the nation after Fort Sumter, and Roosevelt, about a year before Pearl Harbor, using pure executive power to transfer American destroyers to embattled Britain in exchange for use of certain British bases. Because these great leaders used their authority broadly, the thinking goes, assertions of executive prerogative are valid and desirable.

Certainly there are times when presidential firmness is better than rapid changes in policy to suit public opinion. Executive theorists in the United States often pose the choice that way—steady, independent executive leadership or feckless, inconstant pursuit of what Hamilton called "the temporary delusion" of public opinion. But not all shifts in public opinion are delusive or temporary. An executive should have some independence, but a presidency that treats the people as irrelevant is not democratic. It is authoritarian.

Lincoln and Roosevelt asserted emergency powers while holding popular mandates. Lincoln had just won an election that also provided him with a handy majority in Congress; Roosevelt was enormously popular, and in 1940 his party outnumbered the opposition 3-to-1 in the Senate and by nearly 100 seats in the House.

But sometimes a president with little or no political mandate uses the office to further a surprising, obscure, or discredited political agenda. Under these circumstances, what poses as bold leadership is in fact usurpation. The most egregious case arises when a president's policy and leadership have been repudiated by the voters, either by a defeat for reelection or by a sweeping rejection of his congressional allies in a midterm election. When that happens, presidents too often do what George Bush did in 2006—simply persist in the conduct that has alienated the country. Intoxicated by the image of the hero-president, unencumbered by any direct political check, stubborn presidents in this situation have no incentive to change course.

When the voters turn sharply against a president mid-term, his leadership loses some or all of its legitimacy, and the result can be disastrous. Clinton was decisively repudiated in November 1994. After the election, the administration and the new Republican Congress remained so far apart on funding

decisions that the government had to shut down for 26 days in 1995 and 1996. This episode is now remembered for Clinton's political mastery, but it was actually a dangerous structural failure. (Imagine that the al-Qaeda attacks of September 11, 2001, had happened instead on December 20, 1995, when the stalemate had forced the executive branch to send most of its "nonessential" employees home.)

TO SUM UP, while George W. Bush may have been a particularly bad driver, the presidency itself is, and always has been, an unreliable vehicle—with a cranky starter, an engine too big for the chassis, erratic steering, and virtually no brakes. It needs an overhaul, a comprehensive redo of Article II.

Constitutional change is a daunting prospect. But consider how often we have already changed the presidency; it is the Constitution's most-amended feature. And this is the moment to think of reform—the public's attention is focused on the Bush disaster, and ordinary people might be willing to look at the flaws in the office that allowed Bush to do what he did.

So how should the presidency be changed?

First, voters should elect presidents directly. And once the vote is counted, the president-elect (and the new Congress) should take office within a week. Americans accustomed to the current system will object that this would not allow enough time to assemble a Cabinet—but in England and France, the new chief executive considers ministerial nominations before the election. A shorter interregnum would force the creation of something like the British shadow cabinet, in which a candidate makes public the names of his key advisers. That would give voters important information, and provide the president with a running start.

Next, Article II should include a specific and limited set of presidential powers. The "unitary executive" theorists should no longer be allowed to spin a quasi-dictatorship out of the bare phrase *executive power*; like the responsibilities of Congress, those of the president should be clearly enumerated.

It should be made clear, for example, that the president's powers as commander in chief do not crowd out the power of Congress to start—and stop—armed conflict. Likewise, the duty to "take care that the laws be faithfully executed" needs to be clarified: it is not the power to decide which laws the president wants to follow, or to rewrite new statutes in "signing statements" after Congress has passed them; it is a duty to uphold the Constitution, valid treaties, and congressional statutes (which together, according to the Constitution, form "the supreme law of the land").

After a transformative midterm election like that of 1994 or 2006, the nation should require a compromise between the rejected president and the new Congress. A president whose party has lost some minimum number of seats in Congress should be forced to form the equivalent of a national-unity government. This could be done by requiring the president to present a new Cabinet that includes members of both parties, which the new Congress would approve or disapprove as a whole—no drawn-out confirmation hearings on each nominee. If the president were unwilling to assemble such a government or unable to get congressional approval after, say, three tries, he would have to resign.

This would not give Congress control of the executive branch. A resigning president would be replaced by the vice president, who would not be subject to the new-Cabinet requirement. This new president might succeed politically where the previous one had failed (imagine Al Gore becoming president in 1995, and running in 1996—and perhaps in 2000—as an incumbent). And that possibility would discourage the new congressional majority from simply rejecting the compromise Cabinet. Resignation might be worse for them than approval.

As a final reform, we should reconsider the entire Hamiltonian concept of the "unitary executive." When George Washington became president, he left a large organization (the Mount Vernon plantation) to head a smaller one (the federal government). But today, the executive branch is a behemoth, with control over law enforcement, the military, economic policy, education, the environment, and most other aspects of national life. That behemoth is responsible to one person, and that one person, as we have seen, is only loosely accountable to the electorate.

In other areas, the Framers solved this problem neatly: they divided power in order to protect against its abuse. Congress was split into the House and the Senate to ensure that the legislative process would not be so efficient as to absorb powers properly belonging to the other branches. The problem now is not an overweening Congress but an aggrandized executive branch; still, the remedy is the same. We should divide the executive branch between two elected officials—a president, and an attorney general who would be voted in during midterm elections.

As we are learning from the ongoing scandal of the torture memos, one of the drawbacks of a single executive is that Justice Department lawyers may consider it their job to twist the law to suit the White House. But the president is not their client; the United States is. Justice Department lawyers appointed by an elected attorney general would have no motive to distort law and logic to empower the president, while the White House counsel's office, which does represent the president, would have every incentive to monitor the Justice Department to ensure that it did not tilt too strongly against the executive branch. The watchmen would watch each other.

This arrangement would hardly be unprecedented: most state governments elect an attorney general. The new Article II could make clear that the president has the responsibility for setting overall legal policy, just as governors do today.

None of these changes would erode the "separation of powers." That happens only when a change gives one branch's prerogatives to another branch. These changes refer in each instance back to the people, who are the proper source of all power. The changes would still leave plenty of room for "energy in the executive" but would afford far less opportunity for high-handedness, secrecy, and simple rigidity. They would allow presidential firmness, but not at the expense of democratic self-governance.

It's not surprising that the Framers did not understand the perils of the office they designed. They were working in the dark, and they got a lot of things right. But we should not let our admiration for the Framers deter us from fixing their mistakes.

Our government is badly out of balance. There is a difference between executive energy and autocratic license; between leadership and authoritarianism; between the democratic firmness of a Lincoln and the authoritarian rigidity of a Bush. The challenge we face today is to find some advantage in Bush's sorry legacy. Reform of the executive branch would be a good place to start.

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Can We Talk Calmly About Obama's 'Executive Orders'?

By Garrett Epps

No president can do the job without them. Let's try to be clear about which ones are valid and which aren't.

Reuters

You may be perplexed about President Obama's recent actions aimed at promoting gun safety. One of the leading scholars of separation of powers, Peter M. Shane, has set out a calm analysis of Obama's actions here. The president signed three, not 23, executive orders, he notes. Shane's most important point is this:

> What executive orders cannot do is impose obligations or restrictions on the public, unless Congress, through legislation, has expressly or implicitly conferred authority on the President to do so. It is worth noting that none of President Obama's executive orders on gun violence do any such things.

The opposition has many criticisms of the specifics of Obama's actions. Fair enough; that's part of the ongoing debate about the proper regulation of firearms. But some on the right like to claim that "executive orders" in themselves are lawless.

If so, that would have come as news to George Washington -- who issued, among dozens of proclamations, eight executive orders of the kind we recognize today -- and to every president since.

What is the president's job? He is the holder of "the executive power" and has the duty to "take care that the laws be faithfully executed." It would be childish to believe that statutes, once passed by Congress, somehow carry themselves out while the president greets Little League teams in the Rose Garden. New criminal statutes must be enforced; new conditional spending grants must be administered; new programs must be assigned to government departments for administration; new policies must be carried out by government employees on the ground.

A president cannot do his job without issuing executive orders and other instructions to the executive branch. The question should be whether a specific one is justified by law.

Sometimes the president will exceed his authority, and when he does, it's a citizen's duty to call him out. Obama's refusal to obtain authorization from Congress for the intervention in Libya was probably a violation of the Constitution. From what we can tell, the secret drone-strike program and the "kill list" of targets, generated within the executive branch, raise very serious constitutional questions.

There's every reason to think that there will be more of these serious executive-power issues in Obama's second term. It's possible that, for the next two years at least, Obama will have to try to govern without a functioning legislative branch. It's a challenge, to say the least, and one that few presidents have faced. History suggests that the result will be increased executive power, simply because some things -- including paying the debts of the United States -- must be done no matter what. Already, for example, two highly respected academics, Michael Dorf of Cornell and Neil Buchanan of George Washington University, have suggested that the "least unconstitutional" response to a debt-ceiling standoff would be for Obama to raise taxes on his own authority. I am certainly not ready to go there, but Dorf and Buchanan are serious scholars. Their article illustrates that desperate constitutional times sometimes elicit extra-constitutional measures.

Right now the opposition is screaming that, for example, an order that federal agencies *comply* with the NICS Improvement Amendments Act of 2007 is somehow the equivalent of George W. Bush's order establishing military commissions. If we are heading into a true confrontation of the branches, a sane discussion of executive power is going to be important for the future of the Republic. We aren't off to a very good start.

Our National Debt 'Shall Not Be Questioned,' the Constitution Says

By Garrett Epps

In a time that increasingly resembles the Great Depression, Congress shouldn't play politics with raising our debt ceiling

My last post, entitled "The Speech Obama Could Give," was an imaginary presidential address in which Obama announces that if Congress refuses to raise the statutory debt ceiling, he will not observe it, at least to the extent that doing so would require him to default on interest payments on the national debt, suspend payments to Social Security recipients, or withhold paychecks of U.S. troops during Congressionally authorized military action.

The post has drawn some reaction, which I think is a sign of the underlying anxiety people are feeling as Republicans juggle the dynamite of potential default. Emil Henry, a former Bush administration treasury official, calls the ritual of debt-limitation debates a "Kabuki dance." As part of this ritual, my speech was intended to suggest that there are both ramifications and responses to potential default that we may not have foreseen.

As for the consequences, I am a constitutional lawyer, not an economist. But as a matter of common sense, a delay in raising the debt limit may have malign results even if the United States does not technically default on bond-interest payments. I have been reading David Kennedy's *Freedom from Fear: The American People in Depression and War, 1929-1945*, and I am not sleeping well. The current year seems uncomfortably like 1931, when some brave forecasters still nourished hope that

recovery was underway. Shocks to confidence in the nation and the world kept coming, however, until by early 1933 severe recession had become unparalleled catastrophe.

Since 2008, we've heard several times that recovery has begun; but events around the world--European debt crises, Middle East revolutions, the earthquake, tsunami and meltdown in Japan, and now political infighting in Washington--keep intervening to strangle it.

So it seems like a bad time for Congressional Republicans to point a gun at the national credit rating and scream, "One step and I'll shoot!" If the debt limit increase is snarled, confidence in our bonds may crater even if Treasury is able to find a temporary way to maintain the interest payments. If the world no longer feels solid about U.S. debt, the consequences could be as bad as 1932-33.

That's where the good old text of the Constitution comes in--the actual text, not the mythical snippets that many Americans misremember from eighth-grade civics, and not the truncated redaction that too many lawyers, alas, learn in their first-year Con Law class.

Section Four of the Fourteenth Amendment states, at its outset, that "[t]he validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned." This section was inserted into the Amendment because of a very real concern that Southern political leaders, and their Northern allies, would gain the upper hand in Congress in the 1866 or 1868 elections and vote to repudiate the national debt.

The Lincoln administration had borrowed freely to finance the war machine. As Reconstruction dawned, white Southerners complained bitterly that they would now be taxed to repay the funds that had been borrowed to defeat their cause. "What, ruin us, and then make us help pay the cost of our own whipping?" one asked a Northern journalist in 1865. "I reckon not."

Southerners were used to having their way in Congress--they had dominated the institution from 1787 until secession in 1861--and many believed that when their representatives arrived in House and Senate, they would be able to tear up the nation's IOUs.

Section Four was the response; its language is extraordinary. First, it does not simply say that the national debt must be *paid;* it says that its "validity ... shall not be *questioned."* Only one other section of the Constitution--the Thirteenth Amendment's proclamation that "[n]either slavery nor involuntary servitude ... shall exist within the United States, or any place subject to their jurisdiction"--is as unqualified and sweeping.

Second, it suggests a broad definition of the national debt: "...including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion."

From this language, it's not hard to argue that the Constitution places both payments on the debt and payments owed to groups like Social Security recipients--pensioners, that is--above the vagaries of Congressional politics. These debts have to be paid, the argument would be, in full, on time, without question. If Congress won't pay them, then the executive must.

On the other hand, the language could be seen as simply forbidding outright repudiation, not temporary default. Default on U.S. bonds would, in this analysis, not dispute the "validity" of the debt; it would simply delay repayment. But remember the strict language. Suppose you lend $10,000 to your cousin. When the debt comes due, he says, "Listen, I'm good for the money, but I'm a little short right now. Trust me, I will get it to you sooner or later." That's not repudiation. But on the other hand, you might think the validity was now at least being "questioned."

For the Obama administration to adopt the broad reading of Section Four would be bold (and I hasten to say I don't expect them to do it); but it would hardly be unusual in the recent discourse of presidential power--especially the Republican party's theory of the presidency.

(Coming next: The imaginary speech and the imperial presidency)

Image credit: flickr/Tracy O

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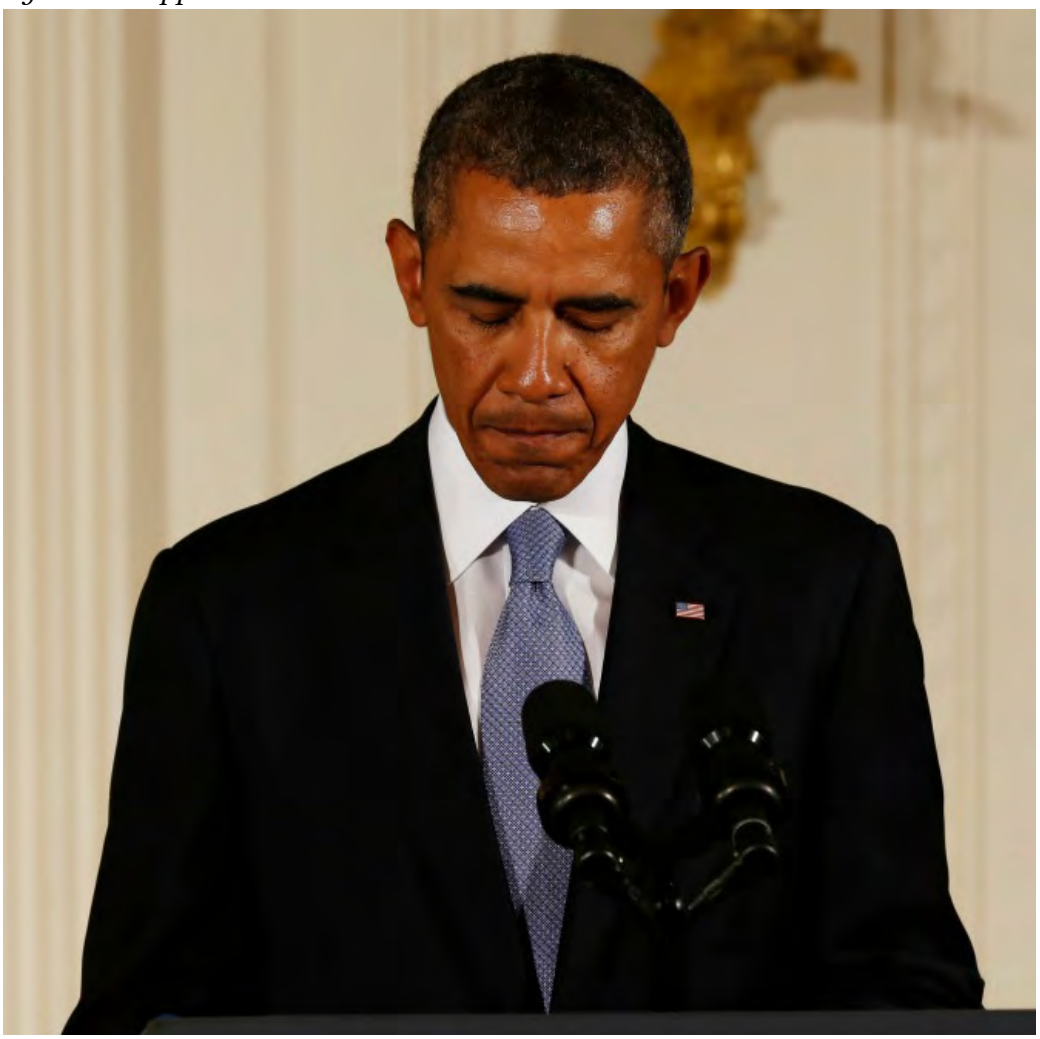
The Authority to 'Declare War': A Power Barack Obama Does Not Have

By Garrett Epps



Larry Downing/Reuters

The prime minister of the United Kingdom, armed with the Royal Prerogative, does not need Parliament's assent to lead Britain into war. The president of the United States, holder of an office designed to keep "prerogative" powers in check, assuredly does.

Yet history will apparently write that, in the late summer of 2013, the prime minister sought permission and, when Parliament denied it, receded from the field -- and that a president scorned to ask, and went ahead with an act of war.

This paradox shows that American intervention in Syria is fraught with legal, as well as military, danger -- and that constitutionally, as well as in foreign-policy terms, it may be a problem with no good solution.

Before discussing American constitutional law, we should admit that the world situation is terrifying, and the arguments for American intervention -- alone, if need be -- are powerful. Syria has apparently used chemical weapons against civilians on a mass scale -- a crime against humanity. Use of chemical weapons is a "red line" not only to Obama but in international law; perhaps only the threat or use of nuclear weapons would be a worse violation of the laws of war. The United Nations, created and empowered to deal with just such an emergency, is paralyzed because two great powers, Russia and China, have shameless decided to pursue short-term self interest and defend the criminals in defiance of the world.

Does that crisis in some way create a new legal regime, a change both in international law and in American constitutional norms?

I think it's pretty clear that an American attack, without the sanction of the United Nations, the support of allies, the authorization of Congress -- or, it must be said, much hope of meaningful success -- would violate the Constitution. As Jack Goldsmith writes in *Lawfare*, it "will push presidential war power beyond where it has gone before."

Since the very beginning of the Republic, presidents have used force to defend American ships, military personnel, and civilians abroad. No one doubts, in 2013, that a commander-in-chief could order emergency military action to defend Americans, or the nation as a whole, from attack. And sometimes that emergency power has been stretched to include a real-time response to fast-moving events that threaten world order, even if U.S. targets are not involved. Time enough, when seconds count, to consult Congress after the dust has cleared a bit.

American presidents have also used force, without consulting Congress, to fulfill American treaty obligations. The most famous example was President Harry Truman's decision to commit American troops to the war in Korea without requesting authorization even after the fact. Truman argued that he was obliged, under the U.N. Charter and a Security Council resolution, to come to the aid of South Korea, and that that obligation superseded Art. I § 8 cl. 11's reservation of the power to "declare war" to Congress alone.

President George H.W. Bush, in seeking authorization for the first Gulf War, claimed that he did not need it, because of a Security Council resolution authorizing action against Kuwait. (The bluff worked, and Congress approved the war.) President Bill Clinton committed U.S. forces to intervention in the former Yugoslavia, and never sought authorization. In Kosovo, there was no Security Council resolution, but Clinton claimed to be acting under the NATO Treaty and at the request of the other nations of the Balkans.

How do these precedents apply to Syria? Not well. First, the crisis is undoubtedly an emergency -- but it is not an emergency that demands presidential action within minutes or hours. The U.S. is preparing in deliberate, even stately, fashion for a carefully choreographed attack on Syria; there's plenty of time for the president to invoke the "extraordinary occasions" language of Article II § 3 and convene a special session of Congress.

Internationally, a strike against Syria would go well beyond the flimsy justification offered even for Kosovo. The Security Council has not authorized action against Syria, and will not. Even with U.N. personnel producing the evidence that the Damascus regime has used chemical weapons, the U.S. apparently does not plan even to ask for permission to use force. The nations in the Middle East region

have not asked for U.S. intervention. NATO does not support it -- and for heaven's sake, not even Britain will stand with the U.S.

To sum up: U.S. citizens and military personnel are not under attack. It is not a split-second emergency. The President does not face a request from the Security Council, NATO, the Arab League or even the Organization of Eastern Caribbean States.

This is precisely the kind of situation for which the Framers of our Constitution designed its division of authority between President and Congress. Sending our missiles against Syria is an act of war. If it is to be done, Congress, not the president, should approve.

We are, of course, a long way from Philadelphia 1787, and much of what the Framers thought and intended is now obscure. But there's not much question they gave the power to commence war to Congress. The idea of a single chief executive arose within the first week of the Convention, and John Rutledge of South Carolina declared that "he was for vesting the Executive power in a single person, tho' he was not for giving him the power of war and peace."

This theme carried through. The Framers gave Congress even the minor powers that go with making war -- prescribing military discipline, issuing letters of "marque and reprisal," etc. The Committee of Detail gave the entire power to "make war" to Congress, not the President; Madison moved the change to "declare," saying he did so to make clear that the president would have power "to repel sudden attacks." Before the vote to change that language, Elbridge Gerry spoke for many when he said he "never expected to hear in a republic a motion to empower the Executive alone to declare war."

That is the power that, signs suggest, Barack Obama will exercise sometime this weekend or next week.

It's important to acknowledge the pressures on the president. An international legal system that does not punish and deter the use of sarin gas is not worthy of the name. The established mechanisms have failed. We may be facing the equivalent of Italy's attack on Ethiopia with poison gas, which revealed the bankruptcy of the League of Nations and set the world on the course for World War II. Weighed down by the specter of what will happen if no one acts against Bashar al-Assad, Obama may believe he dare not risk rejection from a dysfunctional Congress.

If that is his rationale, however, he should say so, not claim some pernickety new exception to the Constitution. He should, perhaps, say that the president of the United States is also de facto Prime Minister of the World, with the prerogative to defend sovereign peace, and that he must act when others do not.

It's not much of an argument, but it may be the best he has.

This article available online at:

http://www.theatlantic.com/politics/archive/2013/08/the-authority-to-declare-war-a-power-barack-obama-does-not-have/279212/

Oregon Constitutional Law in 2014

3:00 p.m. to 4:15 p.m.

- Highlights of Oregon decisions in the past twelve months :

  Search and Seizure – Mere Conversation
  Search and Seizure – Consent
  Search and Seizure – Animals
  Free Assembly
  Takings

Justice Jack Landau, Oregon Supreme Court
Senior Judge David Schuman, Oregon Court of Appeals
Alycia Sykora, Alycia N. Sykora P.C.

THE OREGON CONSTITUTION AND CASES IN 2014

Alycia Sykora

"Oscar Wilde once wrote: 'There is only one thing in the world worse than being talked about, and that is not being talked about.' Wilde's observation has proved true for state constitutions – they are generally not talked about, but even when they are talked about the talk is usually garbled or unintelligible." -- James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH L REV 761, 836 (1992).

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THE OREGON CONSTITUTION AND CASES IN 2014

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"When a father inquired about the best method of educating his son in ethical conduct, a Pythagorean replied: 'Make him a citizen of a state with good laws.'" Georg Hegel, *Philosophy of Right* (1821).

"Oregon's current text can fairly be described as a constitutional mess." Hans A. Linde, *What Is a Constitution, What Is Not, and Why Does It Matter?*, 87 OR L REV 717, 730 (2008).

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Introduction

1765 – British Major Robert Rogers submitted a proposal to King George III to take 200 men westward over land to discover the northwest passage: "The Rout Major Rogers proposes to take, is from the Great Lakes towards the Head of the Mississippi, and from thence to the River called by the Indians Ouragon, which flows into a Bay that projects North-Eastwardly into the [country] from the Pacific Ocean, and there to Explore the said Bay and its Outletts, and also the Western Margin of the Continent to such a Northern Latitude as shall be thought necessary." That is the first known written use of the name "Oregon." (Carey at 9, 15, 256) ("Oregon is a word of Indian origin [that] perhaps originated with the Sautee or Chippewa branch of the Sioux"). But see Duflot de Mofras at 4 ("It is completely impossible to determine the etymology of the word 'Oregon' as it has no root in any European language and one cannot find it in any Indian language.").

July 1787 – Confederation Congress adopted "*An Ordinance for the Government of the Territory of the United States North West of the River Ohio,*" also known as the Northwest Ordinance of 1787. It established a government for the Northwest Territory, outlined the process for admitting a new state to the Union, guaranteed that newly created states would become states on equal footing to the original thirteen states, and provided for civil liberties in the territories, such as religious freedom and prohibition of slavery.

October 1818 – Joint Occupation agreement divided Oregon Country between the British and Americans. ("It is agreed that any country that may be claimed by either party on the northwest coast of America, westward of the Stony mountains * * * be free and open for the term of ten years * * * to the vessels, citizens, and subjects of the two Powers".)

1834 – The first missionaries came to Oregon. Methodist Jason Lee founded a Methodist mission near Salem. Ewing Young arrived in the Chehalem Valley.

1838 – Methodist Missionaries settling in Oregon Country rejected the British Hudson's Bay Company's commissioned officers and appointed their own magistrate and constable. Thirty-five settlers signed a letter to the Senate stating that their settlement had begun in 1832 and they sought the United States' assistance in governance, security, and commerce. No bill passed, apparently because the Southern states opposed everything pertaining to Oregon and the Northern states were afraid of offending the British.

1841 – Ewing Young, a horseman and fur trader who was the wealthiest American in Oregon Country, died intestate. A committee of nine men was appointed to frame a constitution and draft

laws. Doctor Ira L. Babcock was appointed to be the provisional government's "supreme judge with probate powers." The laws of New York were adopted.

1842 – About 140 American settlers were in Oregon Country in early 1842.

1843 – At Champoeg, a new 12-man committee divided Oregon Territory into four districts. The laws of Iowa territory were adopted. Various other liberties were expressly protected: religious worship and sentiment, habeas corpus, trial by jury, cruel and unusual punishment prohibition, property compensation, contract rights, and a ban on slavery. Meanwhile, in June 1843, one thousand people assembled at Westport, Missouri, and began a two-thousand mile trek to the Willamette Valley, arriving in June 1838 (558 males and 442 females with oxen, cattle, horses, and wagons). Before that wave of immigration, there had been about 400 Americans in Oregon Country.

1844 – The first formal Oregon circuit courts, grand juries, and petit juries, convened. On June 27, 1844, the legislative committee also voted six to two to prohibit "Negroes and Mulattoes from residing in Oregon." The law was to go into effect in two years, and if a Negro or Mulatto "shall fail to quit the country," then "he or she may be arrested upon a warrant" and "if guilty upon trial" without a jury, he or she "shall receive upon his or her bare back not less than twenty nor more than thirty-nine stripes, to be inflicted by the constable of the proper county." Every six months, the free man or woman was subject to the same striping punishment. Historian J. Henry Brown called the striping law a "dead law on the statute books," as no one was willing to enforce it. Brown at 134. On December 16, 1844, the striping punishment was removed. By late 1844, just over 3,000 American citizens lived in Oregon Country.

March 1845 – President Polk announced: It is "my duty to assert and maintain by all Constitutional means the right of the United States to that portion of our territory which lies beyond the Rocky Mountains. Our title to the country of the Oregon is 'clear and unquestionable,' and already are our people preparing to perfect that title by occupying it with their wives and children." (President James K. Polk, *Inaugural Address*, March 4, 1845).

July 1845 – An Organic Act and statutes were adopted for Oregon, again adopting Iowa laws and the English common law as a default. The Organic Act of 1845 brought a Provisional Government into effect.

June 15, 1846 – Joint Occupation Agreement of 1818 abrogated. The division of real property between Great Britain and the United States set at the 49th parallel giving Vancouver Island to Great Britain. The "whole south to the south of the 49th degree is to belong to America."

August 14, 1848 – Congress organized the Territory of Oregon. Section 14 of the Act to Establish the Territorial Government of Oregon expressly adopted the Northwest Ordinance of 1787. It permitted Oregon's existing laws under its provisional government to continue as long as those laws were "not incompatible with the constitution of the United States and the principles and provisions of this act."

August 1849 – The first Oregon Territorial Legislative Assembly convened. Its final session adjourned in January 1859. The first term of the Territorial Supreme Court also convened, at Oregon City, on August 30, 1849.

August-September 1849 – President Zachary Taylor's Secretary of State John M. Clayton appointed Abraham Lincoln to be the Oregon Territorial secretary. Lincoln declined the offer. Then in September 1849, Secretary of the Interior Thomas Ewing invited Lincoln to become governor of the Oregon Territory. Lincoln declined the offer. Speculative reasons for his decisions include his wife's refusal and that "Oregon was clearly a Democratic territory."

May 30, 1854 – Congress passed the Kansas-Nebraska Act allowing territories to decide themselves if they wanted to become slave states, repealing the Monroe Doctrine of 1920. "Oregon Democrats generally

praised the Kansas-Nebraska Act and *Dred Scott*, hailing them as victories for 'popular sovereignty.'" (Mooney at 736).

August-September 1857 – 60 men convened as the Oregon Constitutional Convention Committee and draft Oregon's Constitution. Only one delegate, John McBride, was an abolitionist Republican. Only one delegate, Matthew Deady, was an avowed proslavery advocate. Slavery was officially not permitted in Oregon but neither were specific minorities. The free white resident males who voted on the Constitution decided: "No Negro, Chinaman, or Mulatto shall have the right of suffrage;" "No free negro, or mulatto" was permitted to "be within" Oregon, or own real property, or enter contracts, or be a party to a lawsuit; and only "White foreigners" of Oregon were entitled to enjoy property rights.

February 14, 1859 – Congress accepted Oregon into the Union. Message received in Portland, Oregon on March 22, 1969, via steamship *Northerner*. Oregon was the only state admitted to the Union with a black exclusion provision in its original constitution.

March and April 1861 – Abraham Lincoln's inauguration and Confederacy attacks Fort Sumter in South Carolina.

April 15, 1865 –Lincoln's assassination.

December 6, 1865 – Thirteenth Amendment prohibiting slavery ratified and adopted by requisite ¾ of states (27 of 36). Congress recognized Oregon's ratification two days later.

1926 – Oregon repealed its constitutional prohibition barring "free negroes" existing in Oregon.

February 2, 1959 – Oregon ratified the Fifteenth Amendment, which had been in effect since 1870.

1973 – Oregon ratified the Fourteenth Amendment, which had been in effect since 1868.

2004 – A majority of Oregon voters amended their constitution to forbid same-sex marriage.

May 19, 2014 – The same-sex marriage ban in Oregon's constitution is held unconstitutional under the Equal Protection Clause of the United States Constitution.

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Chapter 1: The Rivalship of Power

"In structuring their unique governmental form, the Framers [of the United States Constitution] sought to avoid undue concentrations of power by resort to institutional devices designed to foster three political values: checking, diversity, and accountability. By simultaneously dividing power among the three branches and institutionalizing methods that allow each branch to check the others, the Constitution reduces the likelihood that one faction or interest group that has managed to obtain control of one branch will be able to implement its political agenda in contravention of the wishes of the people. By dividing power on a vertical as well as lateral plane (i.e., between the state and federal governments), they sought to assure that not all policy decisions would be made at one political level. And by implementing a diluted form of popular sovereignty, they assured that those in power would be generally responsive to those they represent while reducing the danger of a tyrannical majority."

-- Martin H. Redish & Elizabeth J. Cisar, "*If Angels Were to Govern ": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L J 449, 451 (1991).

"[T]he separation of powers provisions of the Constitution are tremendously important, not merely because the Framers imposed them, but because the fears of creeping tyranny that underlie them are at least as justified today as they were at the time the Framers established them. For as the old adage goes, 'even paranoids have enemies.' It should not be debatable that, throughout history, the concept of representative and accountable government has existed in a constant state of vulnerability. This has been almost as true in the years since the Constitution's ratification as it had been prior to that time." *Id*. at 453.

"We declare that all men, when they form a social compact are equal in right: that all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness; and they have at all times a right to alter, reform, or abolish the government in such manner as they may think proper." -- Article I, section 1, Or Const

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

- Article III of the Oregon Constitution sets out the Distribution of Powers in government.
- Article IV defines the legislative branch.
- Article V defines the executive branch.
- Article VI defines the administrative department within the executive branch.
- Article VII (Amended) and Article VII (Original) define the judicial branch.

1.1 History

"There is only scant reference in the record [of the Constitutional Convention] to the article on distribution of powers in the Oregon Constitution." Claudia Burton, *A Legislative History of the*

Oregon Constitution of 1857, 39 WILLAMETTE L REV 245, 253 (2003). "There is no reported discussion of section 1 at the Convention." *Id*. at 258.

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." Thomas Balmer, *The First Decades of the Oregon Supreme Court*, 46 WILLAMETTE L REV 517, 531 (2010).

See Roy Pulvers, *Separation of Powers Under the Oregon Constitution: A User's Guide*, 75 OR L REV 443 (1996).

See Roy Pulvers and Jessica D. Osborne, *Separation of Powers and the Oregon Constitution*, Oregon Constitutional Law Manual (2013), www.osbar.org/secured/barbooks/viewchapter.asp?bid=85&cid=2344

Article III, section 1, was amended, effective December 6, 2012, "to indicate that what formerly was known as the Judicial Department is a third branch, not a department, of state government." *Weldon v Bd of Licensed Prof Counselors and Therapists*, 353 Or 85, 86 (2012) (citing Ballot Measure 78 (2012)).

1.2 Separation of Powers

Article III, section 1, of the Oregon Constitution divides the powers of state government into three branches. The Oregon Constitution, like most state constitutions, "splintered the executive branch among several independently elected officials, often with constitutionally assigned duties, and often from opposing political parties." Hans A. Linde, *Dual Enforcement of Constitutional Norms: The State and the Federal Courts in Governance: Viva La Difference!*, 46 WILLIAM & MARY L REV 1273, 1276 (2005).

1.2.1 Oregon Constitution

1.2.1.A Separation

"The separation of powers does not require or intend an absolute separation between the branches of government." *Rooney v Kulongoski*, 322 Or 15, 28 (1995); *Dewberry v Kitzhaber*, 259 Or App 389, 408 (2013).

"[Courts] must be cautious to hold that there has been an encroachment by one branch in the function of another only when there has been 'a plain and palpable abridgment of the powers of one department by another.'" *State v Rudder*, 137 Or App 43, 49, *rev'd*, 324 Or 380 (1996) (quoting *U'Ren v Bagley*, 118 Or 77, 81 (1926)).

A "separation of powers claim" under Article III, section 1, of the Oregon Constitution "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"? *State v Speedis*, 350 Or 424 (2011). Stated another way: First, has one branch unduly burdened the action of another "in an area of responsibility or authority committed to that other department" and second, has one branch performed functions committed to another branch? *Rooney v Kulongoski*, 322 Or 15, 28 (1995); *Dewberry v Kitzhaber*, 259 Or App 389 (2013).

1.2.1.B Delegation

"Three provisions of the Oregon Constitution, taken together, prohibit the delegation of legislative power to make laws." *State v Davilla*, 234 Or App 637, 645 (2010), *rev den*, 350 Or 717 (2011).

Article I, section 21, provides that no law shall "be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution." Article III, section 1, provides that the "powers of the Government shall be divided into three separate branches, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these branches, shall exercise any of the functions of another, except as in this Constitution expressly provided." And Article IV, section 1(1), provides that 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." *City of Damascus v Brown*, __ Or App __ slip op at 21-22 (10/22/14).

"Accountability of government is the central principle running through the delegation cases." *Corvallis Lodge No. 1411 v. OLCC*, 67 Or App 15, 20, 677 P2d 76 (1984); *City of Damascus v Brown*, __ Or App __ slip op at 21-22 (10/22/14).

"The test for determining whether a particular enactment is an unlawful delegation of legislative authority or a lawful delegation of factfinding power is whether the enactment is complete when it leaves the legislative halls. A legislative enactment is complete if it contains a full expression of legislative policy and sufficient procedural safeguards to protect against arbitrary application." *State v. Self*, 75 Or App 230, 236-37, 706 P2d 975 (1985) (citations omitted); *City of Damascus v Brown*, __ Or App __ slip op at 21-22 (10/22/14).

> ***City of Damascus v Brown***, __ Or App __ (10/22/14) (Held: HB 4029 is an unconstitutional delegation of legislative authority to interested landowners to fix the boundaries of the City of Damascus and withdraw their properties from the City's jurisdiction).

1.2.2 United States Constitution

"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); *see also Stern v Marshall*, 131 S Ct 2594, 2609 (2011) (on Article III powers).

"The Constitution's division of power among the three Branches is violated where one Branch invades the territory of another, whether or not the encroached-upon Branch approves the encroachment. In *Buckley v Valeo*, 424 US 1, 118-37 (1976), for instance, the Court held that the Congress had infringed the President's appointment power, despite the fact that the President himself had manifested his consent to the statute that caused the infringement by signing it into law." *New York v United States*, 505 US 144, 182 (1992) (Citing separation of powers analogously to conclude that "State officials thus cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution.").

"In the leading case to find a separation-of-powers violation, *United States v Klein*, 80 US (13 Wall) 128 (1872), Congress had passed a statute requiring courts to treat pardons of Confederate sympathizers as conclusive evidence of disloyalty, and the Supreme Court found the statute invalid for prescribing a rule of decision to the courts. But while *Klein* illustrates that Congress may not "usurp[ ] the adjudicative function assigned to the federal courts," later cases have explained that Congress may "chang[e] the law applicable to pending cases," even when the result under the revised law is clear. *Axel Johnson Inc. v. Arthur Andersen & Co.*, 6 F3d 78, 81 (2d Cir 1993). In *Robertson v Seattle Audubon Society*, 503 US 429 (1992), Congress had passed legislation to resolve two environmental suits challenging logging in the Pacific Northwest. The result of the cases under the new law was clear: the statute stated that 'Congress hereby determines and directs' that if the forests at issue were managed under the terms of the new statute, it would 'meet[ ] the statutory requirements that are the basis for' the plaintiffs'

environmental law challenges in those particular cases. 503 US at 434–35 (quoting Department of the Interior and Related Agencies Appropriations Act, Pub.L. No. 101–121, § 318(b)(6)(A), 103 Stat. 701, 747 (1989)). The Ninth Circuit held this statute to be unconstitutional under *Klein* as directing a particular decision in the two cases. *Id.* at 436. But the Supreme Court rejected this position, concluding instead that "[t]o the extent that [the statute] affected the adjudication of the cases, it did so by effectively modifying the provisions at issue in those cases," not by compelling findings or results under those provisions. *Id*. at 440." *Petersen v Islamic Republic of Iran*, __ F3d __ (2d Cir 2014).

1.3 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

"**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, and they shall have appellate jurisdiction, and supervisory control over the County Courts, and all other inferior Courts Officers, and tribunals.**" -- Article VII (Original), section 9, Or Const

See Gregory A. Chaimov, *Justiciability*, Oregon Constitutional Law Manual (2013), www.osbar.org/secured/barbooks/viewchapter.asp?bid=85&cid=2343.

See Joe K. Stephens, *Courts Under the Provisional Government*, www.oregon.gov/SOLL/pages/ojd_history/historyojdpart1.aspx.

See Stephen P. Armitage, *History of the Oregon Judicial Department, Part II: After Statehood*, www.oregon.gov/SOLL/PublishingImages/OregonJudicialDepartmentHistoryPt2_04_2009.pdf.

"Oregonians can point to the year 1841 and say with certainty that it was the year the judicial branch was created. Prior to 1841 the only organization with activities that could be said to approximate judicial activities was the Hudson's Bay Company. The Company's chief representative in the Oregon country, Dr. John McLoughlin, acted as executive, legislator, and judge." Donald C. Johnson, *Politics, Personalities, and Policies of the Oregon Territorial Supreme Court, 1849-1859*, 4 ENVT'L L 11, 11-12 (1973). That court, before 1841, had only probate authorities. *Id*. at 13.

"Although the people did not repeal Article VII (Original) when they adopted Article VII (Amended), most if not all of the original article has lost its constitutional status and is, in effect, a statute. Article VII (Amended), section 2, provides that the provisions of Article VII (Original) concerning the 'courts, jurisdiction, and judicial system' are effective only 'until otherwise provided by law.' Those provisions, thus, are subject to legislative amendment or repeal at any time. *See, e.g.*, *State ex rel Wernmark v Hopkins*, 213 Or 669, 678 (1958)." *Carey v Lincoln Loan Co.*, 203 Or App 399 n 4 (2005).

1.3.1 Subject Matter Jurisdiction

"**The courts, jurisdiction, and judicial system of Oregon, except so far as expressly changed by this amendment [to the original Article VII] 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

1.3.1.A Habeas corpus

The history of habeas corpus is an example of power struggles among the common people, Parliament, the crown, and the courts. "The writ of habeas corpus – a writ to 'have the body' – goes back in English history to time immemorial. The writ is even older than Magna Carta and may have originated in courts of chancery." Leonard W. Levy, ORIGINS OF THE BILL OF RIGHTS 44 (1999) (tracing history). The writ of habeas corpus did not derive from Magna Carta. *Id.* at 50. In 1627, after King Charles I had dissolved Parliament, the King sought to extract forced "loans" from his knights because he had no way to raise taxes. *Id.* at 48. Five knights, including Thomas Darnel, refused. The King imprisoned him. Darnel sought habeas corpus from the King's Bench, the Chief Justice granted the writ but remanded the prisoners to jail because the King had commanded him to jail. *Id.* at 48-49. The Attorney General argued that such a return was sufficient because the King could imprison anyone without giving any reason. *Id.* at 49. Darnel's counsel argued that such act conflicted with Magna Carta's requirement that no one could be imprisoned "unless by the lawful judgment of his peers or by the law of the land." *Ibid.* The Attorney General still maintained that in a matter of state no man could question the King. *Id.* The Chief Justice determined that the King's authority does not declare the reason for imprisonment, the reason is "presumed" to be for a matter of state, and on such reasoning the King's authority superseded the writ. *Id.* at 50; *see also* Thomas F.T. Plunkett, A CONCISE HISTORY OF THE COMMON LAW 58 (1956) ("*Darnel's Case* has shown doubts" of the continued improvement of the common law due to the writ because *Darnel's Case* held that a king's mere statement of a reason for imprisonment was sufficient) .

In 1628, Parliament took advantage of the King's needs in his war against France to extort from Charles I the Petition of Right of 1628. John W. Burgess, THE SANCTITY OF LAW: WHEREIN DOES IT EXIST? 115 (1927). That Petition, based on earlier charters, is based on several principles: taxes require Parliament's consent, no person could be imprisoned for failing to make payments unless Parliament had authorized those payments; no person could be imprisoned for any offense without a stated cause and the chance to answer the charge, and soldiers could not be housed in citizen's homes and martial law could not be used during peacetime. Richard W. Nice, ed., TREASURY OF LAW 439 (1964). That Petition was the death knell of the divine right of kings. Burgess at 115; Levy at 51. But the next year, King Charles I violated the Petition of Right, imprisoning several members of Parliament for verbal sedition, and the Court of Star Chamber rejected the idea that the King lacked power to do that. Levy at 51. In 1641, Parliament abolished the Star Chamber and enacted the Habeas Corpus Act of 1679. Levy at 51, 54; Burgess at 116.

Political prisoners seemed exempt. In 1670, Quaker leaders William Penn and William Mead were brought to trial for "unlawful assembly." Levy at 52. The jurors, including one named Edward Bushell, gave their verdict as only "guilty of preaching." The court required the jurors to add "unlawful assembly." The jurors refused. The court threatened the confined jurors: no meat, no drink, no fire, no tobacco, no chamber pots. The jurors refused and acquitted. The court rejected the verdict, and then fined and imprisoned the defendants and the jurors. *Id.* Bushell appealed his conviction to the Court of Common Pleas, which issued a writ of habeas corpus for him, instructing that the lower judge could not direct a verdict of "guilty," thus establishing the principle that a jury may render a verdict because it did not wish to punish the crime. *Id.* at 53.

In 1772, Lord Chief Justice William Murray Mansfield granted a writ of habeas corpus brought on behalf of a black man, James Sommersett, held as a slave aboard a ship docked in London, waiting to sail to the Americas. Levy at 55. Because English air "is too pure for a slave to breathe," and no man can be chattel in England because England has no law "so odious," there existed no legal basis to keep a man as a slave. Sommersett was freed based on the writ. *Id.* at 56.

American colonists preferred whipping to imprisonment. *Id.* Some colonial charters recognized it, then disallowed it, in the 1600s. John Peter Zenger of New York, prosecuted for seditious libel for printing material criticizing the governor, was eventually freed after his counsel obtained a

writ of habeas corpus (a trial jury acquitted him in 1735). *Id*. at 57; Akhil Reed Amar, THE BILL OF RIGHTS 24, 84-85 (1998); Gordon S. Wood, EMPIRE OF LIBERTY 259 (2009).

But by the American Revolution, "the writ of habeas corpus was known in all the colonies, though it was not obeyed by officials in some and was not often invoked in others." Levy at 63. North Carolina was the first state to protect the writ in its constitution and it did not include an exception for suspension during emergencies. *Id*. Only four other states constitutionally guaranteed the writ (and those other four allowed it to be suspended during emergencies). *Id*. at 64. All fourteen states in 1791 had the writ if only because all had adopted the English common law. *Ibid*.

The drafters at the federal Constitutional Convention adopted the New York Governor's proposed wording of the writ into the Constitution that included exceptions for rebellion or invasion where public safety required it, and the Committee on Style placed that provision into Article I, section 9, of the Constitution. *Id*. at 65. Nothing in the text specifies which branch of government may "suspend" the privilege. Laurence H. Tribe, THE INVISIBLE CONSTITUTION 94 (2008).

Article I, section 23, of the Oregon Constitution is very similar to Article I, section 9, of the federal Constitution, stating: "The privilege of the writ of *habeas corpus* shall not be suspended unless in case of rebellion, or invasion the public safety require it."

In 1910, voters adopted Article VII (Amended), section 2, of the Oregon Constitution, which among other things protects courts' original jurisdiction over habeas corpus petitions. Habeas corpus in Oregon now is primarily a vehicle for persons to challenge conditions of confinement. See ORS chapter 34 and 426.

1.3.1.B Jurisdiction

Under 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)).

For a case to be justiciable, plaintiffs "must have standing *and* the controversy must not be moot." *Couey v Brown*, 257 Or App 434, 438 (2013), *rev allowed*, 354 Or 735 (2014) (citing *Yancy v Shatzer*, 337 Or 345, 349 (2004)) (emphasis in original). "Standing deals with *who* can bring a controversy before the court * * *. Mootness, on the other hand, deals with *what controversies* can be brought before the court." *Id*. (citing *Kellas v Dep't of Corrections*, 341 Or 471, 476-77, 477 n 3 (2006)) (emphasis in original). Additionally, and close in concept to mootness, to be justiciable, the interest of the parties must be adverse. *Kellas*, 341 Or at 486.

Article VII (Original), section 9, of the Oregon Constitution is the source of circuit court jurisdiction. "[C]ircuit court judges have the power to review the decisions of lower tribunals, but they have no authority to review the decisions of other circuit court judges – let alone the decisions of circuit court judges on whom a particular decisional authority has been exclusively conferred – in the absence of some overriding statutory or constitutional authority." *Oregonian Publishing Company, LLC v The Honorable Nan G. Waller and State of Oregon*, 253 Or 123 (2012), *rev den* 353 Or 714 (2013).

1.3.1.B(i) Standing

Note: The words "standing," "ripeness," and "mootness" are not in Oregon's Constitution (or in the federal constitution). Whether those tests should be *jurisdictional* remains a debatable point. Justice Linde has written:

> "A case that fails those tests is said to lack a quality called 'justiciability.' Of course, the term states a conclusion, not an explanation. Once on that conceptual escalator, justiciability soon is called 'jurisdictional,' with the consequence that judges must raise it on their own motion. This leaves judgments open to future attacks even when standing or mootness went undisputed".

Hans A. Linde, *Dual Enforcement of Constitutional Norms: The State and the Federal Courts in Governance: Vive La Difference!*, 46 WM & MARY L REV 1273, 1283, 1287-88 (2005) ("It is not prudent to link a decision declining adjudication to non-textual, self-created constitutional barriers, and thereby to foreclose lawmakers from facilitating impartial, reasoned resolutions of legal disputes that affect people's public, rather than self-seeking, interests.").

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).

"Ordinarily, 'standing' means the right to obtain an adjudication. It is thus logically considered prior to consideration of the merits of a claim. To say that a plaintiff has 'no standing' is to say that the plaintiff has no right to have a tribunal decide a claim under the law defining the requested relief, regardless whether another plaintiff has any such right." *Eckles v State of Oregon*, 306 Or 380, 383 (1988). "Whether a plaintiff has standing depends on the particular requirements of the statute under which he or she is seeking relief." *Morgan v Sisters School District #6*, 353 Or 189, 194 (2013).

"'Standing' is a legal term that identifies whether a party to a legal proceeding possesses a status or qualification necessary for the assertion, enforcement, or adjudication of legal rights or duties. *See Eckles v State of Oregon*, 306 Or 380, 383. A party who seeks judicial review of a governmental action must establish that that party has standing to invoke judicial review. The source of law that determines that question is the statute that confers standing in the particular proceeding that the party has initiated, 'because standing is not a matter of common law but is, instead, conferred by the legislature.' *Local No. 290 v Dept. of Environ Quality*, 323 Or 559, 566 (1996)." *Kellas v Dep't of Corrections*, 341 Or 471 (2006).

"[N]o statute governs the issue of standing to seek injunctive relief," under *Eckles v State of Oregon*, 306 Or 380, 386 (1988). *Morgan v Sisters School District #6*, 353 Or 189, 201 (2013). But Oregon courts apply "essentially the same standing requirements that ordinarily apply in declaratory judgment actions." *Ibid.*

A plaintiff lacks standing as a voter because he "has offered no explanation as to how the issuance of the judicial declaration that he seeks would have any practical effect on his voting rights, and we are aware of none." Plaintiff lacks standing as a taxpayer because his complaint allege that the defendant school district's potential inability to provide for its daily operations affects him in any way. His allegations "are predicated on a series of hypothetical contingencies, not on present facts" and thus are inadequate to require the requirements of standing under the Uniform Declaratory Judgments Act. Regarding injunctions: "[n]o statute governs the issue of standing to seek injunctive relief," under *Eckles v State of Oregon*, 306 Or 380, 386 (1988). But Oregon courts apply "essentially the same standing requirements that ordinarily apply in declaratory judgment actions." *Morgan v Sisters School District #6*, 353 Or 189 (2013).

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)).

Compare with Article III of the United States Constitution: "Article III of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies.' U. S. Const., Art. III, §2. The doctrine of standing gives meaning to these constitutional limits by 'identify[ing] those disputes which are appropriately resolved through the judicial process.' *Lujan* v. *Defenders of Wildlife*, 504 US 555, 560 (1992). 'The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches.' *Clapper* v. *Amnesty Int'l USA*, 568 US ___ (2013). To establish Article III standing, a plaintiff must show (1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likel[ihood]' that the injury 'will be redressed by a favorable decision.' *Lujan*, *supra*, at 560-561 (internal quotation marks omitted)." *Susan B. Anthony List v Driehaus*, __ S Ct __ (6/16/14) (credible threat of enforcement sufficient to allege an Article III injury for standing).

1.3.1.B(ii) 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)).

See Oregon Medical Association v. Rawls, 281 Or 293, 299-302 (1978) (dismissing petition as nonjusticiable where both parties sought to have a statute declared constitutional).

Note: Ripeness in federal courts requires "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co. v Pacific Coal & Oil Co.*, 312 US 270, 273 (1941).

> ***Hale v State of Oregon***, 259 Or App 379 (11/14/13) (Lane) (Schuman, Wollheim, Duncan) (Note: This case does not use the word "ripeness." It only addresses a "judiciable controversy" generally.). Plaintiff sought a judgment against the state declaring the "Right to Farm and Right to Forest Act" in ORS 30.936 *et seq* which provides for immunity from trespass and nuisance actions for farming and foresting actions, violates Article I, section 10, of the Oregon Constitution (which provides that every man shall have a remedy "for injury done him"). Plaintiffs seek a declaration that the Act is unconstitutional because if future chemicals from neighboring land drifts onto their property, they cannot sue the neighbor because of the immunity under the Act, and the attorney-fee provision in the Act is a deterrent. The trial court dismissed with prejudice under ORCP 21 A, determining that plaintiffs had not stated a justiciable controversy, without explanation.
>
> The Court of Appeals affirmed. Justiciability has two requirements: (1) the dispute must involve present facts and (2) it must be a dispute in which a prevailing plaintiff can receive meaningful relief from a losing defendant." In this case, the "present facts" element has been met because the legislature has acted. As to the second element (meaningful relief), the Court of Appeals concluded that "a judgment declaring the Act unconstitutional will have a concrete impact on plaintiffs in this case only if several contingencies occur. The connection is too speculative" in this case.

1.3.1.B(iii) Mootness

Article III of the federal constitution "restricts federal courts to the resolution of cases and controversies." *Davis v Federal Elections Comm'n*, 554 US 724, 732 (2008). A claim is moot "when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *US Parole Comm'n v Geraghty*, 445 US 388, 396 (1980).

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 Oregon, 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). 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).

Anticipate *WaterWatch of Oregon, Inc. v. Water Resources Dept*., 259 Or App 717, 726 (2013), *rev allowed*, 355 Or 317 (2014).

Courts "have an independent obligation to determine whether a case submitted to us for decision presents a justiciable controversy. *See, e.g., Oregon Medical Association v Rawls*, 281 Or 293, 296 (1978). Among the 'constellation of related issues' that that determination encompasses is whether a case has become moot. *See, e.g., Yancy v Shatzer*, 337 Or 345, 349 (2004). In order to avoid mootness, the parties in a given dispute must 'have adverse interests and "the court's decision in the matter [must] have some practical effect on the rights of the parties to the controversy."' *Blechschmidt v Shatzer*, 197 Or App 536, 539 (2005) (quoting *Brumnett v PSRB*, 315 Or 402, 405 (1993)). Accordingly, even if otherwise justiciable, a case 'in which a court's decision no longer will have a practical effect on or concerning the rights of the parties[ ] will be dismissed as moot.' *Brumnett*, 315 Or at 406." *Housing Authority of Jackson Co v City of Medford*, 265 Or App 648 (2014).

In contrast with the mootness exception in federal courts, in Oregon, mootness is a constitutional matter, not just prudential, therefore: "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)).

ORS 14.175 asserts to create a justiciable controversy where the Supreme Court has held that no such controversy exists, allowing for a mootness exception in cases that are capable of repetition yet evading review. That statute was enacted in 2007 after *Yancy v Shatzer*, 337 Or 345 (2004). See *Couey v Brown*, 257 Or App 434 (2013), *rev allowed*, 354 Or 735 (2014); *Krisor v Henry*, 256 Or App 56 (2013).

Where attorney fees or declaratory judgment is sought, the matter might 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)).

Although "punitive contempt is not a 'crime,' * * * a judgment imposing a punitive sanction of confinement for contempt * * * is sufficiently analogous to a criminal conviction that it carries a collateral consequence of a stigma that is analogous to a criminal conviction and, for that reason, an appeal of a judgment of punitive contempt is not rendered moot by completion of the confinement." *State v Hauskins*, 251 Or App 34 (2012).

Remedy for correcting a decision issued on a moot case: "the absence of an existing controversy means that this court lacked judicial power conferred by Article VII (Amended), section 1, of the Oregon Constitution to issue the decision that it did." See equitable factors in *Kerr v Bradbury*, 340 Or 241, *adh'd to on recons*, 341 Or 200 (2006) as well as ORAP 8.05(2)(c). *State v Hemenway*, 353 Or 498 (2013)

A prayer for costs and fees do not necessarily save a case from mootness. "Where a case has become moot before entry of judgment, the entire case, including attorney fees, is moot." *Krisor v Henry*, 256 Or App 56 (2013) (citing *Kay v David Douglas School District No. 40*, 303 Or 574, 578 (1987), *cert denied* 484 US 1032 (1988)).

See ***Association of Oregon Corrections Employees v State of Oregon***, 266 Or App 496, 507 n 3 (2014) on distinctions between declarations and rulings.

1.3.1.B(iv) Inherent Power

Generally: "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." *Cox v M.A.L.*, 239 Or App 350 (2010).

Declining Jurisdiction: Oregon trial courts have inherent power and discretion to decline jurisdiction based on the inconvenient-forum doctrine, which allows a court to dismiss an action over which it has jurisdiction and venue if trying the action in an alternate forum would "best serve the convenience of the parties and the ends of justice." *Espinoza v Evergreen Helicopters, Inc.*, 266 Or App 24, 34 (2014) (quoting *Novich v McClean*, 172 Or App 241, 251 (2001)).

Sentencing: "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 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." *State v Johnson*, 242 Or App 279 (2011).

Contempt powers: "The power of a court to punish for direct contempt in a summary manner is inherent in all courts, and arises from the necessity of preserving order in judicial proceedings." *State v Spainhower*, 251 Or App 25 (2012); *Rust v Pratt*, 157 Or 505 (1937); *City of Klamath Falls v Bailey*, 43 Or App 331, 334 (1979)).

"Although the direct contempt power is inherent," "ORS 33.096 codifies a court's inherent authority to impose a sanction for a contempt committed in the immediate view and presence of the court." "The inherent common-law authority codified in ORS 33.096 does not offend federal constitutional due process requirements." *State v Spainhower*, 251 Or App 25 (2012). But it is error for a trial court to impose additional sanctions under ORS 33.096 – occurring outside the immediate view" of the court and without giving a defendant notice and the opportunity to object. *State v Kinney*, 264 Or App 612 (2014).

In contrast with summary contempt – which must occur in the immediate view and presence of the court – a defendant charged with "indirect contempt" must be afforded certain procedures, including the right to a hearing, see ORS 33.055 and 33.065. *State v Spainhower*, 251 Or App 25 (2012).

Stays: Courts have "inherent authority to issue stays." *Weldon v Bd of Licensed Professional Counselors*, 353 Or 85 (2012) (neither the text of a statute nor legislative silence indicates that the legislature intended to prohibit courts from exercising their inherent authority to issue stays).

1.3.2 Stare decisis

> "Consistency, commonly thought of as a good thing, requires you to be as ignorant today as you were a year ago." Bernard Berenson, unpublished Notebook (1892-94).

Stare decisis may be a self-imposed limit on judicial authority. On state constitutional interpretation, see Jack L. Landau, *Some Thoughts About State Constitutional Interpretation*, 115 PENN STATE L REV 837, 838 (2011), proposing that "in the case of state constitutional interpretation, the pull of *stare decisis* may not be as strong as it is in other contexts."

"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.'" *Farmers Insurance Co. v Mowry*, 350 Or 686 (2011) (quoting *Strahanan v Fred Meyer, Inc.*, 331 Or 38 (2000)). "*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. *Id.* 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.'" *Id.* (citing *State v Ciancanelli*, 339 Or 282, 290 (2005)).

"To revisit and repudiate [a recent case], especially given the intervening changes in the court's composition, could engender a perception that we have done so merely 'because the personal policy preferences of the members of the court * * * differ from those of our predecessors who decided the earlier case.'" *State v Moore*, 247 Or App 39 (2011), *rev'd* 354 Or 493 (2013) (quoting *Farmers Insurance Co. v Mowry*, 350 Or 686, 698 (2011) and Alexander Bickel, THE LEAST DANGEROUS BRANCH (1962)).

1.3.3 Policy Questions

(i). U.S. Constitution

The "political question" doctrine is "a judicial gloss on the jurisdictional provisions of Article III of the federal Constitution." James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH L REV 761, 808 (1992). It "holds that federal courts may not hear certain types of cases for which the exercise of judicial power is deemed inappropriate. Typically, the doctrine is invoked [] where the Supreme Court would conceive itself to be meddling in the legitimate affairs of other branches of government; for example, the doctrine applies to cases in which the court lacks expertise or which involve the exercise of a power constitutionally committed to the executive or legislative branches." *Ibid.*

On the "political question" doctrine and the Guarantee Clause of Article IV, section 4 of the United States Constitution, see *New York v United States*, 505 US 144, 184 (1992) (addressing

history, cases, and commentaries, but not resolving the "difficult question" of whether all claims under the Guarantee Clause present nonjusticiable political questions").

"At least since *Marbury v Madison*, 1 Cranch 137 (1803), we have recognized that when an Act of Congress is alleged to conflict with the Constitution, '[i]t is emphatically the province and duty of the judicial department to say what the law is.' *Id.* at 177. That duty will sometimes involve the '[r]esolution of litigation challenging the constitutional authority of one of the three branches,' but courts cannot avoid their responsibility merely 'because the issues have political implications.' *INS v Chadha*, 462 US 919, 943 (1983)." This case presents "a familiar judicial exercise." The "question is whether Congress or the Executive is 'aggrandizing its power at the expense of another branch.'" *Zivotofsky v Clinton*, 132 S Ct 1421 (2012).

(ii). Oregon Constitution

"The phrase 'policy question' would be preferable to 'political question' to describe decisions beyond judicial determination." *Lipscomb v State of Oregon*, 305 Or 472, 477 n 4 (1988) (observing that when distinguishing between the Governor's "ministerial" and "discretionary duties, the court has equated "political" with "discretionary" decisions." *Id*. at 477 (citing *Putnam v Norblad*, 134 Or 433 (1930)). "Governors, legislators, and other public officials are responsible in the first instance for determining their constitutional duties." *Id*. at 478-79. "In the constitutional relationships between the legislative and executive branches, a longstanding understanding and practice shared by both branches doubtless deserves respectful consideration, though it is not conclusive." *Id.* at 479 ("a court would be cautious to upset" "a well-established shared understanding of the political constitution").

But "virtually all state courts have significant common law powers that federal courts lack." James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH L REV 761, 808-09 (1992) (Thus, it is not at all clear that state courts should be subject to a political question limitation, and if they are, it seems implausible that the state limitation would be nearly so restrictive as the federal one.").

1.3.4 Appointments to State Supreme Court

> "**The Legislative Assembly or the people may by law empower the Supreme Court to:**
> **"(1) Appoint retired judges of the Supreme Court or judges of courts inferior to the Supreme Court as temporary members of the Supreme Court.**
> **"(2) Appoint members of the bar as judges pro tempore of courts inferior to the Supreme Court.**
> **"(3) Assign judges of courts inferior to the Supreme Court to serve temporarily*** * *. – Article VII (Amended), section 2a, Or Const

Moro v State of Oregon, 354 Or 657 (01/16/14) (Balmer) (Landau not participating) Two senate bills passed in 2013 that changed parts of the Public Employees Retirement System (PERS) in ways that affected some peoples' retirement benefits, such as cost-of-living adjustments and out-of-state taxes. An public employer intervened and moved to disqualify (1) the Oregon Supreme Court Justices from this case and (2) the circuit judge on grounds that a judge cannot act as a judge if s/he is a party to the action, per ORS 14.210(1), and judicial ethics rules require judges to disqualify themselves if they have an interest in the proceeding, and the Due Process Clause forbids them from serving as judges.

The Supreme Court assumed that the change would be the kind of "interest" and "economic interest" in the statutes and judicial ethics rules. The Court concluded that neither ORS 14.210(1) nor judicial ethics required the circuit judge or justices to disqualify themselves, under the "rule of necessity" set out in several United States Supreme Court cases since 1920. Held: "the statues and constitutional provisions regarding the appointment of pro tempore judges to the Oregon Supreme Court permit the appointment only of persons who are elected or appointed judges (or who were elected or appointed Supreme Court judges and are now retired."

The "rule of necessity" applies here because, contrary to the movant's theory, it is not possible to establish a new state supreme court full of non-PERS judges by drawing specially appointed pro tem judges from members of the Oregon State Bar. ORS 2.111(5) forbids more than two pro tem judges on the Supreme Court en banc. So, only two attorney-pro tem judges could be appointed that way. Further, ORS 1.600(1) permits only regularly elected or appointed Court of Appeals, Tax Court, or Circuit Court judges to sit pro tem on the Supreme Court. Pro tem circuit judges cannot serve as pro tem Supreme Court justices.

In addition to those statutory prohibitions on appointing lawyers as pro tem Supreme Court members, Article VII (Amended), section 2a, of the Oregon Constitution further permits only regularly elected or appointed sitting judges to serve as pro tem Supreme Court members. [Text box, *ante*]. Under the express terms of that constitutional text, "non-judge members of the bar cannot be appointed as pro tempore members of the Supreme Court."

1.4 Legislative Assembly

Oregon's Legislative Department is established in Article IV of the Constitution, http://bluebook.state.or.us/state/constitution/constitution04.htm.

The Legislative Assembly's parameters in Article IV include the following:

- A limit of 30 Senators and 60 Representatives (section 2)
- Senators' terms are four years (section 4)
- Representatives' terms are two years (section 4)

- Apportionment and districts (section 6 and 7)
- Legislators must be at least 21 years old and live in his district for at least one year (section 8)
- Legislators are disqualified if they are convicted of a felony during their term of office or if they have been convicted of a felony but have not completed the sentence before they take office (section 8)
- Legislators are "privileged from arrest during the session" and "in going to and returning from the same" "except for treason, felony, or breaches of the peace" and cannot be subjected to "any civil process" for 15 days before and during legislative sessions (section 9)
- Legislators enjoy absolute freedom of speech "for words uttered in debate in either house" and they shall not "be questioned in any other place" (section 9)
- Regular sessions are held annually: odd-numbered years have 160-day limits and even-numbered years have 35-day limits, excluding organizational sessions, with multiple five-day extensions (section 10)
- Emergency sessions may be held (section 10a)
- 2/3 of each house constitutes a quorum (section 12)
- Deliberations "shall be open" (section 14)
- With a 2/3 vote, each house may punish or expel a member for "disorderly behavior" (section 15)
- Either house during session "may punish by imprisonment, any person, not a member, who shall have been guilty of disrespect to the house by disorderly or contemptuous [sic] behavior in its presence" for up to 24 hours (section 16)
- "Every Act shall embrace but one subject" (section 20)
- A prohibition on passing "special or local laws" (section 23)
- Bills are passed by a simple majority, except that bills to raise revenue require 3/5 vote of the House (section 25)
- Acts take effect 90 days after the end of the session except for emergency clauses (section 28)

1.4.1 Legislative Power and Limits

> "**[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

> "**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

The English constitutional documents limited only the crown and protected few rights. But by the Founding, "Americans had progressed far beyond the English in securing their rights." Leonard W. Levy, ORIGINS OF THE BILL OF RIGHTS 4 (1999). "The dominant theory in the United States from the time of the Revolution was that the fundamental law limited all branches of the government, not just the crown as in England, where the great liberty documents did not limit the legislative power." *Id.* at 24.

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.*" *Hazell v Brown*, 238 Or App 487, 496 (2010), *aff'd*, 352 Or 455 (2012).

Article XV, section 4(10) limits legislative power: "The Legislative Assembly has no power to authorize, and shall prohibit, casinos from operation in the State of Oregon." That section "is not a ban on gambling, or even on all casino games; it is a prohibition against establishments in Oregon whose dominant use or purpose is for gambling." *Dewberry v Kitzhaber*, 259 Or App 389 (2013).

1.4.2 The Debate Clause

> "**Senators and Representatives in all cases, except for treason, felony, or breaches of the peace, shall be privileged from arrest during the session of the Legislative Assembly, and in going to and returning from the same; and shall not be subject to any civil process during the session of the Legislative Assembly, nor the fifteen days next before the commencement thereof: Nor shall a member for words uttered in debate in either house, be questioned in any other place."** -- Article IV, section 9, Or Const

There is no reported debate about the Debate Clause at Oregon's constitutional convention. *State v Babson*, 355 Or 383 (2014), citing Claudia Burton, *A Legislative History of the Oregon Constitution of 1857 – Part II (Frame of Government: Articles III-VII)*, 39 WILLAMETTE L REV 245, 286-87 (2003).

Until 2014, the Oregon Supreme Court had "never interpreted that provision, so [its] analysis focuses on the text and on the history surrounding enactment of that provision. See *Priest v Pearce*, 314 Or 411, 415-16 (1992)." *State v Babson*, 355 Or 383 (2014).

The privilege in Article IV, section 9, "applies when legislators are communicating in carrying out their legislative functions. The other clauses of Article IV, section 9, support that interpretation because their protections apply when the legislature is in session – or shortly before or after the session – and, thus, when legislators generally are engaging in legislative functions." *State v Babson*, 355 Or 383 (2014). "[L]egislative functions are at the core of what is protected by the Debate Clause." *Id.* at slip op 50.

> ***State v Babson***, 355 Or 383 (2014), see Section 2.5, *post*. A rule banning overnight presence on the state capitol steps does not facially violate Article I, sections 8 and 26, but its enforcement may have violated those provisions as applied to defendants who held an overnight protest on the steps; case remanded to permit defendants to "question" two legislators within the confines of the Debate Clause of the Oregon Constitution.
>
> The "enforcement is outside the scope of the legislative function" and thus the Debate Clause privilege does not protect legislators acting "in some aspect of enforcement of a law." If "individual legislators directed enforcement" of a rule "against defendants, we think that they acted outside the legislative function of controlling legislative property." *Id.* at 425.

1.4.3 Initiative and Referendum

See James N. Westwood, *Initiative and Referendum*, Oregon Constitutional Law Manual (2013), www.osbar.org/secured/barbooks/viewchapter.asp?bid=85&cid=2341.

Article IV, section 1, sets out both initiative and referendum powers of the people, http://bluebook.state.or.us/state/constitution/constitution04.htm.

Oregon is one of 27 states that have an initiative process. Other states with an initiative process are: Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, South Dakota, Utah, Washington, Wyoming, and U.S. Virgin Islands. See *Oregon Legislative Services Committee*, Background Brief, page 3, www.oregonlegislature.gov/citizen_engagement/Reports/InitiativeReferendumProcess.pdf . For Secretary of State Manuals on the initiative and referendum, see http://sos.oregon.gov/elections/Pages/manuals-tutorials.aspx.

Note: Is Oregon's initiative and referenda power part of the legislative power, or is it distinct from the legislature, belonging directly to the people? The Oregon Supreme Court has answered: "Clearly, the enactment by the people of initiative or referendum measures is a legislative act. Or. Const., Art. IV, § 1 ('The legislative power of the state, except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly'). But, concerning the initiative and referendum process, there is an express constitutional provision that allows the legislature to enlist the other branches of government. Article IV, section 1(4)(b), of the Oregon Constitution, provides: 'Initiative and referendum measures shall be submitted to the people as provided in this section and by law not inconsistent therewith.' (Emphasis supplied.) Although the Oregon Constitution does not require the preparation of ballot titles, we shall assume, for the purposes of this case, that the preparation of a ballot title is a legislative function. It is obvious that such ballot titles can significantly enhance the initiative and referendum process by helping voters to inform themselves, on as objective a basis as possible, concerning the nature of the measures before them. The ballot title process, including the judicial review portions of that process, thus is a part of the legislature's response to the power conferred on it by Article IV, section 1(4)(b), to enact laws governing the initiative and referendum process that are 'not inconsistent' with that process. Case law from this court supports this same proposition." *Rooney v Kulongoski*, 322 Or 15, 25 (1995).

"The initiative and referendum provisions of Article IV, section 1, were added to the Oregon Constitution by the voters in 1902 and then amended in 1968. Because it is not part of the original constitution, our task in interpreting it is to determine the intent of the voters in accordance with the analytical method set out in *Ecumenical Ministries v Oregon State Lottery Comm.*, 318 Or 551, 559-60 (1994), which is the same method of analysis that must be applied in the interpretation of statutes as described in *PGE v Bureau of Labor and Industries*, 317 Or 606, 610-12 (1993). We begin with an analysis of the text in context and, if necessary, also refer to enactment history and other aids to construction. *Ecumenical Ministries*, 318 Or at 560; *PGE*, 317 Or at 612." *Kerr v Bradbury*, 193 Or App 304 (2004), *rev dismissed as moot*, 340 Or 241 (2006) (the Secretary of State should have been enjoined from approving an initiative petition for circulation because the initiative did not comply with Article IV, section 1(2)(d), of the Oregon Constitution).

"The current wording of Article IV, section 1, was adopted by the people in 1968, pursuant to legislative referral." *Stranahan v Fred Meyer, Inc.*, 331 Or 38 (2000). The original version of Article IV, section 1, adopted as part of the original Oregon Constitution, provided: "The Legislative authority of the State shall be vested in the Legislative Assembly, which shall consist of a Senate, and a House of Representatives. The style of every bill shall be `Be it enacted by the Legislative Assembly of the State of Oregon,' and no law shall be enacted except by bill." *Id.* at note 16 (citing not to 1857 but to 1859).

In Article IV, section 1, subsections (2), (3), and (5), "[t]here are two types of referenda: the citizen referendum and the legislative referendum. The citizen referendum allows the people,

after they gather the required number of signatures, to approve or reject legislation that was previously passed by a legislative body. The legislative referendum is the process by which the legislature is required to refer certain matters to the voters for their approval." Subsections (2) and (3) provide "a clear distinction between an initiative and referendum – that an initiative empowers the people to 'enact or reject' a proposed law and a referendum provides the ability to 'approve or reject' an act, or a part of an act of the Legislative Assembly." *American Energy, Inc. v City of Sisters*, 250 Or App 243 (2012).

Oregon courts evaluate Article IV, section 1, under the methodology set out in *Roseburg School Dist. V City of Roseburg,* 316 Or 374, 378 (1993) and *Ecumenical Ministries v Oregon State Lottery Comm.*, 318 Or 551, 559 (1994). *Stranahan v Fred Meyer, Inc.*, 331 Or 38 (2000) (citing *OEA v Roberts,* 301 Or 228, 231 (1986)).

1.4.3.A Initiative Petitions

- Article IV, section 1(2), describes the "initiative power" that the "people reserve to themselves":

-Power to propose laws and amendments to the Constitution and enact or reject them independently of the legislative assembly.
-Initiative laws require a petition signed by at least 6% of the total number of votes cast for all candidates for Governor at the last Governor's election.
-Initiative amendments to the Constitution require a petition signed by at least 8% of the total number of votes cast for all candidates for Governor at the last Governor's election.
-Initiative petitions must include the full text of the law or amendment proposed and may include only one subject.
-Initiative petitions must be filed at least four months before the election.

- Article IV, section 1b allows signature gatherers to receive payment for signature gathering if that payment is not based on the number of signatures. Signature gatherers must not receive money or anything of value based on the number of signatures obtained on the petition. Likewise, paying signature gatherers based on the number of signatures also is illegal.

- Under Article IV, section 1(4):

-Initiative petitions must be filed with the Secretary of State.
-The Secretary of State must verify voters' signatures within 30 days after filing.
-Then the initiative petition is submitted to the people at the next regular general election.
-If the initiative passes, it becomes effective 30 days after it is approved.

- The "Secretary of State has the duty to examine an initiative petition for compliance with the single-subject requirement of Article IV, section 1(2)(d), of the Oregon Constitution and to refuse to accept those that violate the rule. *League of Oregon Cities v State*, 334 Or 645, n 11 (2002) (citing *OEA v Roberts,* 301 Or 228, 235 (1986)).

"Additionally, the right conferred by Article IV, section 1, encompasses the right to vote on a proposed law or constitutional amendment submitted by initiative petition or referral. *See State ex rel. v Snell*, 168 Or 153, 159 (1942) ('The right of the people of the state * * * to vote upon any measure passed by the legislature is reserved to them by § 1 of article IV of the Oregon constitution.'); *Loe v Britting*, 132 Or. 572, 57 (1930) (Article IV, section 1, confers political right to vote on laws and constitutional amendments proposed by initiative petition)." *Stranahan v Fred Meyer, Inc.*, 331 Or 38 (2000).

The Oregon Supreme Court's "Article IV, section 1, jurisprudence also has addressed petitioning activities, in particular, the solicitation of signatures. In *Campbell/Campf/Collins*, 265 Or 82

[1973], the court addressed the question whether a statute banning payment of persons who solicit signatures for initiative petitions contravened Article IV, section 1. The petitioners had argued that the statute severely hampered the 'exercise' of their rights under Article IV, section 1, which—they contended—included a broad ability to solicit signatures. *Id.* at 90. The court first noted * * * that Article IV, section 1, was 'silent as to the means of securing signatures.' *Id.* The court then analyzed whether the statute at issue was a 'reasonable regulation which facilitates the proper exercise of the initiative and referendum' or whether, instead, 'by placing undue burdens on that exercise,' the statute was inconsistent with the people's reservation of the initiative and referendum power. *Id.* The court rejected the petitioners' contention that the statute unduly had burdened their ability to solicit signatures and, accordingly, upheld the statute. *See also generally State ex rel. v Snell,* 155 Or 300, 308-09 (1936) (demonstrating that Article IV, section 1, encompasses right to sign initiative petition and have signature counted by Secretary of State). *Stranahan v Fred Meyer, Inc*., 331 Or 38 (2000).

"[A]fter considering the text, the relevant case law, and the history of the initiative and referendum provisions of Article IV, section 1," the Oregon Supreme Court "found nothing to support the conclusion set out in [a prior case] that persons soliciting signatures for initiative petitions may do so on certain private property over the owner's objection. We therefore hold that Article IV, section 1, does not extend so far as to confer that right." *Stranahan v. Fred Meyer, Inc.*, 331 Or 38 (2000).

1.4.3.B Referendum Orders

- Article IV, section 1(3), describes the "referendum power" that the "people reserve to themselves":

  -Power to approve or reject any legislative act that does not become effective sooner than 90 days after the legislative session that passed it.
  -Referendums may be ordered by a minimum of 4% of the total number of votes cast for all candidates for Governor at the last Governor's election.
  -Referenda must be filed not more than 90 days after the end of the session that enacted it.

- Article IV, section 1b allows signature gatherers to receive payment for signature gathering if that payment is not based on the number of signatures. Signature gatherers must not receive money or anything of value based on the number of signatures obtained on the petition. Likewise, paying signature gatherers based on the number of signatures also is illegal.

- Under Article IV, section 1(4):

  -Referenda must be filed with the Secretary of State.
  -The Secretary of State must verify voters' signatures within 30 days after filing.
  -Then the referendum is submitted to the people at the next regular general election.
  -If the referendum measure passes, it becomes effective 30 days after it is approved.

1.4.3.C Municipalities

Article IV, section 1(5) reserves initiative and referendum powers to "each municipality and district as to all local, special and municipal legislation of every character in or for their municipality or district. "In a city, not more than 15% of the qualified voters may be required to propose legislation by the initiative, and not more than 10 percent of the qualified voters may be required to order a referendum on legislation."

1.5 Executive Power

Article V of the Oregon Constitution sets out the Executive Department, http://bluebook.state.or.us/state/constitution/constitution05.htm

Under Article V, the Governor:

- May hold office for four years but no more than eight of twelve years
- Must be at least 30 years old (unless a successor in a vacancy)
- Must be an Oregon resident for at least three years
- Commands the military and naval forces, and may call out forces to execute the laws
- "[S]hall take care that the Laws be faithfully executed"
- Shall recommend to the legislative assembly "such measures as he shall judge to be expedient"
- May "on extraordinary occasions convene the Legislative Assembly by proclamation"
- Shall "transact all necessary business with the officers of government"
- Has power to grant reprieves, commutations, and pardons, after conviction
- Has power to remit fines and forfeitures
- Has power to veto single items in appropriation bills
- Has power to veto any provision in new bills declaring an emergency
- Has power to sign bills passed by the legislative assembly if s/he approves of the bill
- Has power to return bills with written objections to the house of the legislative assembly where the bill originated; that house may reconsider and pass the bill by 2/3 majority, send it to the other house which may pass the bill by 2/3 majority; and the Governor has five business days to sign it or else it becomes a "law without signature"
- Shall fill vacancies "in any office" by appointment during a recess of the legislative assembly.

1.5.1 Reprieves, Commutations, and Pardons

> **"[The Governor] shall have power to grant reprieves, commutations, and pardons, after conviction, for all offences [sic] except treason, subject to such regulations as may be provided by law. Upon conviction for treason he shall have power to suspend the execution of the sentence until the case shall be reported to the Legislative Assembly, at its next meeting, when the Legislative Assembly shall either grant a pardon, commute the sentence, direct the execution of the sentence, or grant a farther [sic] reprieve. * * * * * ."** -- Article V, section 14, Or Const

"The framers did not devote much time to debating Article V, section 14." *Haugen v Kitzhaber*, 353 Or 175 (2013). But "the Oregon history, although slim, indicates that the delegates considered and rejected additional limitations on the Governor's clemency power in favor of entrusting that power to the Governor alone." *Id.*

Article V, section 14, is interpreted under *Priest v Pearce*, 314 Or 411 (1992) (which is text, history, and case law). *Haugen v Kitzhaber*, 353 Or 175 (2013).

A death-penalty reprieve under Article V, section 14, does "not require a reprieve to specify and end date" or "limit the Governor to granting reprieves only for a particular purpose, as long as the effect of the reprieve is to delay, temporarily, the execution of the sentence." Further, "neither the text nor the historical circumstances surrounding Article V, section 14, unequivocally requires an

act of clemency to be accepted by the recipient to be effective; nor do they require an act of clemency to have a stated end date or to be granted only for a particular purpose." Finally, "none of the Oregon cases holds that an unconditional act of clemency is effective only on acceptance by the recipient." The "executive power to grant clemency flows from the constitution and is one of the Governor's only checks on another branch of government." A reprieve is valid and effective regardless if it is accepted. *Haugen v Kitzhaber*, 353 Or 175 (2013).

Although "it is not within judicial competency to control, interfere with, or even to advise the Governor when exercising his power to grant reprieves, commutations, and pardons," *Eacret v Holmes*, 215 Or 121 (1958), the Court may review the Governor's discretion in invoking clemency power under Article V, section 14, of the Oregon Constitution because one of the "court's fundamental functions is interpreting provisions of the Oregon Constitution", per *Farmers Insurance Co v Mowry*, 350 Or 686, 697 (2011). *Haugen*.

1.5.2 Balance of Power

The chief executive power of the state is vested in the Governor, under Article V, section 1. And "because the Governor is the head of an equal branch of government, this court must not 'assume the power to question the action of the executive of the state.'" *Haugen v Kitzhaber*, 353 Or 175 (2013) (quoting *Putnam v Norblad*, 134 Or 433, 439 (1930)).

1.5.3 Administrative Department

The Oregon Constitution contains an Article specifically devoted to the "Administrative Department." The Administrative Department, however, is part of the Executive, as stated explicitly in Article III, section 1, of the Oregon Constitution: "The powers of the Government shall be divided into three separate branches, the Legislative, the Executive, including the administrative, and the Judicial".

Article VI identifies two elected officials: Secretary of State and Treasurer. http://bluebook.state.or.us/state/constitution/constitution06.htm.

Note the distinctions between the federal and state constitutions. Under the Oregon Constitution, the Secretary of State and the Treasurer are each elected independently of the Governor (section 1). Each holds office for four years, and for no more than eight years of twelve (section 1).

1.5.3.A Secretary of State

"**The Secretary of State shall keep a fair record of the official acts of the Legislative Assembly, and Executive Department of the State; and shall when required lay the same, and all matters relative thereto before either branch of the Legislative Assembly. He shall be the virtue of his office, Auditor of public Accounts, and shall perform such other duties as shall be assigned him by law**." -- Article VI, section 2, Or Const

1.5.3.B Treasurer

"**The powers, and duties of the Treasurer of State shall be such as may be prescribed by law**." – Article VI, section 4, Or Const

1.5.4 Counties

Article VI, sections 6 through 9 set out elections of county officers, terms, and qualifications.

1.5.5 Home Rule

Article VI, section 10, sets out "home rule."
http://bluebook.state.or.us/state/constitution/constitution06.htm.

Article XI, section 2 also provides "home rule" for cities and towns with municipal charters. Adopted together in 1906, those two provisions address "home rule" for cities and towns. *City of La Grande v PERS*, 281 Or 137, 140 (1978). See also *GTE Northwest, Inc. v Oregon Public Utility Comm'n*, 179 Or App 46 (2002) and *Thunderbird Mobile Club, LLC v City of Wilsonville*, 234 Or App 457 (2010).

See Jerry Lidz, *Home Rule*, Oregon Constitutional Law Manual (2013), www.osbar.org/secured/barbooks/viewchapter.asp?bid=85&cid=2342.

Chapter 2: Free Expression and Assembly

2.1 Free Expression: Introduction

> "**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

2.1.1 Origins

2.1.1.A Framers and Voters

In 1987 the Oregon Supreme Court opined: "Oregon's pioneers brought with them a diversity of highly moral as well as irreverent views, we perceive that most members of the Constitutional Convention of 1857 were rugged and robust individuals dedicated to founding a free society unfettered by the governmental imposition of some people's views of morality on the free expression of others." *State v Henry*, 302 Or 510, 523 (1987).

Note: *Henry*'s dicta significantly overstates the "diversity" and "irreverence" of Oregon's pioneers. They weren't original, diverse, or irreverent. Some pre-1857 settlers had been born on the east coast but most grew up in the Mississippi Valley. Helen L. Seagraves, *The Oregon Constitutional Convention of 1857*, 30 REED COLLEGE BULLETIN p. 6 (June 1952) (citation omitted). "They were not idealists entering a wilderness in order to establish a new way of life; they were more interested in bettering their position within an existing social and economic structure than in altering it." *Id*. at 7.

Both in economic and civil perceptions, the Oregon framers and voters were heavily influenced from their Middle West origins. For example, their reactions to slavery and the "free Negro" issue "were strikingly similar to those found in the Old Northwest. Indeed, except for minor changes in detail, it seems as if the story were being repeated." Eugene H. Berwanger, THE FRONTIER AGAINST SLAVERY 32, 78 (1967).

"In contrast to California, the people of the Oregon Country were a homogeneous lot." David Alan Johnson, FOUNDING THE FAR WEST 41, 143 (1992). "More modern-minded observers remarked often on the seeming disregard of Oregon farmers to the opportunities before them." *Id*. at 47. "The Oregonians' embrace of these midwestern [constitutional] models [that limited voting to free white males] testified to the framers' common mold. Indistinguishable in terms of origin, age, length of residence, or occupation, as a group they underlined the one-dimensional character of the charter society of Oregon." *Id*. at 142. For example, only one man at the Oregon Constitutional Convention was a Republican and opponent of slavery: John McBride. *Id*. at 162. There appear to have been very few Jews in Oregon in the 1850s. Steven Lowenstein, THE JEWS OF OREGON 1850-1950 7 (1987). An 1850 census reported 207 black persons in Oregon but that number was alternatively estimated at "about 55," because the 207 count included 114 "Indians or half-breeds" and 38 Hawaiians as those 207 "Negroes." Berwanger 81.

2.1.1.B The Text

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

In 1960, the Oregon Supreme Court ventured to guess that Oregon's "freedom of speech" provision was rooted in Pennsylvania's, with this citationless musing: 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).

Note: Pennsylvania's Constitutions of 1776 and 1790 both contained free-speech provisions in Section XII. Leonard W. Levy, ORIGINS OF THE BILL OF RIGHTS 9 (1999); see also http://avalon.law.yale.edu/18th_century/pa08.asp (Pennsylvania Constitution of 1776) and http://avalon.law.yale.edu/18th_century/pa08.asp (Pennsylvania Constitution of 1790).

Article I, section 8, "does not speak of a special freedom of the press. Nor, for that matter, does it distinguish between different subjects of comment." Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U BALT L REV 379, 386 (1980).

2.1.2 Interpretation: The *Robertson* framework

The judiciary interprets many or most of the original parts of the Oregon Constitution under the *Priest v Pearce*, 314 Or 411 (1992) analysis: The wording, historical circumstances, and Oregon Supreme Court interpretive case law. But not Article I, section 8. Article I, section 8 is interpreted under the three-part "*Robertson* framework" that is "compatible with the 'natural rights' approach" that is "a possible source of Article I, section 8." *State v Ciancanelli*, 339 Or 282, 314 (2005).

State v Robertson, 293 Or 402 (1982) is "the guiding rubric by which Oregon appellate courts have resolved Article I, section 8, challenges to various laws regulating constitutionally protected expression." *Karuk Tribe v Tri-County Metropolitan Trans Dist*, 241 Or App 537 (2011), *aff'd by an equally divided court*, __ Or 239 (2014).

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). The first step is to determine whether the statute is "written in terms directed to the substance of any 'opinion' or any 'subject' of communication." *Robertson*, 293 Or at 412. The first *Robertson* category is thus distinguished from the second and third *Robertson* categories on that basis.

The three-part *Robertson* interpretive method, refined by later cases, may be understood this way:

> First, laws that are explicitly directed at prohibiting "speech itself," or the *substance* of any opinion or any subject of communication, violate Article I, section 8, "unless the scope of the restraint 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." *State*

v Plowman, 314 Or 157, 163-64, *cert den*, 508 US 974 (quoting *Robertson*, 293 Or at 412); *State v Moyer*, 348 Or 220 (2010) (quoting *Plowman*); *State v Henry*, 302 Or 510, 515-25 (1987) (on the "historical exception" exception).

Second, laws that focus on proscribing the pursuit or accomplishment of forbidden *results* are divided further into two categories. Those are considered *Robertson* second and third category analyses. A *Robertson* category-2 law is one that focuses on forbidden *effects* or harms, and specifies that speech might cause that harm, so the law expressly prohibits expression used to achieve those effects. Those are presumptively constitutional unless they are incurably overbroad. An example is a statute prohibiting using a verbal threat to coerce another person. *Robertson*, 293 Or at 415. *Plowman*, 314 Or at 164; *Wilson v Dep't of Corrections*, 259 Or App 554, 558 (2013).

"To be valid as a law that focuses on a harmful effect of speech, the law must 'specify expressly or by clear inference what "serious and imminent" effects it is designed to prevent.'" *Moser v Frohnmayer*, 315 Or 372, 379 (1993) (quoting *Oregon State Police Ass'n v State of Oregon*, 308 Or 531, 541 (1989) (Linde, J., concurring).

Some "burdens on expressive activities are permissible, such as time, place, and manner restrictions" under *Robertson*'s second category, see *State v Babson*, 355 Or 383 (2014).

Third, and still within the category of laws that focus on effects like *Robertson*-2 category laws, are laws that are directed only against causing forbidden effects, but do not refer to expression at all. Those are facially constitutional. They are analyzed for vagueness or for as-applied unconstitutionality. An example is a trespass statute. *Robertson*, 293 Or at 417; *Plowman*, 314 Or at 164; *Wilson*, 259 Or App at 558. Another example is a rule banning overnight use of state capitol property. *State v Babson*, 355 Or 383 (2014). Another example is a law requiring a license to sell things except food, flowers, and balloons, as applied to the sale of joke books. *City of Eugene v Miller*, 318 Or 480 (1994) (law invalid as applied). Some "burdens on expressive activities are permissible, such as time, place, and manner restrictions" under *Robertson*'s third category, see *State v Babson*, 355 Or 383 (2014).

Robertson "recognized that historical exceptions to Article I, section 8, were not restricted solely to the actual statutes or the common law in place when the Oregon Constitution was adopted. Instead, the court recognized that successive legislatures would continue to revise crimes and other laws and create new crimes and laws in the light of societal changes and needs." *State v Moyer*, 348 Or 220 (2010). Whether a statute that restrains expression is "wholly confined within some historical exception" requires the following inquiries: (1) was the restriction well established when the early American guarantees of freedom of expression were adopted, and (2) was Article I, section 8, intended to eliminate that restriction. *State v Henry*, 302 Or 510, 515-25 (1987).

Examples of historical exceptions include campaign fraud: "In *Vannatta v Keisling*, 324 Or 514, 523 (1997), this court upheld, as within a historical exception, a provision of a ballot measure providing that, when a candidate reneges on a promise not to exceed a specified amount of campaign expenditures, the Secretary of State is required to publish in the Voters' Pamphlet a bold-print notice that the candidate failed to abide by his or her promise. The court described a candidate who reneges on his or her promise as one who "has misled the electorate" and stated that "[l]aws that are targeted at fraud do not violate Article I, section 8, because they constitute a historical exception to Article I, section 8." *State v Moyer*, 348 Or 220 (2010). Likewise, a statute requiring that the identification of political contributors be truthful also falls within a historical exception to Article I, section 8. *Id.*

"Obscenity" does not fall within a historical exception to Article I, section 8. *State v Henry*, 302 Or 510, 520 (1987).

The "party opposing a claim of constitutional privilege" has the burden of proving that a speech restriction falls within a "historical exception." *State v Henry*, 302 Or 510, 515-25 (1987); *Moser v Frohnmayer*, 315 Or 372, 376 (1993). "This is a heavy burden." *Moser*, 315 Or at 376 (citing *Henry*, 302 Or at 521).

Note: A fourth step has been proposed to the *Robinson*-based Article I, section 8, analysis. *In re Fadeley*, 310 Or 548, 577-78 (1991) involved a judicial canon prohibiting direct solicitation of campaign money by judges. Justice Unis dissented and concurred in that case, stating:

"If the answer to the third inquiry is that the enactment proscribes expression or the use of words, rather than harm, it violates Article I, section 8, unless there is a claim, as here, that infringement on otherwise constitutionally protected speech is justified under the "incompatibility exception" to Article I, section 8. In that event, a fourth inquiry needs to be addressed.

"The fourth inquiry is whether the speech that may not constitutionally be prohibited outright is nevertheless incompatible with the performance of one's special role or function. This court has recognized that there are some activities that lawmakers could not forbid citizens generally from doing, but that they may declare to be incompatible with the role and work of a public official. Examples are: *In re Lasswell*, [296 Or 121 (1983), *cert denied*, 498 US 810 (1990)] (professional disciplinary rule survived the accused's constitutional challenge, because this court narrowly interpreted it so as to limit its coverage, in the words of Article I, section 8, to a prosecutor's 'abuse' of the 'right to speak, write, or print freely on any subject whatever'); *Cooper v Eugene School Dist. No. 4J*, 301 Or 358, 380 (1986), *appeal dismissed* 480 US 942 (1987) * * * (a statute could validly restrict public school teachers' rights under Article I, sections 2 and 3 (freedom of worship and religious opinion guarantees), if the statute was limited to 'circumstances when a teacher's dressing in accordance with the standards of his or her religion is truly incompatible with the school's commitment to maintaining for its students [an] atmosphere of religious neutrality[.]' 301 Or at 380); and *Burt v Blumenauer*, 299 Or 55 (1985) (public advocacy of a vote for or against a disputed ballot measure, normally the essence of individual free speech, may in some circumstances be incompatible with an individual's public duties). An enactment that infringes on speech, and that is not justified under the 'incompatibility exception,' cannot survive an Article I, section 8 challenge." *In re Fadeley*, 310 Or at 577-78 (Unis, J., concurring and dissenting).

> ***State v Babson***, 355 Or 383 (2014), see Section 2.5, *post*. *Held*: A rule banning overnight presence on the state capitol steps does not facially violate Article I, sections 8 and 26, but its enforcement may have violated those provisions as applied to defendants who held an overnight protest on the steps; case remanded to permit defendants to "question" two legislators within the confines of the Debate Clause of the Oregon Constitution.
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> ***Wilson v Dep't of Corrections***, 259 Or App 554 (11/27/13) (administrative appeal) (Schuman, Wollheim, Duncan) Mr. Wilson is a jail inmate. He and his wife, Stormii, brought this case as a facial challenge to a prison rule that prohibits inmates from receiving sexually explicit material that "by its nature or content poses a threat or is detrimental to the security, good order or discipline of the facility, inmate rehabilitation, or facilitates criminal activity." They contend that the rule facially violates Article I, section 8.
>
> That rule (OAR 291-131-0035) describes the material prohibited, in detail, such as sex with animals and rape. ORS 183.400 permits a person such as Wilson to file a petition in the Court of Appeals, which has jurisdiction to determine the facial challenge to the prison rule. That statute permits the Court of Appeals to declare a rule invalid only if it concludes that the rule violates a constitutional prohibition, exceeds the agency's statutory authority, or was adopted without complying with required rulemaking

procedures, see ORS 183.400(4) and *Estes v Dep't of Corrections*, 210 Or App 399, 401, *rev den* 342 Or 523 (2007).

The Court of Appeals concluded that the prison rule does not facially violate Article I, section 8, as a second-category *Robertson* law. To confiscate prisoners' mail, the prison rule first requires the prison to determine that the material is "sexually explicit." No one contends that that phrase is vague. Next, the prison must determine that the material "by its nature or content" poses a threat or is detrimental to security, order, discipline, or rehabilitation or facilitates crime. "The rule, then, does not apply to all material that is characterized as 'sexually explicit," but only to such material that threatens specified harms. Some material does not pose a threat of specified harms. Other material may. That is determined on a case-by-case basis, which may be vulnerable to as-applied challenges. But it passes facially because the rule specifies a variety of harms and is not significantly overbroad because the Wilsons suggest no situations, and the Court of Appeals could "contemplate none" wherein the rule as applied would prohibit "obviously unregulable expression."

State v Barrett, 260 Or App 442 (12/26/13) (administrative appeal, per curiam) (Ortega, Wollheim, Sercombe) The rule at issue in this case was upheld as valid on a facial challenge in *Wilson v Dep't of Corrections*, 259 Or App 554 (2013).

2.1.3 Limits

"Not even Article I, section 8, is absolute -- there are exceptions to its sweep. Among the exceptions are certain rules of professional conduct, *see, e.g., In re Lasswell*, 296 Or 121 (1983), *cert denied*, 498 US 810 (1990) (prosecutor may validly be restricted in what he says during the pendency of a criminal prosecution), as well as certain historical exceptions, *see, e.g., State v Robertson*, 293 Or at 412 (stating rule)." *In re Fadeley*, 310 Or 548, 559-61 (1991).

2.2 Politicking, Campaigning, and Lobbying

2.2.1 Political Speech

First Amendment: "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v Alabama*, 384 US 214, 218 (1966). "The loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v Burns*, 427 US 347, 373 (1976) (for injunctive relief).

Oregon Constitution: Illustrative: "The signature-gathering process for political petitions is a form of political speech." *Lloyd Corporation v Whiffen*, 307 Or 674, 684-85 (1989) (defendants have some right to petition on plaintiff's property).

See Section 2.5, *post*, on Peaceable Assembly, particularly *State v Babson*, 355 Or 383 (2014) on barring overnight use of the state capitol steps.

2.2.2 Campaign Contributions, Expenditures, and Reporting

A. Oregon Constitution

"[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).

Legislatively "imposed limitations on individual political campaign contributions and expenditures" violate Article I, section 8." *Meyer v Bradbury*, 341 Or 288, 299 (2006); *Hazell v Brown*, 352 Or 455 (2012); *Deras v Myers*, 272 Or 47 (1975) (limits on political campaign spending unlawfully restricted the right to speak, write, or print freely on any subject whatever).

B. First Amendment

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).

"The *Buckley* Court * * * sustained limits on direct contributions in order to ensure against the reality or appearance of corruption. That case did not extend this rationale to independent expenditures, and the Court does not do so here." *Citizens United v. Federal Election Commission*, 558 US 50, 130 S Ct 876, 908 (2010) ("independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption").

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).

"In *Citizens United v FEC*, a majority of the Supreme Court decided that the First Amendment prohibits the government from restricting independent political expenditures by corporations and trade unions. That decision and its consequences in the 2012 presidential elections strike overseas observers as bizarre and an affront to basic democratic principles. Justice Holmes famously said, echoing John Stuart Mill, 'the best test of truth is the power of the thought to get itself accepted in the competition of the market.' However, that statement assumes that the market has not been distorted by the wealthy." Anthony Lester, *Two Cheers for the First Amendment*, 8 HARVARD LAW & POLICY REVIEW 177, 182 (2014) (citations omitted).

***Citizens United v Federal Election Comm'n*, 558 US 310 (2010)** *Austin* v. *Michigan Chamber of Commerce*, 494 US 652 (1990) held that political speech may be banned based on the speaker's corporate identity. "*Austin* upheld a direct restriction on the independent expenditure of funds for political speech for the first time in this Court's history." *Citizens United v. Federal Election Commission*, 558 US 50, 130 S Ct 876 (2010). But *Citizens United* concluded that "*Austin* interferes with the 'open marketplace' of ideas protected by the First Amendment . * * * It permits the Government to ban the political speech of millions of associations of citizens." Overturning Austin, the Court decided that the "Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether." "We return to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations * * * *. *Austin* is overruled, so it provides no basis for allowing the Government to limit corporate independent expenditures."

Federal law at issue in *Citizens United* prohibited "electioneering communication." An electioneering communication is "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and is made within 30 days of a primary or 60 days of a general election. Under federal law, corporations and unions are barred from using their general treasury funds for express advocacy or electioneering communications. They may establish, however, a "separate segregated fund" (known as a political action committee, or PAC)

for these purposes. The segregated-fund moneys are limited to donations from stockholders and employees of the corporation or, for unions, to members of the union. The law here "makes it a felony for all corporations — including nonprofit advocacy corporations — either to expressly advocate the election or defeat of candidates or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election." Limits on electioneering communications were upheld in *McConnell* v. *Federal Election Comm'n*, 540 US 93, 203-209 (2003) ("*McConnell* permitted federal felony punishment for speech by all corporations, including nonprofit ones, that speak on prohibited subjects shortly before federal elections.").

Citizens United wanted to make its movie, *Hillary*, available through video-on-demand within 30 days of the 2008 primary elections. *Hillary* promoted the idea that Hillary Clinton was unfit for the US presidency. Citizens United also sought to broadcast one 30-second and two 10-second ads to promote *Hillary*. It feared, however, that both the film and its promotional ads would be banned as corporate-funded independent expenditures, thus subjecting the corporation to civil and criminal penalties. It sought declaratory and injunctive relief in court, arguing that the federal law is unconstitutional as applied to *Hillary* and its ads for *Hillary*. The district court denied Citizens United the relief it sought, and granted the Federal Elections Commission's motion for summary judgment.

The US Supreme Court reversed: The law's "prohibition on corporate independent expenditures is * * * a ban on speech. As a 'restriction on the amount of money a person or group can spend on political communication during a campaign,' that statute 'necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.' *Buckley v Valeo*, 424 US 1, 19 (1976) (*per curiam*)." "Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. See *Buckley*, *supra*, at 14-15 ('In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential'). The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment "`has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu* v *San Francisco County Democratic Central Comm.*, 489 US 214, 223 (1989) (quoting *Monitor Patriot Co.* v. *Roy*, 401 U. S. 265, 272 (1971)); see *Buckley* at 14 ('Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution'). For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.' *WRTL*, 551 US, at 464 (opinion of Roberts, CJ)."

"The Court has recognized that First Amendment protection extends to corporations." (about 22 string cites omitted). "This protection has been extended by explicit holdings to the context of political speech* * * * * * Under the rationale of these precedents, political speech does not lose First Amendment protection 'simply because its source is a corporation.'" (citations omitted). "Corporations and other associations, like individuals, contribute to the `discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster" * * * The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not "'natural persons.'" The "Government lacks the power to ban corporations from speaking." "If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech." "Political speech is 'indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.' *Bellotti*, 435 US, at 777" (other citations omitted). It is irrelevant for purposes of the First Amendment that corporate funds may "have little or no correlation to the public's support for the corporation's political ideas." *Id.*, at 660 (majority opinion). "All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting

speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker's ideas." "The Framers may not have anticipated modern business and media corporations. See *McIntyre* v *Ohio Elections Comm'n*, 514 US 334, 360-361 (1995) (Thomas, J., concurring in judgment). Yet television networks and major newspapers owned by media corporations have become the most important means of mass communication in modern times. The First Amendment was certainly not understood to condone the suppression of political speech in society's most salient media. It was understood as a response to the repression of speech and the press that had existed in England and the heavy taxes on the press that were imposed in the colonies."

Under the federal regulations applicable to this case, "televised electioneering communications funded by anyone other than a candidate must include a disclaimer that `___ is responsible for the content of this advertising.' 2 U.S.C. § 441d(d)(2). The required statement must be made in a 'clearly spoken manner,' and displayed on the screen in a 'clearly readable manner' for at least four seconds. *Ibid.* It must state that the communication 'is not authorized by any candidate or candidate's committee'; it must also display the name and address (or Web site address) of the person or group that funded the advertisement. * * * [A]ny person who spends more than $10,000 on electioneering communications within a calendar year must file a disclosure statement with the FEC. * * * That statement must identify the person making the expenditure, the amount of the expenditure, the election to which the communication was directed, and the names of certain contributors* * * * * * Disclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities,' *Buckley*, 424 US at 64, and 'do not prevent anyone from speaking,' [citation omitted] The Court has subjected these requirements to 'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." (citations omitted). The federal regulations requiring disclosures and disclaimers are applicable to the pay-per-view ads for *Hillary*. Those regulations are not unconstitutional under the First Amendment.

The US Supreme Court noted that *Citizens United* "is about independent expenditures, not soft money." Soft money is donations to political parties. "An outright ban on corporate political speech during the critical preelection period is not a permissible remedy" for Congress's attempts to dispel either the appearance or the reality of improper influences on politicians.

2.3 Stalking

"A person may obtain a stalking protective order in two ways. One method involves filing a complaint with law enforcement. See ORS 163.735 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). The "substantive standards for an SPO under ORS 163.738 are the same as for an SPO under ORS 30.866; the difference between the two types of SPOs is the manner in which the SPO proceeding is initiated." *V.L.M. v Miley*, __ Or App __ (2014) (citing *Carter v Bowman*, 249 Or App 590, 593-94, *rev den* 352 Or 377 (2012)).

2.3.1 Civil Stalking Protective Orders

To obtain a civil Stalking Protective Order (an SPO), the petitioner must meet the statutory requirements, that is, showing by a preponderance of the evidence that the stalker engaged in intentional, knowing, or reckless repeated and unwanted conduct, *C.J.L. v Langford*, 262 Or App 409 (2014) 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).

Name-calling alone is insufficient to meet the *Rangel* standard for speech-based contacts. *K.R. v Erazo*, 248 Or App 700 (2012). Name-calling also may be insufficient to meet the standard for non-expressive contacts that is less stringent than *Rangel*'s. *V.L.M. v Miley*, __ Or App __ (8/13/14) (letter stating "you are a slutty whore" accompanying a box of condoms).

Just following a person around a store is insufficient to cause "objectively reasonable apprehension or fear resulting from the perception of danger," as the element of "danger" is used in ORS 163.170(1). *K.R. v Erazo*, 248 Or App 700 (2012).

Just stating "I wish you were dead" is insufficient as a threat. *C.J.L. v Langford*, 262 Or App 409 (2014).

There is no culpable mental state that the victim must prove regarding his feeling of alarm, per *Delgado v Souders*, 334 Or 122 (2002); instead the victim must prove that the stalker acted at least recklessly. *T.M.B. v Holm*, 248 Or App 414 (2012).

> ***D.W.C. v Carter/Bosket*** (or *Christiansen v Carter/Bosket*), 261 Or App 133 (02/20/14) (Washington) (Ortega, Sercombe, Hadlock) The trial court denied petitioner's petitions for stalking protective orders against two of his neighbors under ORS 30.866. The Court of Appeals agreed that petitioner had failed to prove two contacts for Bosket, but reversed on the other neighbor (Carter) because two contacts had been proven.
>
> The Court of Appeals declined petitioner's request for de novo review and reviewed the trial court's findings for "any evidence" and its conclusions for errors of law.
>
> Petitioner and his domestic partner had moved into a condo that shares a wall with Bosket's unit. Carter's unit is on the far side of Bosket's unit. Petitioner became his condo Homeowner's Association chairman. His relationship with Bosket and Carter was fine before he became HOA chair. After that, as chair, petitioner had to enforce some sign rules, causing Bosket to yell foul language at petitioner. A second incident occurred after another HOA incident, after which Bosket forcibly entered petitioner's home, punched him, pushed him backward, wrapped his hands around his neck, and choked petitioner while yelling homophobic slurs. Police arrested Bosket. As for Carter, he too became infuriated at HOA decisions, and made threats and homophobic assaults on petitioner on several occasions. Carter was riding a bike on a sidewalk and ran petitioner off the sidewalk. After another HOA decision, Carter became very angry and told petitioner that by Sunday, he'd be dead. Petitioner called the police. Carter again threatened petitioner by approaching him in his carport with clenched fists and yelling, "You better watch your back." Petitioner testified that Carter "scared the crap out of him" because he "appears out of nowhere."
>
> The trial court concluded that Bosket only strangled petitioner once, so the statutorily required "two contacts" were not met, and Carter's offensive contacts were not suggestive that petitioner actually would be harmed.
>
> The Court of Appeals did not need to engage in a *State v Rangel*, 328 Or 294 (1999) analysis because it concluded that as to Carter, at least two nonexpressive contacts would have caused alarm that meet the statutory requirement of objective reasonableness. First, trying to run down petitioner with a bicycle on a sidewalk is objectively reasonable to cause alarm for personal safety. The second qualifying contact was when Carter approached petitioner with clenched fists in his carport. Coming into a person's visual presence is "nonexpressive" contact under ORS 163.730(3)(a). (Note: The Court of Appeals did not explain why it interjected ORS chapter 163 into this civil stalking

analysis). Further the court stated that "taken in isolation, this contact may not have been enough" but "when analyzed in the context of the expressive contacts," it does support objectively reasonable alarm.

C.J.R. v Fleming, 265 Or App 342 (9/10/14) (Jackson) (Wollheim, Duncan, Lagesen) The trial court did not err in granting petitioner a permanent stalking protective order under ORS 30.866 and awarding attorney fees. This case was not decided on de novo review, thus the case was reviewed for "any evidence and the legal conclusions based on those facts for errors of law."

2.3.2 The Crime of Violating an Existing SPO

Stalking is a crime defined in ORS 163.732. In addition, violating either a civil or criminal SPO is another crime defined in ORS 163.750.

In contrast with a petition to obtain an SPO, when defendant is charged with the crime of violating an existing SPO (ORS 163.750), 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). "[B]ecause defendant's communications with the victim were already prohibited by the stalking protective order [and that underlying SPO was not challenged], 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." *Id.*; *see also State v Nahimana*, 252 Or App 174 (2012) (under *State v Ryan*, 350 Or 670 (2011), *Rangel*'s narrowing standard does not apply to the crime of violating an existing SPO); *State v Nguyen*, 250 Or App 225 (2012) (Under *Ryan*, "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.").

2.3.3 Terminating an SPO

ORS 30.866 allows a victim to petition and obtain a civil SPO directly with the court without having law enforcement issue a complaint to the stalker. That statute does not provide for any method for a stalker to terminate an SPO. But the criminal stalking statute (ORS 163.738(2)) does provide for terminating an SPO when the reasons for the SPO "are no longer present," see *Edwards v Biehler*, 203 Or App 271, 277 (2005). The statutes require the same evidentiary showing for issuance. *C.L.C. v Bowman*, 249 Or App 590 (2012).

"Constitutionally protected speech" may be considered in determining the termination of an SPO. *C.L.C. v Bowman*, 249 Or App 590 (2012) (website postings).

2.3.4 The Crime of Stalking

Under *State v Ryan*, 350 Or 670 (2011), *Rangel*'s narrowing standard does not apply to the crime of violating an existing SPO. *State v Nahimana*, 252 Or App 174 (2012) SPO (defendant's convictions for violating an underlying SPO are affirmed when he did not challenge that underlying SPO).

2.3.5 Jury Right in Civil Stalking Cases Seeking Money Damages

When a plaintiff files a petition under ORS 30.866 for both a stalking protective order and compensatory money damages for the stalking "the parties are entitled to a jury trial on the claim

for money damages" under Article I, section 19, and Article VII (Amended), section 3, of the Oregon Constitution (although the statute does not grant any jury trial right). *M.K.F. v Miramontes*, 352 Or 401 (2012).

If a plaintiff seeks nothing but money under that statute, then her claim would have been "at law" and the defendant would have had a jury-trial right, per *Fleischner v Citizens' Real Estate & Investment Co.*, 25 Or 119, 130 (1893), *Carey v Hays*, 243 Or 73, 77 (1966), *Molodyh v Truck Insurance Exchange*, 304 Or 290, 297 (1987), and *Thompson v Coughlin*, 329 Or 630, 637-38 (2000). Conversely, if a plaintiff seeks only a stalking protective order (injunctive relief), then her claim would have been equitable and the Oregon Constitution would not provide a jury-trial right. *M.K.F. v Miramontes*, 352 Or 401 (2012).

"The right to jury trial must depend on the nature of the relief requested and not on whether, historically, a court of equity would have granted the relief had the legal issue been joined with a separate equitable claim. * * * Article I, section 17, and Article VII (Amended), section 3, of the Oregon Constitution do not guarantee a right to jury trial for claims or request for relief that, standing alone, are equitable in nature and would have been tried to a court without a jury. By the same token, in the absence of a showing that the nature of a claim or request for relief is such that, for that or some other reason, it would have been tried to a court without a jury, those provisions do guarantee a right to jury trial on claims or requests that are properly categorized as 'civil' or 'at law.'" *M.K.F. v Miramontes*, 352 Or 401 (2012).

The Court held: "Article I, section 17, and Article VII (Amended), section 3, preserve the right to jury trial for claims that are properly categorized as 'civil' or 'at law.' * * * [P]laintiff's claim seeking monetary damage for injury inflicted fits within those terms, even if it does not have a precise historical analog." *M.K.F. v Miramontes*, 352 Or 401 (2012).

2.4 Profanity, Obscenity, and Fighting Words

"One man's vulgarity is another's lyric." *Cohen v California*, 403 US 15, 25 (1971).

Obscenity is <u>not</u> a "historical exception" to the protections of Article I, section 8: "We hold that characterizing expression as 'obscenity' under any definition * * * does not deprive it of protection under the Oregon Constitution." *State v Henry*, 302 Or 510, 525 (1987). "In this state any person can write, print, read, say, show, or sell anything to a consenting adult even though that expression may be generally or universally considered "obscene." *Id*. at 525. "[T]his form of expression, like others," may be "regulated in the interests of unwilling viewers, captive audiences, minors, and beleaguered neighbors," but "it may not be punished in the interest of a uniform vision on how human sexuality should be regarded or portrayed." *Id*. "We also do not rule out regulation, enforced by criminal prosecution, directed against conduct of producers or participants in the production of sexually explicit material, nor reasonable time, place, and manner regulations of the nuisance aspect of such material or laws to protect the unwilling viewer or children." *Id*.

2.5 Right to Peaceably Assemble, Instruct Representatives, and Apply for Redress

> "**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 grievances [sic].**" -- Article I, section 26, Or Const

See Alycia N. Sykora, *Right to Assemble, Instruct, and Petition*, Oregon Constitutional Law Manual (2013), www.osbar.org/secured/barbooks/viewchapter.asp?bid=85&cid=2350.

2.5.1 Article I, section 26

Oregon courts use the *Robertson* framework to determine if laws or state actions violate Article I, section 26. See Section 2.1.2, *ante*.

Article I, section 26, protects three rights: (1) to assemble together in a peaceable manner to consult for their common good; (2) to instruct their Representatives; and (3) to apply to the legislature for redress of grievances. *State v Babson*, 355 Or 383 (2014).

Under *Robertson*, as with Article I, section 8, "the rights protected under Article I, section 26, similarly are not exempt from neutral laws that do not target assembling, instructing representatives, or applying for redress of grievances. The Oregon Constitution does not prohibit the government – in this case, the Legislative Administration Committee – from enacting laws in terms that do not target speech or the rights protected under Article I, section 26, even if those laws may have some incidental impact on those rights * * * ." *State v Babson*, 355 Or 383 (2014)

Note: Under *Babson*, is *Robertson*'s test a First Amendment time, place, and manner analysis for content-neutral laws and acts? See *Moser v Frohnmayer*, 315 Or 372, 383 (1993) (Graber, J., concurring) (*City of Hillsboro v Purcell*, 306 Or 547 (1988) "clearly shows that a selective time, place, or manner restriction is not necessarily a content restriction").

> ***State v Babson***, 355 Or 383 (5/15/14) (Marion) (Balmer) On the state capitol steps, defendants protested Oregon National Guard troop involvement in Iraq and Afghanistan. The months-long vigil lasted after 11:00 p.m. overnights. A Legislative Administration Committee guideline prohibited anyone's presence overnight on the steps between 11:00 pm and 7:00 am unless an administrator allowed the use. The LAC is a joint committee of the Legislative Assembly that makes policies for control of the capitol under ORS chapter 173.
>
> During the ongoing vigils, the LAC held two meetings to discuss the overnight rule. At one meeting, LAC members stated that the rule had not been consistently enforced because an administrator had authorized groups, on request, to use the steps overnight. The administrator understood that he was to prohibit use of the steps overnight. He delivered a letter to a defendant on the steps stating that she had to leave, per the overnight rule. She did not leave. She was cited for second-degree criminal trespass for overnight use of the capitol steps. Two days later, she was again cited. The DA did not prosecute those citations.
>
> Another LAC meeting occurred, this time to remove the administrator's discretion to permit overnight use, which the text of the rule still permitted. A month later, police cited defendants for violations of the overnight rule. In defense of the citations, defendants had attempted to question the administrator about discussions he had with legislators regarding enforcement of the overnight rule. The trial court refused to allow that questioning. Defendants also subpoenaed legislative co-chairs of the LAC to question them about enforcement of the guideline, but the trial court quashed those subpoenas. The trial court found defendants guilty of a crime – second-degree trespass, over their several constitutional challenges.
>
> The Court of Appeals reversed and remanded, concluding that under Article I, section 8, the overnight rule was speech-neutral and thus was a *Robertson* category 3 (as-applied challenge). But under the Debate Clause of the Oregon Constitution (Article IV, section 9), the Court of Appeals concluded that defendants were entitled to question the

legislators regarding enforcement – not enactment – of the overnight rule. Similarly, as a *Robertson* category 3 case under Article I, section 26, (that is, "assembly neutral" and thus subject only to an as-applied challenge), defendants could challenge the rule as applied and consequently could question the LAC co-chairs about enforcement of the guideline to support their as-applied challenge. The Court of Appeals did not address the First and Fourteenth Amendment challenges.

The Oregon Supreme Court affirmed the Court of Appeals' decision, remanding to the trial court to permit defendants to question the LAC co-chairs about their role, if any, in enforcing the overnight rule against defendants: "Based on that testimony and the other testimony presented, the trial court must determine whether enforcement of the guideline was a reasonable restriction on the time, place, and manner of defendants' expression and assembly, or whether it targeted defendants because they were engaged in expression and assembly, and therefore violated Article I, section 8, and Article I, section 26, as applied to defendants."

The Court further concluded that on its face, the overnight rule does not violate Article I, sections 8 or 26. Those provisions do not bar the legislature from limiting presence on the capitol steps for any purpose from 11:00 pm to 7:00 am, except when legislative sessions are occurring. The remand is to determine whether enforcing the rule, as applied to defendants, violated Article I, sections 8 or 26.

First category. The Court's 63-page opinion reviewed 30 years of *Robertson*. Laws "written in terms" directed at speech that expressly regulate expression are assessed under *Robertson*'s first category. In this case, the court considered only the text of the overnight rule – not the context or legislative history – because it does not do so when "the meaning or scope of the text of a statute is not in dispute" under *Gaines*. This rule is not "written in terms directed to the substance of any 'opinion' or 'subject' of communication," thus it is not unconstitutional under the first *Robertson* category.

Second category: Laws "directed in terms against the pursuit of a forbidden effect" and the "proscribed means [of that effect] include speech or writing" are assessed under *Robertson*'s second category. Such laws may be assessed for overbreadth; if a law is overbroad, then it is interpreted, if possible, to avoid overbreadth. The law's text is considered in the second category. In this case, the overnight rule "does to directly refer to speech," but it "does have apparent applications to speech." But that "fact alone, however, does not subject the guideline to Article I, section 8, scrutiny under the second category of *Robertson*." The rule may prohibit words, but it also prohibits sitting, skateboarding, sleeping, and walking. "Thus, because the guideline does not expressly refer to expression as a means of causing some harm, and it does not 'obviously' prohibit expression within the meaning of *State v Moyle*, 299 Or 691 (1985), it is not subject to an overbreadth challenge under the second category of Robertson." In other words, this second-category *Robertson* law is not reviewed for overbreadth.

Third category. Laws "directed only at causing * * * forbidden effects" that are applied to a person for his expression are assessed under *Robertson*'s third category. The Oregon Supreme Court noted here that case law under this "third category" is "largely undeveloped." The most detailed as-applied analysis under Article I, section 8, is *City of Eugene v Miller*, 318 Or 480 (1994), which held an ordinance invalid as applied to that defendant's conduct. *Miller*'s "general premise applies equally here: a law is invalid as applied to particular expression if 'it did, in fact, reach privileged communication,' and enforcement of the law against a particular defendant 'impermissibly burden[ed] his right of free speech.'" (quoting *Miller*). No one disputes that enforcement of the overnight rule did burden defendants' expressive activities. However, the Oregon Supreme Court "has acknowledged that some burdens on expressive activities are permissible, such as time, place, and manner restrictions," citing *Outdoor Media Dimensions v Dep't of Transportation*, 340 Or 275, 289-90 (2006), *State v Henry*, 302 Or 510, 525 (1987), and

City of Portland v Tidyman, 306 Or 174, 182 (1988). The test in this case is whether the burden on defendants' expressive activity was impermissible.

Time, place, and manner test. That time, place, and manner test has been used in *Robertson* category two cases, as in *Outdoor Media*, and it "also can be applied under the third category of *Robertson*." (The Court provided no citation.). When "a law is enforced in a way that restricts 'far more' speech than is necessary to advance the government interest, that enforcement is not a reasonable restriction on the time, place, and manner of expression." Here only 8 nighttime hours were prohibited, allowing 16 hours of protest, therefore the Court concluded that the overnight rule "advanced the government's legitimate interests without restricting substantially more speech than necessary." Defendants also had "ample alternative locations" during the nighttime hours. Defendants contended that enforcement of the overnight rule was "directed at suppression of their speech in general or the content of their speech in particular." The trial court had excluded two "pieces of testimony" that would have helped them determine that allegation. The Oregon Supreme Court, like the Court of Appeals, did not consider defendants' challenge to one "piece" (one person's testimony) because they had not made an offer of proof.

Debate Clause. As to the other "piece" of evidence – the testimony of LAC co-chairs Sen. Courtney and Rep. Hunt, who had been subpoenaed before trial - the Court concluded that under the Debate Clause of the Oregon Constitution, Article IV, section 9, legislators are protected from being compelled to testify about communications that occur "when legislators are communicating in carrying out their legislative functions." Slip op at 43. The framers of the U.S. Constitution "intended to preserve legislative independence while limiting the protections of the Debate Clause to communications associated with performing legislative functions." Slip op at 45. Further the only state case interpreting a state constitution before the Oregon Constitution was adopted concluded that the Speech and Debate Clause privilege in the Massachusetts Constitution did not protect defamatory speech made outside the discharge of an official duty, even while the legislature was in session. Slip op at 48-49 (citing *Coffin v Coffin*, 4 Mass 1 (1808). That opinion is aligned with Article IV, section 9, "because it emphasizes the legislative function" as the Debate Clause test. In sum, the LAC co-chairs can be questioned "about enforcement of the guideline * * * because the enforcement of laws is outside the scope of the legislative function." "[L]egislative members who participate in or specifically direct enforcement of a law against particular individuals may be questioned about that conduct because it is not protected under the Debate Clause of Article IV, section 9." The "legislators could not have asserted the privilege in response to questions about their direct involvement."

Article I, section 26. The court used the *Robertson* framework for Article I, section 26, "because the parties agree" that it applies. Slip op at 56. The Court here noted that the overnight rule, by its own terms, is not "directed at assembling, instructing representatives, or applying for redress of grievances," it is not directed at rights protected under Article I, section 26, "and it does not expressly or obviously include those rights as a proscribed means of causing some harm," thus the rule "survives scrutiny under the first two categories of *Robertson*." Slip op at 58-59. In sum, the overnight rule "left open ample alternative avenues" for defendants to exercise their Article I, section 26,rights, but whether "enforcement" was neutral needs to be determined by the trial court after it hears "testimony from the LAC co-chairs about their role, if any, in enforcing the guideline against defendants."

2.5.2 Speech and Debate Clause

"The Speech or Debate Clause provides that, 'for any Speech or Debate in either House, [a member of Congress] shall not be questioned in any other Place.' U.S. Constitution, Art. I, § 6, cl.

1. Evident from its plain language, the focus is on the improper questioning of a Congressman. As such, the Clause is violated when the government reveals legislative act information to a jury because this "would subject a Member to being 'questioned' in a place other than the House or the Senate." *United States v. Helstoski*, 442 US 477, 490 (1979)." *United States v Renzi*, __ F3d __ (9th Cir October 9, 2014). "We hold that, if a member of Congress offers evidence of his own legislative acts at trial, the government is entitled to introduce rebuttal evidence narrowly confined to the same legislative acts, and such rebuttal evidence does not constitute questioning the member of Congress in violation of the Clause." *Id.* at __ (agreeing with 2nd, 3rd, and D.C. Circuits).

2.6 Advertising

A mass-transit district's advertising policy that forbade publishing a group's salmon-restoration advertisement on its vehicles violated Article I, section 8, because the policy classified acceptable and not-acceptable displays based on their subject matter. *Karuk Tribe v Tri-County Metropolitan Trans Dist*, 241 Or App 537 (2011), *aff'd by an equally divided court*, __ Or 239 (2014) (the policy explicitly regulated expression based on content).

2.7 Soliciting Money

2.7.1 Oregon Constitution

2.7.2 First Amendment

"Without question, solicitation of funds 'is a form of speech protected under the First Amendment.' [*Int'l Soc'y for Krishna Consciousness, Inc. v Lee (Lee I)*, 505 US 672, 677 (1992)]. The Supreme Court, however, has traditionally afforded solicitation less protection than other forms of speech. Compare *Lee v Int'l Soc'y for Krishna Consciousness, Inc.* (Lee II), 505 US 830, 831 (1992) (per curiam) (invalidating the Port Authority's ban on literature distribution in New York City's airport terminals), with *Lee I*, 505 US at 683–85 (upholding the Port Authority's ban on solicitation in New York City's airport terminals), *United States v Kokinda*, 497 US 720, 733–37 (1990) (plurality opinion) (upholding a federal regulation banning solicitation on U.S. Post Office premises, including adjacent sidewalks), and *Heffron v Int'l Soc'y for Krishna Consciousness, Inc.*, 452 US 640, 654–56 (1981) (upholding a rule restricting solicitation to designated booths within the Minnesota State Fairgrounds). This is so, the Court has said, because of 'the disruptive effect that solicitation may have.' *Lee I*, 505 US at 683; *see also Kokinda*, 497 US at 736 (explaining that 'solicitation is inherently more disruptive than other speech activities'). *Internat'l Society for Krishna Consciousness v City of Los Angeles*, __ F3d __ (9th Cir 8/20/14).

2.8 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, amendment I

2.8.1 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: *Gitlow v New York*, 268 US 652 (1925) (speech); *Near v Minnesota ex rel Olson*, 283 US 697 (1931) (press); *Cantwell v Connecticut*, 310 US 296 (1940) (free exercise); *De Jonge v Oregon*, 299 US 353 (1940) (assembly); *Everson v Board of Education of Ewing*, 330 US 1 (1947) (establishment). *McDonald v City of Chicag*o, 130 S Ct 3016, 3034 n 12 (2010) (so reciting).

2.8.2 State Action

State action is subject to the First Amendment (through the Fourteenth Amendment). Private conduct is not.

"The state action doctrine is designed to preserve an area of individual freedom free of constitutional restraints and to avoid the imposition of responsibility on a state for conduct it cannot control, but it is also intended to ensure that constitutional standards are invoked when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains.'" *O'Connor v Clackamas County* (Case No. 3:11-cv-1297-SI) (D Or 2012) (quoting *Brentwood Academy v Tennessee Secondary School*, 531 US 288, 295 (2001)).

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*, 531 US at 295.

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.

"State action exists when: (1) a private party carries out a function that has been historically and traditionally the prerogative of the state, *see, e.g., Flagg Bros. v Brooks*, 436 US 149, 157-58 (1978), *West v Atkins*, 487 US 42 (1988); (2) the state has ordered the private conduct or 'exercised coercive power over" the conduct or provided significant encouragement, overt or covert, so that the "choice must in law be deemed to be that of the State,' *see, e.g., Blum v Yaretsky*, 457 US 991, 1004 (1982); (3) a private party jointly participates in alleged constitutional wrongdoing with a state or local official engaged in state action, *see, e.g., [Lugar v Edmondson Oil Co., Inc.*, 457 US 922, 941 (1982)], *Dennis v Sparks*, 449 US 24, 27-28 (1980); or (4) the state is pervasively entwined with a private association, *see, e.g., Evans v. Newton*, 382 U.S. 296, 299, 301 (1966); *Brentwood Acad.*, 531 U.S. at 302." *O'Connor v Clackamas County* (Case No. 3:11-cv-1297-SI) page 27 (D Or 2012).

On state action, see also *Rendell-Baker v Kohn*, 457 US 830 (1982) and *National Collegiate Athletic Ass'n v Tarkanian*, 488 US 179 (1988). See also *Webber v First Student, Inc.*, 928 F Supp 2d 1244, 1249 (D Or 2013) (Section 1983 action); *Giulio v BV Centercal, LLC*, 815 F Supp 2d 1162, 1177 (D Or 2011) (Section 1983 action for violations of First, Fourth, Fifth, and Fourteenth Amendments).

Note: the requirement under § 1983 that the challenged conduct be taken "under color of state law" is the same as the "state action" required under the Fourteenth Amendment. *Lugar v Edmondson Oil Co., Inc.*, 457 US 922, 928-29 (1982).

2.8.3 Speech ***not*** protected 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). 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." *Brown v Entertainment Merchants Ass'n*, 131 S Ct 2729 (2011).

"There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or fighting words – those which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v New Hampshire*, 315 US 568, 571-72 (1942) (The words "'damned racketeer' and 'damned Fascist' are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace.").

"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 2010) (en banc) *cert denied*, 132 S Ct 112 (2011) (Kozinski, CJ, concurring) (city council meeting attendee's sarcastic "Nazi" salute given to city council during public comment period of meeting was protected by First Amendment).

Speech that the First Amendment does not protect or that has heightened standards:

- **Legislators' votes**. A legislator's vote is not protected speech. A legislator's power is not personal to him but belongs to the people. *Nevada Comm'n on Ethics v Carrigan*, 131 S Ct 2343 (2011).
- **Obscenity.** *Brown v Entertainment Merchants Ass'n*, 131 S Ct 2729 (2011) (obscenity, incitement, and fighting words "have never been thought to raise any Constitutional problem"); *Miller v California*, 413 US 15, 23 (1973).
- **Fighting words**. *Chaplinsky v. New Hampshire*, 315 US 568, 571-72 (1942); *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).
- **Lying, defamation, fraud, and <u>some</u> false statements of facts**. 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. *United States v Gilliland*, 312 US 86, 93 (1941); *New York Times v Sullivan*, 376 US 254 (1964) (public official alleging defamation must show "actual malice" that the statement was published with "knowledge that it was false or with reckless disregard of whether it was false or not"); *Gertz v Robert Welch, Inc.*, 418 US 323, 340 (1974) (negligence standard for private defamation actions); *R.A.V. v City of St. Paul*, 505 US 377, 391-92 (1992); *United States v Alvarez*, 132 S Ct 2537, 2546-47 (2012). Commercial speech that is false, misleading, or proposes illegal transactions is unprotected, see *Central Hudson Gas & Electric Corp v Pub Serv Comm'n of New York*, 447 US 557, 562, 566-67 (1980). But speech is not unprotected merely because the speaker knows he is lying, *United States v Alvarez*, 132 S Ct 2537, 2545-47 (2012) (plurality struck a statute that criminalized lying about receiving a military medal).
- **True threats**. *Watts v United States*, 394 US 705, 708 (1969).
- **Advocacy that imminently incites lawless action**. *Brandenburg v Ohio*, 395 US 444, 447-48 (1969); *Hess v Indiana*, 414 US 105, 108 (1973) (but mere advocacy of illegal action at some indefinite future time is not sufficient).
- **Speech Integral to Criminal Conduct.** *Giboney v Empire Storage & Ice Co.*, 336 US 490, 498 (1949).
- **Child Pornography** made with real children. *Ashcroft v Free Speech Coalition*, 535 US 234, 245-46 (2002); *New York v Ferber*, 458 US 747, 764-65 (1982).

Obsidian Finance Group et al v Cox, 740 F3d 1284 (9th Cir), *cert denied* 134 S Ct 2680 (2014). Defendant published blog posts accusing plaintiffs of fraud, corruption, money-laundering, and other illegal acts regarding a bankruptcy. The individual plaintiff

is a bankruptcy trustee. Plaintiffs issued a "cease-and-desist letter" but she continued posting. Plaintiffs sued. See Janine Robben, OREGON STATE BAR BULLETIN, April 2012, www.osbar.org/publications/bulletin/12apr/posterchild.html and David L. Hudson, Jr., AMERICAN BAR ASSOCIATION JOURNAL, July 2014, www.abajournal.com/magazine/article/should_bloggers_count_as_journalists_in_defamation_suits/.

The district court permitted one claim to go to the jury (that an individual plaintiff as bankruptcy trustee failed to pay $174K in taxes). The district court had decided that despite defendant's First Amendment defenses, plaintiffs were not required to prove either negligence or actual damages because defendant did not submit evidence that she was a journalist, and also neither of the plaintiffs were "all-purpose public figures" or "limited public figures" or that the blog post referred to a matter of public concern. In short the district court concluded that "a showing of fault was not required to establish liability" and presumed damages. The jury found for plaintiffs, awarding $2.5 million in compensatory damages.

On appeal, defendant did not contest the jury's conclusion that her post was false and defamatory. She only challenged the district court rulings that she could be liable without showing fault or actual damages and that plaintiffs were not public officials.

New York Times v Sullivan, 376 US 254, 280 (1964) "held that when a public official seeks damages for defamation, the official must show 'actual malice' – that the defendant published the defamatory statement 'with knowledge that it was false or with reckless disregard of whether it was false or not.'" And *Gertz v Robert Welch, Inc.*, 418 US 323, 350 (1974) "held that the First Amendment required only a 'negligence standard for private defamation actions." This case involves the internet which was "entirely unknown at the time of those decisions." Also, this case involves an individual speaker rather than "the institutional press."

This is an issue of first impression in the Ninth Circuit. "But every other circuit to consider the issue has held that the First Amendment defamation rules in Sullivan and its progeny apply equally to institutional press and individual speakers. * * * We agree with our sister circuits."

"In defamation cases, the public-figure status of a plaintiff and the public importance of the statement at issue – not the identity of the speaker – provide the First Amendment touchstones. We therefore hold that the *Gertz* negligence requirement for private defamation actions is not limited to cases with institutional media defendants." "We hold that liability for a defamatory blog post involving a matter of public concern cannot be imposed without proof of fault and actual damages."

The "district court should have instructed the jury that it could not find [defendant] liable for defamation unless it found that she acted negligently. * * * The court also should have instructed the jury that it could not award presumed damages unless it found that [defendant] acted with actual malice." Finally, a bankruptcy trustee is not a public official.

2.8.4 Schools

See Fourth Amendment "Special Needs" in the Fourth Amendment context in **Section 4.8.17**.

Generally. Students' First Amendment claims against public schools start with *Tinker v Des Moines Independent Community School District*, 393 US 503 (1969). Under *Tinker*, schools may prohibit speech or expressive conduct (such as a black armband protesting war) only if that

speech might materially disrupt classwork or invade other students' rights to be secure and left alone. *Tinker*, 393 US at 508, 513-14. To limit students' speech, and especially to justify prohibiting expression of a viewpoint, the schools must show that their action was caused by "more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. *Id.* at 509. In *Tinker*, there was no evidence that the students' black armbands protesting war interfered with anything in school and the school failed its burden to show disruption. See also *Dariano v Morgan Hill Unified School District*, __ F3d __ (9th Cir 02/27/14) (upholding summary judgment for school that banned clothing with American flags after receiving several threats of race-related violence).

Vulgar or Obscene. Students' First Amendment claims involving what schools ban as vulgar, lewd, or obscene usually are governed by *Bethel School District v Fraser*, 478 US 675 (1986).

Illegal Drug Promotion. Schools may suppress student speech that is not disruptive and occurs off-campus during a school field trip if it promotes illegal drug use. *Morse v Frederick*, 551 US 393 (2007) (14-foot long banner stating "Bong Hits 4 Jesus" unfurled on public street during a school field trip). Note: This may, or may not, be permission for schools to engage in viewpoint discrimination. On one hand, the banner Frederick held appears to promote religion or drug use. On the other hand, Frederick later stated: "The phrase was not important. I wasn't trying to say anything about religion. I wasn't trying to say anything about drugs. I was just trying to say *something*. I wanted to use my right to free speech, and I did it." Robert Barnes, *Justices to Hear Landmark Free-Speech Case*, THE WASHINGTON POST, 3/13/07 (www.washingtonpost.com/wp-dyn/content/article/2007/03/12/AR2007031201699.html.

Chapter 3: Religion, Love, and Economics

3.1 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

"**Persons whose religious tenets, or conscientious scruples forbid them to bear arms shall not be compelled to do so in time of peace, but shall pay an equivalent for personal service**." -- Article X, section 2, Or Const

3.1.1 Origins

See Charles Hinkle, *The Religion Clauses*, Oregon Constitutional Law Manual (2013), www.osbar.org/secured/barbooks/viewchapter.asp?bid=85&cid=2334.

Maryland's Toleration Act of 1649 was the first colonial law to use the phrase "free exercise of religion," later embodied in the First Amendment. Leonard W. Levy, *Origins of the Bill of Rights* 6 (1999). Rhode Island, Pennsylvania, Delaware, and New Jersey also granted freedom of religion in their colonies before 1776. *Ibid*. In contrast, other colonies excluded non-Christians before and after the First Amendment's ratification. A charter in Connecticut that existed from 1662 to 1818, for example, declared that maintaining Christianity "is the only and principal end of this plantation." Jacob Rader Marcus, EARLY AMERICAN JEWRY, VOL. I (1649-1794) 161 (1951).

The Northwest Ordinance of 1787, section 13, provided for the extension of "the fundamental principles of civil and religious liberty" in the Territories Northwest of the Ohio River. Its first

article provided: "No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship or religious sentiments, in the said territory." Northwest Ordinance of 1787, section 14, art. 1.

"By 1834, no state in the Union [had] an established church, and the tradition of separation between church and state would seem an ingrained and vital part of our constitutional system." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV L REV 1409, 1437 (1990).

Each of Articles 1 through 7 of the Oregon Constitution are either similar or identical to corresponding articles of the Indiana Constitution of 1851. WC Palmer, *The Sources of the Oregon Constitution*, 5 OR L REV 200, 201 (1926). But the bill of rights that a delegate reported to Oregon's constitutional convention in 1857 "differed most from the Indiana model in its treatment of organized religion and immigration rights." David Alan Johnson, FOUNDING THE FAR WEST 178 (1992). All references to "God" and "Creator" were removed from Indiana's text when brought for debate in the Oregon convention. *Ibid*. Indiana's 1851 Constitution's religion clauses appear to be adopted from Indiana's earlier Constitution of 1816, and "it did not copy or paraphrase the 1791 language of the federal First Amendment." *City Chapel Evangelical Free, Inc. v City of South Bend*, 744 NE2d 443,445-50 (Ind 2001) ("Even by the time of Indiana's initial Constitution in 1816, religious liberty provision in other states were broadly construed.").

An Oregon commentator finds a "secularizing impulse" in the framers' religion clauses of the Oregon Constitution. Charlie Hinkle, *Article I, Section 5: A Remnant of Prerevolutionary Constitutional Law*, 85 OR L REV 541, 553 (2006). The convention's history, including [one framer's stated] 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.

Note: There was a non-secularizing force in Oregon's Constitutional Convention. Some framers were *not* secular. For example, at the convention, the provision against using public money for religious services drew the ire of some framers, as reported in Charles Henry Carey, HISTORY OF THE OREGON CONSTITUTION 296-303 (1926):

> • The provision is "a bill of wrongs!" "It is a disregard of the injunctions of the New Testament". (Campbell).
> • "[Y]ou could not find in any country claiming to be Christian a provision of this character * * * Why, sir, that is worse than infidelity. It is a disgrace to any country." (Dryer).
> • The provision "was intended as a slur * * * at religion itself." (Watkins).
> • "[T]he action of this convention has cast indirectly a slur upon [the peoples'] religious faith and practices, or upon their creed." (Farrar).

But advocating for separation of church and state, others retorted:

> "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 * * * Let us take the step farther, and declare a complete divorce of church and state." (Grover).

3.1.2 Interpretation

"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).

"A law that is neutral toward religion or nonreligion as such, that is neutral among religions, and that is part of a general regulatory scheme having no purpose to control or interfere with rights of conscience or with religious opinions does not violate the guarantees of religious freedom in Article I, sections 2 and 3." *Meltebeke v Bureau of Labor & Indus.*, 322 Or 132 (1995) (employment case).

The Oregon Supreme Court has assumed that Article I, section 3, of the Oregon Constitution extends protection to nontraditional religious practices, such as satanism, under *Cooper v Eugene School District No. 4J*, 301 Or 358, 371 (1986). *State v Brumwell*, 350 Or 93 (2011), *cert denied* 132 S Ct 1028 (2012). The US District Court for the District of Oregon has assumed that the Oregon Constitution also protects the Wiccan religion. *Luke v Williams*, No. CV 09-CV-307-MO (D Or 2010).

Oregon "statutes permit a parent to treat a child by prayer or other spiritual means so long as the illness is not life threatening. However, once a reasonable person should know that there is a substantial risk that the child will die without medical care, the parent must provide that care, or allow it to be provided, at the risk of criminal sanctions if the child does die." *State v Hays*, 155 Or App 41, 47, *rev den* 328 Or 40 (1998); *State v Beagley*, 257 Or App 220, 225 (2013).

> ***State v Hickman***, (A150127) *review allowed* __ Or __ (S061896) (2014) See www.youtube.com/watch?v=IP8t9bpUOgE .
>
> (The Oregon Supreme Court heard oral argument October 8, 2014). The two defendants, husband and wife, are members of the Followers of Christ Church in Oregon city. Defendant Shannon Hickman went into labor two months before her due date and deliberately avoided any medical care during her pregnancy. She and defendant Dale Hickman chose to have the baby in her mother's home. At birth, the baby weighed 3 pounds, 7 ounces, but was breathing and pink. Then the baby turned grey struggled to breathe. Rather than call a doctor, or 911, the midwives put oil on him and prayed, per their religious beliefs. The baby died nine hours after his birth. If defendants had taken the baby to the hospital, experts testified that he had a 90-99% chance of surviving what an autopsy determined to have been treatable staph pneumonia. Shannon Hickman testified that as a woman in the church, she must defer to her husband, who decided to pray rather than call a doctor. "That's not my decision anyway," she said. "I think it's God's will whatever happens." A jury convicted them of second-degree manslaughter. They were sentenced to six years in jail. The Court of Appeals summarily affirmed.
>
> On review, the Oregon Supreme Court may address Article I, sections 2 and 3, of the Oregon Constitution, and faith-healing under *Meltebecke v Bureau of Labor & Industries*, 322 Or 132 (1995).

3.1.2 First Amendment

A. Anti-Establishment Clause

The Establishment Clause prohibits the Government from compelling an individual to participate in religion or its exercise, or otherwise from taking action that has the purpose or effect of promoting religion or a particular religious faith. *See Lee v Weisman*, 505 US 577, 587 (1992).

"The touchstone * * * is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.' " *McCreary County, Ky. v ACLU*, 545 US 844, 860 (2005) (quoting *Epperson v Arkansas*, 393 U.S. 97, 104

(1968)). Establishment Clause violations are determined according to the three-pronged test articulated in *Lemon v Kurtzman*, 403 US 602, 612–13 (1971) ("*Lemon* test"). A statute or regulation will survive an Establishment Clause attack if (1) it has a secular legislative purpose, (2) its primary effect neither advances nor inhibits religion, and (3) it does not foster excessive government entanglement with religion. *Id. See Williams v California*, _ F3d __ (9th Cir 2014) (so noting).

B. Free Exercise Clause

The Free Exercise Clause guards an individual's practice of her own religion against restraint or invasion by the Government. *See School District of Abington Township v Schempp*, 374 US 203, 222–23 (1963).

To establish a violation of the Free Exercise Clause, a plaintiff must show that the challenged conduct resulted in an impairment of the plaintiff's free exercise of genuinely held beliefs. *United States v Lee*, 455 US 252, 256–57 (1982). However, "every person cannot be shielded from all burdens incident to exercising every aspect of the right to practice religious beliefs." *Id*. at 261. "[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Employment Division v Smith*, 494 US 872, 879 (1990); *see also Christian Legal Soc. Chapter v Martinez*, 561 US 661 (2010) ("[T]he Free Exercise Clause does not inhibit enforcement of otherwise valid regulations of general application that incidentally burden religious conduct."). *Williams v California*, __ F3d __ (9th Cir 2014) (No. 12–55601).

The free exercise of religion means the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment prohibits all "governmental regulation of religious beliefs as such." *Sherbert v Verner*, 374 US 398, 402 (1963). Further, the government may not compel affirmation of religious belief, *Torcaso v Watkins*, 367 US 488, 496 (1961), punish the expression of religious doctrines it believes to be false, *United States v Ballard*, 322 US 78, 86–88 (1944), impose special disabilities on the basis of religious views or religious status, *McDaniel v Paty*, 435 US 618, 629 (1978), or lend its power to one or the other side in controversies over religious authority or dogma, *Presbyterian Church v Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 US 440, 445–47 (1969). *Williams v California*, __ F3d __ (9th Cir 2014) (No. 12–55601).

"In addition to belief, the Free Exercise Clause also protects the performance of (or abstention from) physical acts that constitute the free exercise of religion: 'assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation.' [*Employment Division v Smith*, 494 US 872, 877 (1990).] As the Supreme Court has instructed, however, the Free Exercise Clause 'does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' *Id*. at 879 (quoting *United States v Lee*, 455 US 252, 263 n 3 (1982) (Stevens, J., concurring in the judgment)) (internal quotation marks omitted). Such laws are subject to rational basis review. See *Commack Self–Serv. Kosher Meats, Inc. v. Hooker*, 680 F3d 194,212 (2d Cir 2012). A law burdening religious conduct that is not both neutral and generally applicable, however, is subject to strict scrutiny. [*Church of the Lukumi Babalu Aye, Inc. v City of Hialeah*, 508 US 520, 531-32, 546 (1993)]. 'Neutrality and general applicability are interrelated,' and 'the failure to satisfy one requirement is a likely indication that the other has not been satisfied.' *Id*. at 531." *Central Rabbinical Congress v New York Dep't of Health*, __ F3d __ (2d Cir 8/15/14).

3.2 Marriage

> "**The property and pecuniary rights of every married woman, at the time of marriage or afterwards, acquired by gift, devise, or inheritance shall not be subject to the debts, or contracts of the husband; and laws shall be passed providing for the registration of the wife's separate [sic] property**." -- Article XV, section 5, Or Const

3.2.1 Origins

Article XV, section 5, on married women's property, is part of the original Oregon Constitution of 1857.

3.2.2 Same-Sex Marriage

Article XV, section 5a, of the Oregon Constitution provides: "It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage." That provision, purporting to invalidate same-sex marriage, was enacted in 2004 by initiative petition.

Oregon's constitutional ban on same-sex marriage was declared unconstitutional in May 2014 by *Geiger v Kitzhaber*, _ F Supp 2d __ (2014 WL 2054264 (May 19, 2014)), (D Or Case No. 6:13-cv-01834-MC), http://media.oregonlive.com/politics_impact/other/OPINION.pdf.

3.2.3 Early Marriage Restrictions (repealed)

> "The nature of injustice is you can't see it in your own times." -- Justice Anthony Kennedy, Remarks at University of California on October 7, 2013, reprinted in THE WALL STREET JOURNAL, A4, 10/11/13.

In June 1844, Oregon's provisional council passed a law prohibiting slavery, requiring slaveholders to remove their slaves within three years, and threatened flogging to any black or mixed-race person who remained in Oregon after two years. In December 1844, the provisional council repealed and replaced its flogging law with an indentured servitude law, where a black person was an "apprentice" to a white man who accepted that apprenticeship, and then had to guarantee the black apprentice's ejection from Oregon. Eugene H. Berwanger, THE FRONTIER AGAINST SLAVERY 80 (1967). Although an 1850 census listed 207 black persons in Oregon, apparently that number included Hawaiians, Indians, and mixed-race persons; only 55 black persons were estimated in Oregon in 1850. *Id.* at 81.

Three reasons have been suggested for white objections to black citizenship in Oregon. One is economic competition for jobs. A second reason is the "dumping ground" argument: states did not want free former slaves to immigrate. A third reason is "the fear of miscegenation" – intermarriage. Berwanger at 33-36, 139. That last point "was too often raised to be overlooked." *Id*. at 36. Indiana, Illinois, Iowa, and Michigan forbade intermarriages and invalidated those that had been performed. *Ibid*. In 1847, an Illinois politician at the Illinois Constitutional Convention declared that if blacks could immigrate, they would "make proposals to marry our daughters." *Ibid*.

In 1862, Oregon lawmakers rendered "absolutely void" a marriage "on account of either of them being of one fourth or more of negro blood." Title VII, section 486, THE ORGANIC AND OTHER GENERAL LAWS OF OREGON (1874). Anyone who performed a prohibited marriage ceremony was subject to one year in prison and a $100 fine. *Id.*; *see also* Cheryl A. Brooks, *Race, Politics, and Denial: Why Oregon Forgot to Ratify the Fourteenth Amendment*, 83 OR L REV 731, 740, 743 (2004). In 1866, the intermarriage ban expanded to include other minorities. See Oregon Historical Society reproduction of the Oregonian's publication of that Act on November 2, 1866, http://ohs.org/education/oregonhistory/historical_records/dspDocument.cfm?doc_ID=16F99FAD-AADF-7E49-C10198BB87555DF6. Oregon repealed its interracial-marriage ban in 1951. 1951 Or Laws 792; Brooks at 749-51.

Consistent with that law, the Oregon Constitution had provided: "No free negro or mulatto, not residing in this state at the time of the adoption of this constitution, shall come, reside or be within this state, or hold any real estate, or make any contracts, or maintain any suit therein; and the legislative assembly shall provide by penal laws for the removal by public office of all such negroes and mulattoes, and for their effectual exclusion from the state, and for the punishment of persons who shall bring them into the state, or employ or harbor them." Article I, section 35, Oregon Constitution. That provision was superseded by the Fourteenth Amendment to the United States Constitution. Oregon repealed that law in 1926.

Forty-seven of the 60 members of Oregon's constitutional convention had lived in the Middle West before Oregon and 25 men came from southern slave states. Eugene H. Berwanger, THE FRONTIER AGAINST SLAVERY 80 (1967). Thus, the anti-black story was repeated in Oregon. As Ohio, Indiana, Illinois, Michigan, Iowa, and Wisconsin had done before Oregon's constitutional convention in 1857, Oregon (white male) voters decided to keep suffrage to themselves, with 89% voting that "No negro, chinaman, or mulatto shall have the right of suffrage." Article II, section 6, Oregon Constitution (superseded by the Fourteenth Amendment and *The Slaughterhouse Cases*, 16 Wall 36 (1873)); David Alan Johnson, FOUNDING THE FAR WEST 278 (1992); Berwanger, 32-33, 40-41. Additionally, the Oregon Constitution further provided: "No chinaman, not a resident of the state at the adoption of this constitution, shall ever hold any real estate or mining claim, or work any mining claim therein. The legislative assembly shall provide by law in the most effectual manner for carrying out the above provision." Article XV, section 8, Oregon Constitution.

Oregon ratified the Fifteenth Amendment in 1951. 1959 Or Laws 1511; *see also* Cheryl A. Brooks, *Race, Politics, and Denial: Why Oregon Forgot to Ratify the Fourteenth Amendment*, 83 OR L REV 731, 751 (2004).

Oregon ratified the Fourteenth Amendment in 1959. 1973 Or Laws 2865-66; Brooks at 753-54, 760.

Chapter 4: Privacy - Search or Seizure and Warrants

"**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

"**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, United States Const

4.1 Introduction

4.1.1 Origins

The wording of Article I, section 9, is similar to its counterpart in the Indiana Constitution of 1851. WC Palmer, *The Sources of the Oregon Constitution*, 5 Or L Rev 200, 201 (1926). (The Indiana Constitution of 1851 is here: www.in.gov/history/2466.htm).

There is no reported debate on Article I, section 9, during the Oregon Constitutional Convention. Claudia Burton & Andrew Grade, *A History of the Oregon Constitution of 1857*, 37 WILLAMETTE L REV 469, 515 (2001).

Oregon judge Matthew Deady was a primary force in the Oregon Constitutional Convention. David Alan Johnson, FOUNDING THE FAR WEST 144 (1992) ("six men stood out"). Deady wrote later 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. * * * 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.).

Note: That may just be Deady's backward-looking view as just one of the 60 convention delegates. Among other reactionary, conservative views, "Deady promoted Southern proslavery views" and "remained committed, to the end of his life, to a complex strain of eighteenth-century ideas." Johnson, FOUNDING THE FAR WEST at 152; David Schuman, *The Creation of the Oregon Constitution*, 74 OR L REV 611, 617 (1995) (noting that as a Constitutional Convention delegate candidate, Deady ran as "an avowed pro-slavery advocate").

"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." Jack 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).

"Beyond the fact that [Article I, section 9] was obviously based on the Fourth Amendment, there is a complete absence of direct historical evidence of what the framers intended or what the voters understood about the provision. It was adopted without discussion in the constitutional convention, and there is no record of public debate about it during ratification. * * * Any attempt to reconstruct what the framers of voters might have intended in adopting Article I, section 9, will yield only speculation." *State v Hemenway*, 353 Or 129 (2013) (Landau, J, concurring), *vacated as moot* 353 Or 498 (2013) ("the majority is correct in rejecting the state's contention that we should interpret the search and seizure clause of Article I, section 9, to reflect only the intentions or understandings of its framers in 1857.").

4.1.2 Interpretation

"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 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).

Oregon courts rarely cite *Priest v Pearce*, 314 Or 411 (1992) as the interpreted method for Article I, section 9, cases. However, a few cases have ventured to cite *Priest v Pearce*: "[w]e consider the "specific wording [of Article I, section 9], the case law surrounding it, and the historical circumstances that led to its creation. *See Priest v Pearce*, 314 Or 411, 415-16, 840 P2d 65 (1992) (stating methodology for interpreting original constitutional provisions)." *State v Carter*, 342 Or 39 (2006). Note that *Carter* does not cite any prior Article I, section 9, case applying *Priest v Pearce*.

4.2 Probable Cause

"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).

"'Probable cause' has the same meaning throughout [state and federal] constitutional and statutory requirements." *State v Marsing*, 244 Or App 556, 558 n 2 (2011).

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). "The probable cause analysis for a warrantless search is the same as for a warranted one." *State v Foster*, 350 Or 161 (2011) (citing *State v Brown*, 301 Or 268, 274-76 (1986)).

Probable cause requires that an "officer must subjectively believe that a crime has been committed and thus that a person or thing is subject to seizure, and this belief must be objectively reasonable in the circumstances." *State v Owens*, 302 Or 196, 204 (1986).

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." *State v Foster*, 350 Or 161 (2011). "Probable cause depends on whether an incriminating explanation remains a probable one, when all of the pertinent facts are considered." *Id*.

4.3 Fourth Amendment

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).

"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)." *Kentucky v King*, 563 US __, 131 S Ct 1849 (2011). But "the text of the Fourth Amendment does not specify when a search warrant must be obtained." *Fernandez v California*, 134 S Ct 1126 (2014) (quoting *Kentucky v King*, at slip op 5).

On originalism: "We have no doubt that such a physical intrusion [installing a GPS tracker on a car without consent or a valid warrant] would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted." (Citing *Entick v Carrington*, 95 Eng. Rep. 807 (C.P. 1765)). That would have been a common law trespass. "Whatever new methods of investigation may be devised, our task, *at a minimum* is to decide whether the action in question would have constituted a 'search' within the original meaning of the Fourth Amendment." *United States v Jones*, 132 S Ct 945 (2012).

4.4 Protected Interests

4.4.1 State Action

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*); cf. Lund v Chase Bank*, Case No. 6:14-CV-00448-AA (D Or 6/26/14) ("the complaint is does not set forth any factual allegations regarding how defendant's conduct, as that of a private bank, qualifies as state action. * * * This omission is dispositive as to plaintiff's claims under the Oregon Constitution").

See also **Section 2.8.2** on the Fourteenth Amendment and "state action" determinants.

> ***State v Sines***, 263 Or App 343 (6/04/14) (Deschutes) (Duncan, Armstrong, Brewer pro tem) Defendant's maid and defendant's assistant suspected that he was raping his 9-year old daughter. Maid called DHS anonymously and told DHS worker that she was thinking about stealing a pair of the child's underwear because the underwear contained evidence of the crimes. DHS worker told maid that he could "hook her up" with someone in law enforcement who could have the underwear tested. Maid asked DHS worker what would happen if she took the underwear. DHS worker told her several times that he could not tell her to take the underwear. But DHS worker gave maid his direct phone number and called the sheriff. DHS rules require a safety check within 24 hours of such a report. But DHS worker and the sheriff's lieutenant decided to "assign the case as a five-day response

instead," because the DHS worker thought there was "a good likelihood that the case was going to get stronger" when the maid "made her decision."

The maid and the assistant decided to steal the child's underwear. The assistant went into defendant's the laundry room, took a pair that had "a large amount" of evidence in it, left defendant's house, and gave the underwear to the maid at maid's house. Maid called DHS worker, who told her to put the underwear into a paper bag to preserve evidence. DHS worker arranged for the maid to bring the underwear to sheriff's deputies, who all met at a Wal-Mart parking lot. The maid asked the deputy: "Did I do good by bringing this bag?" Both defendant's maid and his assistant testified that they took the underwear to assist law enforcement. Deputies immediately took the underwear to the OSP crime lab.

The OSP crime lab then tested the underwear without a warrant. The child's underwear had sperm on it. Deputy then prepared an application for a search warrant based on that evidence and information he had gathered from defendant's maid, his assistant, and the DHS worker. That night, defendant was arrested and more property was taken, including the child's nightgown, pajama pants, a swimsuit, and jeans, all of those items had sperm on them, and the nightgown had evidence of seminal fluid.

Defendant was charged with numerous sex-related crimes against his daughter and his son. He moved to suppress all evidence seized and searched without a warrant. The trial court denied the motion on grounds that no state action was involved in taking the underwear.

The Court of Appeals reversed. The state's argument was only that no state action was involved; the state did not make an argument under any exception to the warrant requirement. The Court of Appeals concluded: "Although this case presents a close question, we conclude that the state was sufficiently involved that the seizure of the underwear was state action." The court so concluded because the DHS worker:

- did not tell the maid <u>not</u> to take the underwear;
- knew the maid likely would take the underwear;
- deliberately delayed the safety check to the maid time to take the underwear;
- failed to say anything to prevent the maid from taking the underwear;
- offered the sheriff's support if the maid took the underwear ("hook you up").

The court also cited a legal treatise from 1994 that states: "parents retain property rights in items, like clothing, provided to their children for support or maintenance," so the Court of Appeals decided that the child's underwear belonged defendant rather than to his daughter he was raping.

The error was not harmless. And the defendant established the "minimal factual nexus" between the illegal seizure and testing of the underwear and the issuance of the warrant. The state made no showing that the evidence did not derive from that seizure.

4.4.2 Privacy Rights – Searches Defined

A. Generally

The state 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 search occurs if the state's action "will significantly impair

the peoples' freedom from scrutiny" if the state engages in it "wholly" at its discretion. *Campbell*, 306 Or at 171; *State v Holiday*, 258 Or App 601 (2013).

"[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 den* 345 Or 381 (2009).

"An individual either has a protected privacy interest or does not; the existence of such an interest does not depend on the reasonableness of the individual's subjective expectations in various circumstances." *Weber v. Oakridge School District 76*, 184 Or App 415, 426, 56 P3d 504 (2002), *rev den*, 335 Or 422 (2003).

To determine "what constitutes a protected privacy interest" (a "search"), the "focus tends to be on the place." "[D]ivining whether a person has a cognizable privacy interest in a place requires an assessment of the social norms that bear on whether a member of the pubic * * *would have felt free to enter the place without permission." Then to "discern the norms that would inform a person's conduct, courts look to societal cues that are used by people to determine the appropriate behavior for them to follow in seeking to enter a place. Those cues most often take the form of barriers to public entry into a place," with examples being window coverings, fences, no trespassing signs. *State v Mast*, 250 Or App 605 (2012) (person has a protected privacy interest in his office with a door in a larger office).

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).

B. Specific Examples

"Every man's house is his castle" and even a public restroom is a "bastion of privacy." People have protected privacy interests in bathrooms while doing various acts alone. *State v Owczarzak*, 94 Or App 500, 502 (1988); *State v Holiday*, 258 Or App 601 (2013); see also *State v Lange*, 264 Or App 126 (2014) (café bathroom).

When a text message arrives at another person's phone, the sender "lost all ability to control who saw that message. As a result, under Article I, section 9," the sender "had no protected privacy interest in the digital copy of the message." *State v Carle*, 266 Or App 102 (2014).

No specific privacy right exists in license plates when on public ways: A person's "driver's license and car registration records were created by the state for its own purposes, just as in *Johnson*, where the cellular telephone provider's records were created for the provider's own purposes. The state has a substantial administrative interest in confirming that only licensed persons drive properly registered vehicles on public roads. ORS 803.300 requires vehicles to be registered. ORS 803.540 requires vehicles to display registration plates, in part, as confirmation that the vehicles are registered. ORS 803.550 prohibits obscuring registration plates. The state can access a person's driving records by observing a driver's registration plate that is displayed in plain view and looking up that registration plate number in the state's own records. *See Higgins v DMV*, 335 Or 481, 487 (2003) ("The characters that the state assigns to a vehicle's registration plates facilitate the prompt identification of the vehicle for law enforcement purposes."). Indeed, the state has created an electronic system that allows authorized agencies and government entities to access the driving records of individuals and vehicles. *See* ORS 181.730 (establishing the Law Enforcement Data System). *State v Davis*, 237 Or App 351, 356-57 (2010), *aff'd by an equally divided court*, 353 Or 166 (2013) (defendant did not have an inherent privacy interest in his driving records and the state did not create such an interest).

Testing for nystagmus is a "search" that requires a warrant or an exception to the warrant requirement under Article I, section 9. *State v McCrary*, __ Or App __ (2014). "A search does

not occur in readily apparent observations of an individual's physical appearance." "To constitute a search, the examination requires something more than observation of a physical characteristic that a person plainly manifests to the public." Examples of private conditions are "one's pulse or the content of one's breath, blood, and urine." Similarly, "[r]evealing the presence of nystagmus implicates potential medical facts that an individual may well wish to keep private."

> ***State v Carle***, 266 Or App 102 (10/08/14) (Marion) (Sercombe, Hadlock, Tookey) Police found a man sleeping in a stolen truck. Police arrested the man, found a cell phone on him, and found another one on the truck visor. The man told police that phone on the visor was not his and it belonged to "Duane." While officers searched the truck, a text message came through to Duane's phone from "Angel" that said "do you know anybody that wants a 30." One officer texted back "maybe" and gave the phone to his partner who was a narcotics detective. Detective and Angel texted back and forth for several hours, Angel agreed to meet him at a place in Salem, and she texted that she was about to arrive, and police read her her *Miranda* rights, and she consented to a search of her hone, which contained the texts to/from Duane's phone. She made incriminating statements. She moved to suppress evidence of the initial text she made to Duane's phone, plus the evidence during the subsequent police investigation. She contended that she did not "assume the risk" that she might be texting a detective. The trial court denied the motion on grounds that she did not have a constitutionally protected privacy interest in Duane's phone or in the text messages that she sent.
>
> The Court of Appeals affirmed in this case of first impression. Defendant did not retain any protected privacy in the text message that she sent to Duane after it was delivered to his phone. Whether "the government" (the state) "invaded a person's protected privacy interest" is determined by "an objective test" rather than a subjective test under *State v Wacker*, 317 Or 419, 425 (1993). The searched phone was not defendant's phone. "Accordingly," the Court wrote, "we are not concerned with any privacy interest that defendant had in any digital copies of the sent text messages on her own phone. Nor are we concerned with what privacy interests Duane had with respect to the text messages on his phone" because Duane is not seeking suppression, see *State v Makuch/Riesterer*, 340 Or 658, 670 (2006).
>
> The Court of Appeals compared the text to garbage one sends to a sanitation company. Once a trash company takes garbage, the garbage owner "retained no more right to control the disposition of the garbage" than if they had "abandoned it" under *State v Howard/Dawson*, 342 Or 635, 643-44 (2007). Here, "just as the defendants in Howard/Dawson had given up control of the property they gave to their sanitation company, defendant lost the ability to control the dissemination of the digital copy of the message stored on Duane's phone. The recipient could show that copy to anyone in his presence, or he could instantaneously forward it along to anyone with a cell phone."
>
> Her subjective expectation of privacy does not determine the matter. "When defendant sent a text message to Duane's phone, she may have expected that police would not see it. But once a copy of the text message arrived on Duane's phone, defendant lost all ability to control who saw that message. As a result, under Article I, section 9, defendant had no protected privacy interest in the digital copy of the message that police found on that phone." No search occurred.

4.4.3 Possessory Rights – Seizures Defined

4.4.3.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).

4.4.3.B Seizure of Persons

"[N]ot every police-citizen encounter rises to the level of a seizure for constitutional purposes." *State v Anderson*, 354 Or 440, 450 (2013). Police "remain free to approach persons on the street or in public places, seek their cooperation or assistance, request or impart information, or question them without being called upon to articulate a certain level of suspicion in justification if a particular encounter proves fruitful. *State v Holmes*, 311 Or 400, 410 (1991). That is true even though the person approached may be discomforted by an officer's inherent authority as such and, for reasons personal to the individual, feel inclined or obliged to cooperate with the officer's request. " *Id*. (Note how the Oregon Supreme Court affirms its opinions as "truth" and addresses police officers' "freedom" rather than citizens'.).

"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) (emphasis in original). The guiding principle is whether the officer has made a "show of authority" that restricts and individual's "freedom of movement." *Id*. at 317.

An "analysis of a defendant's rights under ORS 131.605 to 131.625 is substantially the same as an analysis of a defendant's rights under the search and seizure provisions of the Oregon and federal constitutions. *State v Kennedy*, 290 Or 493, 497 (1981); *see also State v Toevs*, 327 Or 525, 534 (1998) (so stating." *State v Holdorf*, 355 Or 812, 819 (2014). Oregon courts, however, cannot exclude relevant evidence "on the grounds that it was obtained in violation of any statutory provision" unless exclusion is required under constitutions, rules of evidence on privileges and hearsay, or the rights of the press" under ORS 136.432. Id.

The Oregon Supreme Court divides state-citizen encounters into three categories. *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):

> **(1). <u>Mere conversations</u>** between officer and citizen that are free from coercion or interference with liberty are not "seizures" and thus do not require any justification to occur. No suspicion is required if the encounter is just "mere conversation." What constitutes "mere conversation," particularly of people on foot, in parked cars, or as passengers in traffic-stopped cars, remains an interesting area of law. *See State v Beasley*, 263 Or App 29 (2014) (a reasonable person like defendant -- asleep in his lawfully parked car, awakened by officer by knocking on the car window, asking for

defendant's ID and his criminal status, retaining his ID, and asking to run a records check – "would not have felt that the officer was exercising his authority to significantly restrain defendant's liberty or freedom," thus they engaged in mere conversation).

The bottom line: "A mere request for identification made by an officer in the course of an otherwise lawful police-citizen encounter does not, in and of itself, result in a seizure." *State v Backstrand*, 354 Or 392, 410-11 (2013) (shoppers in store). "Thus, we agree with the United States Supreme Court, which has held for purposes of the Fourth Amendment that an officer's questions related to identity or a request for identification do not result in a seizure unless the circumstances of the encounter are 'so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded.' *INS v Delgado*, 466 US 210, 216-17 (1984).'" *Id*. at 410. "[V]erbal police inquiries are not, by themselves, seizures. * * * 'Something more' is required. * * * That something more can be 'the content or manner of questioning, or the accompanying physical acts by the officer, if those added factors would reasonably be construed as "threatening or coercive" show of authority requiring compliance with the officer's request. * * * If an officer does not, by words or conduct, convey such a show of authority, the officer remains free to contact or otherwise engage a citizen to request information and cooperation or to impart information without justification." *State v Anderson*, 354 Or 440, 450-51 (2013) (quoting *Backstrand* and *Ashbaugh*) (passenger in parked car); *see also State v Highley*, 354 Or 459 (2013) (officer did not seize defendant, who was a passenger in a car, by asking for his identification and checking his probation status based on that ID; requests did not implicate Article I, section 9).

(2). "Stops" also known as **"temporary restraints"** are defined in ORS 131.605(6). A stop is a temporary restraint of a person's liberty for investigatory purposes. "For Article I, section 9, purposes, a stop is a type of seizure. *State v Ashbaugh*, 349 Or 297, 308–09 (2010); *State v Kennedy*, 290 Or 493, 498 (1981); *State v Warner*, 284 Or 147, 161–62 (1978)." *State v Morfin-Estrada*, 251 Or App 158 (2012) (walking across street as a traffic infraction). Seizures under Article I, section 9, must be justified depending on where the stop occurs. People can be "stopped" on the street as a traffic infraction, such as for crossing against a light or for nontraffic-code reasons, or they can be "stopped" while shopping or walking or standing.

(i). Nontraffic stops: "[A]lthough an officer needs no justification for engaging in mere conversation with a citizen, he or she must have a reasonable suspicion of criminal activity for a stop." *State v Ashbaugh*, 349 Or 297, 309 (2010); *State v Alexander*, 238 Or App 597, 604 n 1(2010), *rev denied*, 349 Or 654 (2011).

"What distinguishes a seizure (either a stop or an arrest) from a constitutionally insignificant police-citizen encounter 'is the imposition, either by physical force or thorough some "show of authority," of some restraint on the individual's liberty.' *Ashbaugh*, 349 Or at 309. The test is an objective one: Would a reasonable person believe that a law enforcement officer intentionally and significantly restricted, interfered with, or otherwise deprived the individual of his or her liberty or freedom of movement. *Id*. at 316." *State v Backstrand*, 354 Or 392, 399 (2013).

During the course of a nontraffic stop that is supported by reasonable suspicion of criminal activity, 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); *State v Hemenway*, 232 Or App 407 (2009) (state must prove that deputies had "reasonable suspicion of criminal activities" to block defendant's parked truck with their cars). 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.").

(ii). Traffic Stops: Pedestrians, bicyclists, and motorists may be stopped based on traffic code violations, such as crossing against a "Don't Walk" signal. A traffic stop is not an ordinary police-citizen encounter because, in contrast to a person on the street who "may unilaterally 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). But even if a person is walking or biking – not driving – the person comes within the ambit of the traffic stop. Thus a person on foot or biking who is traffic stopped has Article I, section 9, rights of a motorist who is traffic stopped. *State v Jimenez*, 263 Or App 150 (2014) (when officer asked traffic-stopped, on-foot defendant if he was carrying any weapons, his inquiries unrelated to the traffic violation violated defendant's rights under Article I, section 9, unless the officer had reasonable suspicion that defendant had committed or was committing a crime, or the inquiry occurred during an unavoidable lull, or an exception to the warrant requirement applied).

A traffic stop (a stop of walkers, bicyclists, drivers) must be supported by probable cause. *State v Morfin-Estrada*, 251 Or App 158 (2012) (person walking across street stopped for traffic infraction). Other cases, however, state that only reasonable suspicion is required, *see e.g. State v Broughton*, 221 Or App 580, 587 (2008), *rev dismissed*, 348 Or 415 (2010).

Similarly, "[s]topping 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).

(3). Arrests are defined in ORS 133.005(1). An arrest -- 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) (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); *cf. 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.").

See **Sections 4.5.2 and 4.5.3**, *post*, for recent cases on "stops."

State v Zamora-Martinez, 264 Or App 50 (7/02/14) (Washington) (Ortega, DeVore, Garrett) This case is on remand from the Oregon Supreme Court. Although under *State v Backstrand*, 354 Or 392 (2013), *State v Highley*, 354 Or 459 (2013), and *State v Anderson*, 354 Or 440 (2013), a police officer's request for identification is not necessarily a stop, in this case, an ICE officer's request for additional identification "escalated the encounter into a stop and the stop was unsupported by reasonable suspicion." In *Backstrand*, an officer approached defendant in an XXX bookstore and asked for his ID; that was deemed "not a stop." Here, in contrast, police officers arrested every adult at a residence per a search warrant for either immigration violations or drug charges. Then when defendant arrived to retrieve his sister's children, a federal officer in plain clothes wearing a badge identified himself as an immigration officer, asked defendant why he was present, asked for ID, and took his Oregon ID card which according to the Court of Appeals was apparently "satisfactory." But then the constitutional violation occurred: "instead of releasing the children to defendant," the officer "proceeded to ask defendant where he was from and, upon learning that defendant was from Mexico," the officer "requested additional identification" in the presence of at least five other uniformed officers. Defendant produced two obviously forged IDs: a Social Security card and a resident alien card. He was charged with and convicted of a forged instrument. In this case, the Court of Appeals reversed and remanded because

defendant would not have felt free to leave when the ICE officer asked him for additional ID.

State v Thompson, 264 Or App 754 (8/13/14) (Washington) (Schuman SJ, Wollheim, Nakamoto) This case is on remand from the Oregon Supreme Court after *Backstrand*, *Anderson*, and *Highley* were decided on November 21, 2013. Defendant had a "stressful day," went to her friend's apartment, sat on the couch, and three sheriff's deputies displaying badges arrived. They had no warrant but conducted a "knock and talk" at the residence. Two deputies interrogated defendant's friend inside, and the other asked defendant to step outside. Defendant testified that she believed she had no right to refuse his request/command. In this case, "the state failed to produce any evidence that the officer's retention of defendant's identification was brief." Further, the request for consent occurred while officers were investigating a crime in an apartment where defendant was present. Three officers were present. The officer asked defendant to change her location. He took down her identification (name and date of birth). He told her officers suspected drug activity was occurring on the premises, asked why she was there, and asked if she was a drug user, all while retaining her information. Defendant was stopped when the police obtained defendant's consent to search her purse. The trial court had denied defendant's motion to suppress. The Court of Appeals here reversed and remanded.

State v Holdorf, 355 Or 812 (8/07/14) (Linn) (Baldwin) Officers traffic-stopped a vehicle with a driver they knew was a convicted felon running a meth ring with an outstanding warrant. Defendant was in the passenger seat "tweaking" under the influence of meth, in officers' opinions, based on his fidgeting, minimal eye contact, very nervous behavior. Officers asked for his name and date of birth, the warrants check came back clear of any warrant for defendant (although the driver's check came back with an outstanding warrant). Defendant then asked if he could leave. Officer said he could not leave. The parties agree that the "stop" of defendant occurred at that point. While officers prepared to do an inventory of the car, they asked if defendant had any weapons. He said there was a knife between the seat and the door, opened the door, the knife slid down, defendant stepped out, officer patted him down, and found marijuana, meth, and another knife inside defendant's pockets. He moved to suppress everything after the stop. The trial court denied the motion, concluding that the officer had reasonable suspicion to stop defendant for suspected drug crimes and the officer's safety concerns justified keeping defendant at the scene when he asked to leave. The Court of Appeals reversed: there was no objective reasonable suspicion that defendant was involved in criminal activity when he was stopped – a "nervous, fidgety demeanor" does not equal objective reasonable suspicion.

The Oregon Supreme Court reversed. Starting with ORS 131.615(1) and 131.605(6), an officer may stop a person if he reasonably suspects criminal conduct under the totality of the circumstances. ORS 131.615 was legislative codification of *Terry* stops, the Supreme Court wrote here. And "an analysis of a defendant's rights under ORS 131.605 to 131.625 is substantially the same as an analysis of a defendant's rights under the search and seizure provisions of the Oregon and federal constitutions" per *State v Kennedy*, 290 Or 493, 497 (1981) and *State v Toevs*, 327 Or 525, 534 (1998). Because ORS 136.432 limits courts' authority to exclude evidence based on statutory violations, the Court's "review in this case is limited to whether Article I, section 9, of the Oregon Constitution requires exclusion of the evidence identified in defendant's motion to suppress."

"The standard of 'reasonable suspicion' justifying a police intrusion" is less than probable cause to arrest. "Officer intuition and experience alone are not sufficient to meet that objective test. However, if an officer is able to point to specific and articulable facts that a person has committed or is about to commit a crime, the officer has a 'reasonable suspicion' and may stop the person to investigate."

Officers "often reasonably rely on information provided to them by other officers to determine whether to stop a suspect." This "shared knowledge" is deemed "the collective knowledge doctrine" by the Court, citing *State v Soldahl*, 331 Or 420, 427 (2000). "We hold that the collective knowledge doctrine also applies when a police officer reasonably relies on information from other officers in making a determination that a stop is justified based on articulable facts that criminal activity is afoot." That information, in this case, included "the shared knowledge" of another officer about the driver and the vehicle. (Note: Apparently that means the driver's meth-ring history).

The officer's observation and suspicion that defendant was "tweaking" "together with other information" was sufficient to establish a reasonable suspicion that defendant had or was about to commit a crime. The officer testified about his knowledge and training, which included many positions where he came into contact with "tweakers" at jail and in juvenile corrections and on patrol. That included "a pretty distinct look" of not sleeping sometimes for days and fidgeting. The Court emphasized that "training and experience must be established, as it was here, through admissible evidence of specific articulable facts that permit an officer to make a reasonable inference based on the officer's pertinent training and experience."

The Court here footnoted that it agrees with the Court of Appeals that the observing someone else in the same vehicle in a drug deal two weeks early was too speculative.

In sum: "defendant was nervous and fidgety and avoided eye contact." The officer "testified that, in his substantial experience as a police officer, he had observed a distinctive behavior associated with methamphetamine use that is popularly referred to as 'tweaking' and that, in his opinion, defendant was tweaking." The officer "testified that another officer had told him that the driver of [the vehicle] in which defendant was riding was a known felon with an outstanding warrant who was under investigation as a suspect in a local methamphetamine distribution ring. We conclude that the above facts, considered in their totality, gave rise to a reasonable inference that defendant committed the crime of possession of methamphetamine." The stop was justified by reasonable suspicion.

4.5 Persons, Houses, Papers, and Effects

The Oregon Court of Appeals has stated: To determine "what constitutes a protected privacy interest, the focus tends to be on the place." *State v Mast*, 250 Or App 605 (2012).

But the focus is on where, what, and why the search occurs. *See, e.g., State v Nix*, 236 Or App 32 (2010) (mobile phone searched as part of a lawful arrest); *Riley v California*, 573 US __ , slip op at 21 (2014) ("a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is.").

Section 4.5 and 4.6 identify places and effects - see Section 4.8 on exceptions.

4.5.1 "Persons, Houses, Papers, and Effects"

A search occurs when the government invades a protected privacy interest. *State v Meredith*, 337 Or 299 (2004).

The Fourth Amendment and Article I, section 9, expressly protect "persons, houses, papers, and effects." The Oregon Supreme Court follows the United States Supreme Court by distinguishing searches and seizures based on place: "We note first that the Supreme Court distinguished early between the constitutional protections afforded a dwelling or other building and those afforded an automobile in transit on a public street." *State v Davis*, 295 Or 227, 242 (1983) (motel room + reasonable suspicion). The *Davis* Court did not address the text of the Fourth Amendment and Article I, section 9, of the Oregon Constitution. But it followed federal precedent by separating a home from a street encounter with police: "we have never held, and decline to hold here, that a reasonable suspicion sufficient to support a temporary detention of a citizen during investigation suffices to legalize entry into one's premises without probable cause, without a warrant, without exigent circumstances and over one's protests." *Id*. at 242.

4.5.2 Traffic Stops

Article I, section 9, protection to "effects" applies to vehicle stops based on its application to "persons." *State v Juarez-Godinez*, 326 Or 1, 6 (1997); *see also Whren v United States*, 517 US 806, 809-10 (1996) (Fourth Amendment protection to "persons" extends to vehicle stops. "An automobile stop is thus subject to the constitutional imperative that it not be "unreasonable" under the circumstances. As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.")

"[I]n contrast to a person on the street, who may unilaterally end an officer-citizen encounter at any time, the reality is that a motorist stopped for a traffic infraction is legally obligated to stop at an officer's direction, *see* ORS 811.535 (failing to obey a police officer) and ORS 811.540 (fleeing or attempting to elude a police officer), and to interact with the officer, *see* ORS 807.570 (failure to carry or present license) and ORS 807.620 (giving false information to a police officer), and therefore is not free unilaterally to end the encounter and leave whenever he or she chooses. Moreover, an officer ordinarily cannot casually 'approach' a moving vehicle on the road in the same way that an officer may approach a person on the street. It follows that a traffic stop by its nature is not an ordinary police-citizen 'encounter.'" *State v Rodgers/Kirkeby*, 347 Or 610, (2010).

4.5.2.A The Initial Traffic Stop

4.5.2.A.(i) Traffic Stop Defined

When a pedestrian, a bicyclist, or a motorist is stopped by an officer for a traffic code violation, that is a traffic stop. *State v Jimenez*, 263 Or App 150 (2014). 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). It is the state's burden to establish the lawfulness of a warrantless traffic stop. *State v Ordner*, 252 Or App 444, 447 (2012), *rev den* 353 Or 280 (2013); *State v Anderson*, 259 Or App 448, 453 (2013).

4.5.2.A.(ii) Probable Cause or Reasonable Suspicion to Traffic Stop

The Court of Appeals has contradicted itself on whether Article I, section 9, requires reasonable suspicion or instead probable cause for an initial traffic stop. The Oregon Supreme Court has not conclusively decided which level of suspicion is constitutionally required.

Usually probable cause is required for a traffic stop:

> "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 (1994)." *State v Rosa*, 228 Or App 666, 671 (2009).

(Note: *Matthews* was a statutory case, not a constitutional case). But plenty of other Court of Appeals cases bridge *Matthews* to Article I, section 9: *State v Isley*, 182 Or App 190 (2002) (The state may meet its burden of demonstrating a lawful warrantless seizure by proving that the officer who seized the defendant had probable cause to believe that the defendant had committed a traffic offense); *State v Anderson*, 259 Or App 449, 451 (2013) ("to stop and detain a person for a traffic violation, an officer must have probable cause to believe that the person has committed a violation." (Quoting *State v Stookey*, 255 Or App 489, 491 (2013)); *State v Suppah*, 264 Or app 510, 516 (2014).

But in other cases, the Court of Appeals requires only reasonable suspicion:

> "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), *rev dismissed*, 348 Or 415 (2010) (citing *State v Amaya*, 176 Or App 35, 43 (2001), *aff'd on other grounds*, 336 Or 616 (2004) which stated: "To be reasonable, traffic stops must be supported by reasonable suspicion that the defendant has engaged in criminal activity.")

Note: Neither of those standards appears to be correct statements of the law. Those may just be mistaken statements.

Other times, the Court of Appeals appears to mix traffic with nontraffic stops. For example, in *State v Pichardo*, 263 Or App 1 (2014), the police officer testified at a suppression hearing that he stopped defendant's car because it was parked and idling in a traffic lane in violation of ORS 811.130, which is a traffic offense. Defendant contended that the police lacked probable cause to meet the elements of ORS 811.130. The trial court denied the motion. On appeal, however, the state argued that the officer stopped defendant for an entirely separate reason: the officer had objective reasonable suspicion that defendant was attempting to help another man evade the police, which is a crime under ORS 162.325 and ORS 162.247. The Court of Appeals did not mention that switch in theories or describe how significant it is. Instead, the Court of Appeals simply stated: "We first consider whether the initial stop was supported by reasonable suspicion. *State v Rodgers/Kirkeby*, 347 Or 610, 621 (2010)." The problem is that the Court of Appeals did not identify the basis for the stop – is it a traffic stop or a nontraffic stop? The Court of Appeals concluded "that the initial stop was lawful" because the officer "believed he had lawful authority to stop defendant based on a traffic violation." But a traffic stop requires probable cause, not reasonable suspicion. The Court of Appeals parenthetically cited *State v Miller*, 345 Or 176, 186 (2008), "explaining that an officer's expressed reason for making a stop does not control a court's determination of the legality of that stop."

As for the Oregon Supreme Court, it recently has contended that it is waiting to weigh in on the standard of proof for traffic stops:

> "The requirement that an officer have probable cause to believe that a driver committed a traffic violation is a statutory requirement. Whether that requirement also is found in Article I, section 9, is a question that this court has reserved. *State v Matthews*, 320 Or 398, 402 n 2 (1994). We need not decide that question in this case." *State v Watson*, 353 Or 353 Or 768, 774 n 7 (2013).

4.5.2.A.(iii) Drivers

ORS 810.410(3) requires officers to have probable cause to believe that a driver has committed a traffic infraction to stop the driver. The Oregon Supreme Court has interpreted that statute: 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"). But, as noted in the immediately preceding paragraphs, the Court of Appeals may have interpreted Article I,

section 9, as requiring only reasonable suspicion, despite that statute, see e.g., *State v Pichardo*, 263 Or App 1 (2014).

Contrast with Fourth Amendment: "The Fourth Amendment permits brief investigative stops--such as the traffic stop in this case [an anonymous 911 caller was run off the road by a possibly intoxicated driver]--when a law enforcement officer has 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.' *United States* v *Cortez*, 449 US 411, 417-18 (1981); *see also Terry* v *Ohio*, 392 US 1, 21-22 (1968). The 'reasonable suspicion' necessary to justify such a stop 'is dependent upon both the content of information possessed by police and its degree of reliability.' *Alabama* v *White*, 496 US 325, 330 (1990). The standard takes into account 'the totality of the circumstances--the whole picture.' *Cortez*, *supra*, at 417. Although a mere 'hunch' does not create reasonable suspicion, *Terry*, *supra*, at 27, the level of suspicion the standard requires is 'considerably less than proof of wrongdoing by a preponderance of the evidence,' and 'obviously less' than is necessary for probable cause, *United States* v *Sokolow*, 490 US 1, 7 (1989)." *Prado Navarette v California*, __ S Ct __ (4/22/14) (30 pounds of marijuana properly admitted into evidence over defendants' motion to suppress for illegal stop made after anonymous 911 caller recited defendants' truck's make and model and license plate number in a precise location and dangerous driving).

4.5.2.A.(iv) Passengers

An officer may "stop" (temporarily seize) a passenger who is not the driver only on reasonable suspicion of criminal activity. *State v Jones*, 245 Or App 186 (2011); *State v Ayles*, 348 Or 622, 628 (2010). This is not a "traffic stop." The stop of the passenger just occurs during the traffic stop of the driver and vehicle.

"Passengers in a stopped vehicle – whether lawfully or unlawfully stopped – are not seized merely by virtue of their status as passengers. Instead, a passenger is only seized when there has been the 'imposition, either by physical force or through some "show of authority," of some restraint on the individual's liberty.' *Ashbaugh*, 349 Or at 309." *State v Ross*, 256 Or App 746 (2013). .

> ***State v Holdorf***, 355 Or 812 (8/07/14) (Linn) (Baldwin) Officers traffic-stopped a vehicle with a driver they knew was a convicted felon running a meth ring with an outstanding warrant. Defendant was in the passenger seat "tweaking" under the influence of meth, in officers' opinions, based on his fidgeting, minimal eye contact, very nervous behavior. Officers asked for his name and date of birth, the warrants check came back clear of any warrant for defendant (although the driver's check came back with an outstanding warrant). Defendant then asked if he could leave. Officer said he could not leave. The parties agree that the "stop" of defendant occurred at that point. While officers prepared to do an inventory of the car, they asked if defendant had any weapons. He said there was a knife between the seat and the door, opened the door, the knife slid down, defendant stepped out, officer patted him down, and found marijuana, meth, and another knife inside defendant's pockets. He moved to suppress everything after the stop. The trial court denied the motion, concluding that the officer had reasonable suspicion to stop defendant for suspected drug crimes and the officer's safety concerns justified keeping defendant at the scene when he asked to leave. The Court of Appeals reversed: there was no objective reasonable suspicion that defendant was involved in criminal activity when he was stopped – a "nervous, fidgety demeanor" does not equal objective reasonable suspicion.
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> The Oregon Supreme Court reversed. Starting with ORS 131.615(1) and 131.605(6), an officer may stop a person if he reasonably suspects criminal conduct under the totality of the circumstances. ORS 131.615 was legislative codification of *Terry* stops, the Supreme Court wrote here. And "an analysis of a defendant's rights under ORS 131.605 to 131.625 is substantially the same as an analysis of a defendant's rights under the search and seizure provisions of the Oregon and federal constitutions" per *State v Kennedy*, 290 Or

493, 497 (1981) and *State v Toevs*, 327 Or 525, 534 (1998). Because ORS 136.432 limits courts' authority to exclude evidence based on statutory violations, the Court's "review in this case is limited to whether Article I, section 9, of the Oregon Constitution requires exclusion of the evidence identified in defendant's motion to suppress."

"The standard of 'reasonable suspicion' justifying a police intrusion" is less than probable cause to arrest. "Officer intuition and experience alone are not sufficient to meet that objective test. However, if an officer is able to point to specific and articulable facts that a person has committed or is about to commit a crime, the officer has a 'reasonable suspicion' and may stop the person to investigate."

Officers "often reasonably rely on information provided to them by other officers to determine whether to stop a suspect." This "shared knowledge" is deemed "the collective knowledge doctrine" by the Court, citing *State v Soldahl*, 331 Or 420, 427 (2000). "We hold that the collective knowledge doctrine also applies when a police officer reasonably relies on information from other officers in making a determination that a stop is justified based on articulable facts that criminal activity is afoot." That information, in this case, included "the shared knowledge" of another officer about the driver and the vehicle. (Note: Apparently that means the driver's meth-ring history).

The officer's observation and suspicion that defendant was "tweaking" "together with other information" was sufficient to establish a reasonable suspicion that defendant had or was about to commit a crime. The officer testified about his knowledge and training, which included many positions where he came into contact with "tweakers" at jail and in juvenile corrections and on patrol. That included "a pretty distinct look" of not sleeping sometimes for days and fidgeting. The Court emphasized that "training and experience must be established, as it was here, through admissible evidence of specific articulable facts that permit an officer to make a reasonable inference based on the officer's pertinent training and experience."

The Court here footnoted that it agrees with the Court of Appeals that the observing someone else in the same vehicle in a drug deal two weeks early was too speculative.

In sum: "defendant was nervous and fidgety and avoided eye contact." The officer "testified that, in his substantial experience as a police officer, he had observed a distinctive behavior associated with methamphetamine use that is popularly referred to as 'tweaking' and that, in his opinion, defendant was tweaking." The officer "testified that another officer had told him that the driver of [the vehicle] in which defendant was riding was a known felon with an outstanding warrant who was under investigation as a suspect in a local methamphetamine distribution ring. We conclude that the above facts, considered in their totality, gave rise to a reasonable inference that defendant committed the crime of possession of methamphetamine." The stop was justified by reasonable suspicion.

4.5.2.A.(v) Blocking vehicles

If an officer "boxes in" a person's car, so that the person is "physically prevented from driving away," that is a restraint on liberty and freedom of movement and is a stop for Article I, section 9.

State v Thacker, 264 Or App 150, 157 (07/02/14) (Marion) (Garrett, Ortega, DeVore) An officer followed defendant's truck, without reasonable suspicion of a crime or traffic infraction, to her driveway, where she turned in and parked. The officer parked less than one car length behind defendant's truck in her driveway so that defendant could not leave, boxing her in. She was charged with DUII. The trial court denied her motion to suppress. The Court of Appeals reversed and remanded: Defendant was stopped when the officer entered her driveway and blocked her from leaving. Her intent or attempt to

move the car is not relevant to the analysis. The state conceded that the officer had no reasonable suspicion to stop her.

4.5.2.A.(vi) Parked cars

A person who is the subject of a traffic stop, whether on foot, on a bicycle, in a parked car, or driving a car, is required to comply with an officer's orders and to interact with the officer, such as under ORS 811.535 (failing to obey a police officer) and ORS 807.620 (false information to a police officer). *State v Beasley*, 263 Or App 29 (2014) (Duncan, J., dissenting).

Parked cars not traffic stopped: If there is no traffic code violation, an officer may "stop" the person in a parked car only on reasonable suspicion of criminal activity. *State v Heater*, 262 Or App 298, 302 (2014); *State v Jones*, 245 Or App 186 (2011). That means the officer has a subjective belief that the person has committed or is about to commit a crime and that belief is objectively reasonable under the total circumstances at the time of the stop. ORS 131.605(6); *Heater*, 262 Or App at 302. After *Backstrand, Anderson,* and *Highley*, however, if one officer approaches a parked car, informs its occupants that they were in a high-crime area, asks if they have seen anything suspicious, and asks what the occupants are doing, without taking other physical action and without requesting physical action from the occupants, that is not a stop. *State v Dierks*, 264 Or App 443 (2014). Further, the occupants are not stopped even if an officer runs the occupants' names through LEDS. *Id*.

See Section 4.5.6 and ***State v Beasley***, 263 Or App 29 (5/21/14) (Multnomah) (Ortega, Sercombe, with Duncan, J., dissenting) Note: The majority characterized this case as *not* a traffic stop. Instead the majority characterized it as a "check on" defendant's well-being as he lawfully slept in a parked car at 5:00 a.m.

State v Anderson, 259 Or App 448 (11/14/13) (Jackson) (Egan, Armstrong, Nakamoto) Defendant was traffic stopped for a cracked front windshield that led to a citation for driving while suspended and obstruction of vehicle windows. Defendant moved to suppress all evidence because the officer lacked probable cause to believe he committed a traffic infraction, perhaps citing *State v Stookey*, 255 Or App 489 (2013) which requires probable cause to traffic stop based on objective and subjective probable cause. (The appellate opinion block-quoted *Stookey* as if defendant had block-quoted it). The trial court denied the motion to suppress on grounds that the officer had probable cause.

The Court of Appeals reversed: "we are mindful that it is the state's burden to establish the lawfulness of a warrantless traffic stop." The record does not contain evidence about the size or nature of the crack to show that it created the *probable* risk of harm. (Emphasis in opinion). Some cracks may interfere with a driver's vision, others may not, but the state did not establish its burden in this case to show objective reasonableness here. Suppression is required because defendant established the minimal factual nexus between the officer's conduct and the evidence and the state did not argue that the evidence did not derive from the preceding illegality.

State v Dierks, 264 Or App 443 (07/30/14) (Multnomah) (Hadlock, Ortega, Sercombe) Before *Backstrand, Anderson*, and *Highley*, the Court of Appeals concluded in this case that a police officer had stopped defendant in a parked car without reasonable suspicion of criminal activity, in violation of Article I, section 9, see 257 Or App 88 (2013). The Oregon Supreme Court vacated that decision, see 354 Or 837 (2014).

Now, after *Backstrand, Anderson*, and *Highley*, here, where one officer approaches a parked car, informs its occupants that they were in a high-crime area, asks if they have seen anything suspicious, and asks what the occupants are doing, without taking other physical action and without requesting physical action from the occupants, that is not a

stop. Further, the occupants are not stopped even if an officer runs the occupants' names through LEDS.

State v Wright, 265 Or App 479 (9/17/14) (Marion) (Wollheim, Sercombe, Schuman SJ) Defendant and his sister were sleeping in defendant's car in an apartment complex's parking lot. Their friend was arrested in his apartment. The friend asked the police to tell defendant that the friend had been arrested. Police approached defendant's car, saw defendant and his sister sleeping in the car, and asked who they were and asked for their identification. Defendant testified that the officer asked defendant to open the car door when he asked for defendant's identification. Defendant gave his identification card to the officer. Dispatch told the officer that efendant was a registered sex offender. Officer asked why defendant was sleeping in his car, defendant said because he was "transient," and officer asked defendant if he was living in the car rather than at the address where he'd registered as a sex offender. Officer also asked defendant if he knew he had to register even if he had no address. Defendant said he did know that. Officer arrested defendant. Defendant moved to suppress, the trial court denied that motion, and the case went up and down from the trial court and the Oregon Supreme Court. This is its third time in the Court of Appeals.

Under *Backstrand*, *Anderson*, and *Highley*, "asking for, taking, and checking a person's identification is not a sufficient show of authority to constitute a stop." This case has no showing of "coercive authority." "The officer approached defendant and his sister in order to give them information, then asked for and very briefly retained their identifications without giving them any indication that their movements were being significantly restricted. That the officer might have had defendant open the car door to hand out his identification rather than handing it through a window is, in these circumstances, not a significant enough act to transform the encounter at issue here into a stop."

4.5.2.B Detention: "Unavoidable Lull" versus "Unlawful Prolongation"

This section applies to both traffic stops and nontraffic stops.

4.5.2.B (i) Generally

A traffic stop is not an ordinary police-citizen encounter because a person stopped for an infraction is not free to end the encounter when he chooses. *State v Rodgers/Kirkeby*, 347 Or 610, 623 (2010).

An "officer may not extend the duration of a traffic stop by interposing a series of unrelated questions or actions constituting another investigation, without reasonable suspicion of another offense. *State v Rodgers/Kirkeby*, 347 Or 610, 626-28 (2010). During a lawful stop, officers may nonetheless make an inquiry into unrelated matters during an 'unavoidable lull' in the investigation. *State v Dennis*, 250 Or App 732, 737 (2012) * * *. An unavoidable lull occurs in a period of time in which the officer cannot proceed with the investigation, such as while awaiting record check results or while awaiting the driver's identification. *State v Nims*, 248 Or App 708, 713, *rev den*, 352 Or 378 (2012). If an officer has initiated an unrelated inquiry, then it is the state's burden to prove that an officer did so during an unavoidable lull. *Dennis*, 250 Or App at 737; *State v Berry*, 232 Or App 612, 616-17, *rev dismissed*, 348 Or 71 (2010)." *State v Peters*, 262 Or App 124, 127 (2014).

"An extension of an otherwise lawful stop to investigate matters unrelated to the initial basis for the stop must be justified anew by reasonable suspicion of criminal activity in order to be lawful under ORS 131.615 and Article I, section 9, of the Oregon Constitution." *State v Heater*, 263 Or App 298, 303 (2014).

On the issue of whether an extension of a traffic stop into a criminal investigation for drug trafficking was supported by reasonable suspicion that defendant was engaged in criminal activity, per ORS 131.605 and *State v Belt*, 325 Or 6, 11 (1997), in *State v Espinoza-Barragan*, 253 Or App 743 (2012), the Court of Appeals wrote:

> 1. There is nothing inherently suspicious about being pulled over by police.
> 2. Evasiveness, even taking an exit ramp off the highway while being followed by a police vehicle, is not inherently suspicious.
> 3. Not making eye contact with a police officer passing a person on the highway at 2:00 a.m. is not suspicious.
> 4. Evasiveness, even avoiding questions that a person is not required to answer, does not support objective reasonable suspicion.
> 5. The absence of visible luggage is not entitled to any weight because luggage can be not visible, such as in a trunk or under a seat.
> 6. Driving a vehicle that the driver recently purchased for cash, and has no registration or insurance, is not sufficient to justify extension of a traffic stop.

In *State v Watson*, 353 Or 768 (2013), the Oregon Supreme Court wrote:

> 1. "An officer's determination of a person's identity generally is reasonably related to the officer's investigation of a traffic infraction."
> 2. "An officer who stops a driver also may release the driver, and a reasonable investigation may therefore include a determination of whether the driver has valid driving privileges, as required by ORS 807.010."
> 3. If the officer conducted the records check to verify driving privileges, the detention of defendant did not violate Article I, seciton9, unless the detention was unreasonably lengthy. Whereas here the officer testified that it usually takes 4 to 10 minutes to run the records and warrants checks, and this one took 10 minutes: "we have concluded that [the officer] was entitled to verify defendant's driving privileges, and defendant does not contend that 10 minutes was an unreasonably long period of time given the particular circumstances."
> 4. But a "warrants check necessitates a different analysis." Whether a warrants check is reasonably related to the investigation or otherwise constitutionally justified, for instance, to protect officer safety, presents an important question, but one that the court "need not decide here."
> 5. An "officer may develop reasonable suspicion or probable cause during the course of a traffic stop that may justify activities that would not have been permissible based on the original purpose of the stop."

4.5.2.B(ii) Inquiries versus Patdowns

"During a traffic stop an officer may inquire about issues related to that stop; however, police inquiries unrelated to the traffic violation may violate Article I, section 9, of the Oregon Constitution by unlawfully extending the duration of the stop. * * * There are two situations in which an officer may lawfully extend a stop. First, an officer may inquire about matters unrelated to the stop when the officer has reasonable suspicion that the person has engaged in criminal activity. * * * Second, an officer may take reasonable steps – including asking about weapons – to protect herself or others if she 'develops a reasonable suspicion, based upon specific and articulable facts, that the citizen might pose an immediate threat of serious physical injury to the officer or to others then present.' *State v Bates*, 304 Or 519, 524 (1987)." *State v Pearson*, 262 Or App 369 (2014).

The test for reasonable suspicion is based on the total circumstances at the time and place of the encounter, ORS 131.605(6), and the officer must testify to "specific and articulable facts" that give rise to a reasonable inference that the person is involved in criminal activity," *State v Ehly*, 317 Or 66, 80 (1993). *State v Holdorf*, 355 Or 812 (2014).

"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).

On consent: "Under Article I, section 9, a police officer may ask a driver to consent to a search during a lawful traffic stop, provided that the request does not extend the duration of the stop. * * * Thus, an officer may ask a driver for consent to search during an 'unavoidable lull' in a traffic stop, such as when the officer is waiting for the results of a records check." *State v Marino*, 259 Or App 608 (2013). "But, an officer may not ask a driver for consent to search in lieu of completing a traffic stop." *Id.*

4.5.2.B.(iii) Drivers

"During a traffic stop, a police officer may question the driver about criminal activity that is unrelated to the stop, even if the officer does not have any suspicion of such activity, without violating Article I, section 9." *State v Hampton*, 247 Or App 147, 151-52 (2011); *State v Hall*, 238 Or App 75, 83 (2010) (there are no Article I, section 9, implications if an inquiry unrelated to a traffic stop occurs during a routine stop but does not delay it).

An unavoidable lull during an investigation may occur while a person looks for his ID or registration, or while police are running warrants checks. *State v Nims*, 248 Or App 708, 713, *rev den* 352 Or 378 (2012). Questioning during an unavoidable lull is permissible unless it prolongs the lull. *State v Jones*, 239 Or App 201, 208 (2010), *rev den*, 350 Or 230 (2011).

Questioning that either: (1) causes an extension of the stop or (2) detains a defendant beyond a completed traffic stop must be supported by reasonable suspicion that the defendant is engaged in criminal activity. *State v Rodgers*, 201 Or App 366, 371 (2008), *aff'd*, 347 Or 610 (2010).

If an officer initiates an unrelated inquiry, it is the state's burden to prove that the inquiry was during an unavoidable lull. *State v Dennis*, 250 Or App 732, 737 (2012).

> ***State v Pichardo***, 263 Or App 1 (5/21/14) (Multnomah) (Haselton, Wollheim, Schuman SJ) A police officer testified at defendant's suppression hearing that he stopped defendant's car because it was parked and idling in a traffic lane in violation of ORS 811.130, which is a traffic offense. Defendant contended that the police lacked probable cause to meet the elements of ORS 811.130. The trial court denied the motion.
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> On appeal, however, the state argued that the officer stopped defendant for an entirely separate reason: the officer had objective reasonable suspicion that defendant was attempting to help another man evade the police, which is a crime under ORS 162.325 and ORS 162.247. The Court of Appeals did not explain that switch in theories or describe how significant it is. Instead, the Court of Appeals simply stated: "We first consider whether the initial stop was supported by reasonable suspicion. *State v Rodgers/Kirkeby*, 347 Or 610, 621 (2010)." *Rodgers/Kirkeby* is a nontraffic stop case which requires only reasonable suspicion of criminal activity. The Court of Appeals did not identify the basis for the stop – is it a traffic stop or a nontraffic stop? The Court of Appeals concluded "that the initial stop was lawful" because the officer "believed he had lawful authority to stop defendant based on a traffic violation." But a traffic stop requires probable cause, not reasonable suspicion. The Court of Appeals parenthetically cited *State v Miller*, 345 Or 176, 186 (2008), "explaining that an officer's expressed reason for making a stop does not control a court's determination of the legality of that stop."
>
> The Court of Appeals reversed and remanded because the officers had committed an "unlawful prolongation of the duration of the stop." The officer had "reasonable suspicion to stop defendant to inquire about defendant's interactions [with a suspect] and

to gather information necessary to issue a traffic citation. Additionally after [officer] discovered that defendant was driving without a driver's license, [he] had probable cause to investigate circumstances surrounding that possible violation. However, [the officer] followed none of those constitutionally permissible paths of inquiry and action. Instead, [the officer] immediately asked defendant whether he was carrying drugs and whether he would consent to a search." The court suppressed the evidence.

State v Aung, 265 Or App 374 (09/10/14) (Washington) (Ortega, DeVore, Edmonds SJ) No unlawful extension because officer "did not question defendant about matters unrelated to the traffic stop 'as an alternative' to processing the traffic citation." Officer "properly stopped defendant for a traffic violation and then proceeded with standard procedure – he obtained defendant's identification and returned to his patrol car to run a 'records check.' When the check came back 'clear' he began to write a citation for the traffic violation." The trial correctly denied defendant's motion to suppress.

4.5.2.B.(iv) Passengers

A passenger in a stopped car may be unlawfully seized during the course of a traffic stop regardless whether he has any protected privacy or possessory interest in the vehicle. *State v Knapp*, 253 Or App 151 (2012). A "passenger is only seized when there has been the 'imposition, either by physical force or through some "show of authority," of some restraint on the individual's liberty.' *Ashbaugh*, 349 Or at 309." *State v Ross*, 256 Or App 746 (2013).

"There are no implications under Article I, section 9, if the inquiry occurs during the stop but does not extend the stop." *State v Hampton*, 247 Or App 147 (2011), *rev den* 352 Or 107 (2012).

Nothing in *Rodgers/Kirkeby* "supports the proposition that a passenger is seized when a police officer unlawfully extends the stop of a vehicle. That is because *Rodgers/Kirkeby* did not involve the constitutional rights of passengers at all; only the rights of the defendant drivers were at issue." *State v Ross*, 256 Or App 746 (2013).

"A police officer's suspicion must be particularized to the individual based on the individual's own conduct." The "faint odor" or "general odor of marijuana in a vehicle alone does not give rise to a reasonable suspicion that a passenger of that vehicle has committed a crime." *State v Kingsmith*, 256 Or App 762 (2013) (citing *State v Morton*, 151 Or App 734, 738 (1997), *rev den* 327 Or 521 (1998)).

See ***State v Bailey***, 356 Or 486 (2014), where defendant was a passenger in a car stopped for a traffic infraction, unlawfully detained, drugs were found on him, but the police discovered an outstanding warrant. Under the Fourth Amendment, the Oregon Supreme Court held that the trial court should have suppressed the evidence found on him under the Fourth Amendment, specifically under *Brown v Illinois*, 422 US 590 (1975). There are three factors to consider under a Fourth Amendment "attenuation analysis: (1) the temporal proximity between unlawful police conduct and the discovery of the challenged evidence; (2) the presence of intervening circumstances; and (3) 'particularly, the purpose and flagrancy of the official misconduct." *Id.* at 488-49.

State v Parker, 266 Or App 230 (10/15/14) (Multnomah) (Armstrong, Haselton, Nakamoto) This case is on remand for the second time. Defendant was a passenger in a stopped vehicle. A "passenger is only seized when there has been the imposition, either by physical force or through some show of authority, of some restraint on the individual's liberty." *Id.* at 235 (citing *State v Ross*, 256 Or App 746, 754 (2013)). The officer obtained identifying information from driver and passengers, ran a warrants check, and learned that another passenger had an outstanding warrant. Officer asked for defendant's consent to pat him down for weapons in a non-coercive tone of voice.

Defendant consented. Officer found his switchblade. He moved to suppress it. The Court of Appeals held here, based on the totality of the circumstances of this case, defendant was not seized.

4.5.2.B.(v) Bicycles

When a pedestrian, a bicyclist, or a motorist is stopped by an officer for a traffic code violation, that is a traffic stop. *State v Jimenez*, 263 Or App 150 (2014) (it's a "traffic stop," not a "traffic conversation"). 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).

An "officer stopping a motor vehicle may have more to check" that an officer stopping a bicycle, because "a check in a motor vehicle stop involves a check of a vehicle's registration and insurance coverage. However, that does not change the nature of the inquiry under ORS 810.410 and Article I, section 9, concerning whether "the investigation reasonably [is] related to that traffic infraction, the identification of persons, and the issuance of a citation." *State v Leino*, 248 Or App 121, 128 (2012) (citations omitted).

4.5.2.B.(vi) Pedestrians

A person walking/standing may be stopped for a traffic-code violation, which requires probable cause to believe that the pedestrian committed the traffic infraction. *See, e.g., State v Dennis*, 250 Or App 732 (2012) (jaywalking is a traffic code violation). That is different than an officer detaining a person in a public place, outside of the traffic code.

When a pedestrian, a bicyclist, or a motorist is stopped by an officer for a traffic code violation, that is a traffic stop. *State v Jimenez*, 263 Or App 150 (2014) (it's a traffic stop, not a "traffic conversation").

> ***State v Jimenez***, 263 Or App 150 (5/21/14) (Multnomah) (Schuman SJ, Duncan, Wollheim) This case clarifies that a "traffic stop" is not "a traffic conversation." In broad daylight, defendant crossed 122nd Avenue and Division, a busy commercial intersection in Portland, despite a "Don't Walk" light. That is a Class D traffic code violation. Defendant sat on a bench at a bus stop. Officer approached him in his car. Defendant walked away. Officer honked at him. Defendant stopped. Officer asked him why he crossed against the "Don't Walk" sign. Defendant said he thought it was ok. Officer asked defendant if he had any weapons. Defendant said he had a gun in his right front pocket and leaned forward and put his hands on the officer's patrol car. Officer handcuffed him, took his ID, and arrested him on an active warrant. Defendant, charged with unlawful possession of a firearm, moved to suppress the evidence because the officer had discovered the gun during an unjustified extension of the traffic stop. The trial court denied the motion.
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> The Court of Appeals reversed and remanded. No one disputed that this was a traffic stop of a pedestrian to cite him for a traffic code violation. The officer had no reasonable suspicion that defendant had committed any crime when he asked about weapons, which was unrelated to the traffic stop. The Court of Appeals concluded that, despite internal inconsistencies in *State v Rodgers/Kirkeby*, 347 Or 610 (2010), "when a person is approached by a police officer – whether the person is in an automobile, on a bicycle, or on foot – for committing a noncriminal traffic violation, and the police officer and the person know that is the basis of the stop, then the officer who has approached the person must proceed to process the traffic violation, and may not launch an investigation into unrelated matters unless [1] the inquiries are justified by reasonable suspicion of the unrelated matter; [2] the inquiry occurred during an unavoidable lull in the citation-writing process; or [3] some exception to the warrant requirement applies." This case also involved the officer-safety exception, which is addressed in **Section 4.8.4**.

State v Heater, 263 Or App 298 (5/29/14) (Yamhill) (Garrett, Ortega, DeVore) Police received a call about a possible domestic disturbance involving defendant and a woman who appeared to be under the influence of drugs. Police saw a car matching the description of defendant's parked at his grandmother's residence. Police knocked on the door of the residence, defendant came outside voluntarily, and answered police questions about the argument with the woman. Defendant had erratic speech, erratic movements, and "an overall demeanor" consistent with prolonged meth, although he did not appear to be under the influence at that time. Officer asked defendant if he had drugs. He said no. Officer asked for consent to search defendant's car, and said that consent can be revoked at any time. Defendant consented, meth was found in the car, defendant revoked his consent, and the officer stopped the search. Officer said he'd get a search warrant. Defendant consented to a further search. Officer found more drugs, more drug items, and arrested defendant. Defendant moved to suppress on grounds that the state failed to prove the search was justified by any exception to the warrant requirement. The trial court denied defendant's motion to suppress.

The Court of Appeals reversed and remanded. The initial stop is not at issue. The only issue is whether the officer unlawfully extended the initial stop to investigate about drug possession. "An extension of an otherwise lawful stop to investigate matters unrelated to the initial basis for the stop must be justified anew by reasonable suspicion of criminal activity in order to be lawful under ORS 131.615 and Article I, section 9, of the Oregon Constitution." *Id.* at 303.

"There are two situations in which questioning unrelated to the initial basis for a stop can constitute an unlawful extension of a stop. First, an officer might conclude a lawful stop (for example, by telling a person that he or she is free to leave) and then initiate a second stop by inquiring about other matters without reasonable suspicion. *State v Huggett*, 228 Or app 569, 574 (2009). [Second], an officer might detain a person beyond the time reasonably required to investigate the initial basis for the stop, without telling the person expressly or by implication that he or she is free to leave and without the requisite reasonable suspicion to support a *new* basis for a stop. *Id*." (emphasis in original; citations omitted). This case involves the second situation.

"However reasonable the initial stop may have been * * * [the officer] was required to have a separate reasonable suspicion of defendant's drug possession before extending the stop to investigate that issue." In this case, the officer did not have it: just looking like a long-term meth user, and being associated with a person who appeared to use meth, is inadequate under existing case law. The evidence should have been suppressed.

4.5.3 Nontraffic Stops

Police encounters with people can occur in many places. A person on a bike, on foot, or in a parked car can be constitutionally "stopped" upon probable cause for violating a traffic code or for reasonable suspicion that the person is about to commit a crime. Those are different bases for stops with different legal tracks.

On traffic code violations (such as crossing against a "Don't Walk" signal under ORS 814.020), see *State v Jimenez*, 263 Or App 150 (2014) and **Section 4.5.2**.

Oregon statutes (ORS 131.605 through 131.615) address the "stopping of persons" outside of traffic stops. In addition, Article I, section 9, has been interpreted to have different standards for traffic stops versus nontraffic encounters.

Basically, officers legally may "stop" a person under Article I, section 9, if the stop is supported by the officer's reasonable suspicion that the stopped person has a "connection with criminal

activity." *State v Worthington*, 265 Or App 368, 371 (2014) (quoting *State v Jones*, 245 Or App 186,192 (2011) quoting *State v Cloman*, 254 Or 1, 6 (1969)). A complexity arises over what is a "stop."

See **Section 4.5.2.B on Unavoidable Lulls versus Unlawful Prolongation** of either a traffic stop or a nontraffic stop.

4.5.3.A No Stop

Police questions for information or for cooperation do not implicate Article I, section 9 – they are not "stops" -- as long as the officer does no more than seek the individual's cooperation through noncoercive, nonthreatening questioning and conduct. *State v Backstrand*, 354 Or 392, 417 (2013).

No "stop" occurs if police officers initiate "mere conversation" with a person. *State v Backstrand*, 354 Or 392 (2013)*; State v Highley*, 354 Or 459 (2013); *State v Anderson*, 354 Or 440 (2013); *see also State v Kinkade*, 247 Or App 595 (2012) (on foot); *State v Soto*, 252 Or App 50, *rev den* 353 Or 127 (2013) (on foot); *State v Dierks*, 264 Or App 443 (2014) (parked car). This idea of "mere conversation" traces at least to *State v Rodgers/Kirkeby*, 347 Or 610 (2010) which contained the statement: "verbal inquiries are not searches and seizures."

Backstrand, *Highley*, *and Anderson* "repeatedly emphasized that neither briefly holding a person's identification card, nor calling in the person's identification information to check for warrants, necessarily and always meant that the person was stopped." *State v Thompson*, 264 Or App 754, 759 (2014) (citing *Backstrand*, *Highley*, *and Anderson*).

But whether an encounter is a "stop" almost always requires a fact-specific inquiry and courts fact-match. It's a "stop" if the police officer engages in a show of authority that reasonably conveys to the person that the person's freedom is significantly restricted or that she cannot terminate the encounter and go away. *State v Anderson*, 354 Or 440, 450 (2013); *State v Highley*, 354 Or 459 (2013).

> ***State v Hunt*,** 265 Or App 231 (09/04/14) (Multnomah) (Ortega, Sercombe, Hadlock) The Court of Appeals concluded that the officer had reasonable suspicion to stop defendant, who was selling drugs out of a motel room, based on a motel desk clerk's reports. The clerk reported that he or she had received several calls from next-door guests that "twitchy" people were outside defendant's room, a "really dirty" Lexus was driving around the parking lot, two "girls" were standing outside the room, and the clerk took a photo of a car's license plate. Other guests called again, telling the clerk that they had seen people in the Lexus "weighing things on a small scale" and guests further continued calling about "cash transactions" between the "girls" and people in a car in the lot that may have been related to the defendant's room. Officers arrived and investigated. Heroin was being sold. Defendant moved to suppress. The trial court denied the motion.
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> The Court of Appeals affirmed. "A police officer may stop and temporarily detain a person without a warrant in order to make a reasonable inquiry of that person if the officer has reasonable suspicion that the person has been or is about to be involved in criminal activity. ORS 131.615(1)." "A reliable report from a citizen informant may be sufficient on its own to provide reasonable suspicion; however '[w]hen reasonable suspicion is based solely on a citizen informant's report, that report must contain some indicia of reliability.' *State v Villegas-Varela*, 132 Or App 112, 115 (1994)." Three factors are important: (1) whether the informant is exposed to criminal or civil prosecution for a false report; (2) whether the report is based on personal observations; and (3) whether the officer's own observations corroborate the informant's report. Here, based on those three factors and the specific facts, the report was sufficiently reliable.

State v Canfield, 266 Or App 73 (10/08/14) (Washington) (Wollheim, Nakamoto, Schuman SJ) This case is on remand from the Oregon Supreme Court after *Backstrand, Anderson,* and *Highley* were decided on November 21, 2013. An officer saw defendant walking down the street. Defendant crossed and walked to a mall. Officer made a U-turn and trailed defendant. Defendant went to a parking lot, got into the passenger side of a parked car, the car traveled a short distance in the parking lot, then reparked. Defendant and driver got out and walked to a restaurant. Officer approached, asked to talk to them, told them he thought defendant's walking across the street was "strange," asked for both of their identifications, and they complied. Officer kept the ID for 30 seconds, wrote their information on his hand, returned the IDs, asked defendant if he had any weapons or drugs, and defendant said he had a pipe. Officer asked both for permission to search them, they consented, and the officer told defendant that he was not under arrest and was free to leave. Defendant said he understood. Officer found the marijuana pipe, asked for consent to search the car, and found $20 in marijuana. Defendant moved to suppress, and the trial court denied the motion.

The Court of Appeals affirmed the denial: Defendant was not "stopped" when the facts are compared to Oregon Supreme Court precedent. When the officer spoke to defendant, he was not investigating any crime, the Court of Appeals decided. The officer was not investigating a potential probation violation. The officer did not retain the ID. The officer did not tell defendant that he would be free only after the officer had checked things. There was no pending warrants check. And the officer's demeanor – his "manner or tone" – was not coercive.

4.5.3.B A Stop

State v Backstrand, 354 Or 392, 399 (2013) sets the principles for "mere conversation" into "stops:" "What distinguishes a seizure (either a stop or an arrest) from a constitutionally insignificant police-citizen encounter is the imposition, either by physical force or through some 'show of authority,' of some restraint on the individual's liberty. The test is an objective one: Would a reasonable person believe that a law enforcement officer intentionally and significantly restricted, interfered with, or otherwise deprived the individual of his or her liberty or freedom of movement. Because of the diversity of potential police-citizen encounters, the inquiry necessarily is fact-specific and requires an examination of the totality of the circumstances involved."

Examples in the Court of Appeals:

"When an officer takes a person's identification card and retains it *for more than a reasonable time*, the encounter is a stop." *State v Thompson*, 264 Or App 754, 760 (2014) (citing *Backstrand*) (emphasis in *Thompson*).

Where "officers approached [a] defendant and his brother, told them that they suspected that the men were violating a law, and asked for identification * * * then retained the identifications and returned to the patrol car to verify their validity[, under] *Backstrand*, those circumstances were sufficiently coercive to result in a seizure of defendant." *State v Rodriguez-Perez*, 262 Or App 206 (2014).

At a residence, per *State v Charles*, 263 Or App 578, 584 (2014), no "stop" or "seizure" occurs when:

-An officer approaches and knocks on a citizen's front door, *State v Portrey*, 134 Or App 460, 464 (1995).

-An officer asks a person to come out of a residence to talk to the officer, *State v Shaw*, 230 Or App 257, 262-63, *rev den*, 347 Or 365 (2009).

-An officer suggests that a person walk together with the officer, *State v Crandall*, 197 Or App 591, 595 (2005), *rev'd on other grounds*, 340 Or 645 (2006).

Statute. ORS 131.615(1) 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(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 reasonable suspicion involves both a subjective and objective component." *State v Wiseman*, 245 Or App 136 (2011) (citing *State v Belt*, 325 Or 6, 11 (1997) ("subjective belief must be objectively reasonable under the totality of the circumstances")). These stops require reasonable suspicion that the person was engaged in criminal activity. *See, e.g.*, *State v Morfin-Estrada*, 251 Or App 158 (2012) ("A stop must be supported by reasonable suspicion.").

Constitution. ORS 131.605(5) is a codification of both state and federal constitutional standards. *State v Valdez*, 277 Or 621, 625-26 (1977). 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." *State v Mitchele*, 240 Or App 86 (2010); *State v Wiseman*, 245 Or App 136 (2011).

See ***State v Holdorf***, 355 Or 812 (2014) on reasonable suspicion standard for stopping a "tweaker" in the company of a meth-ring felon with an outstanding warrant.

4.5.4 Public Parks and Sidewalks

In *State v Ashbaugh*, 349 Or 297 (2010), two officers on bikes approached a couple in a park because the couple looked middle-aged and therefore out of place in the park. After the five-minute process of arresting the husband on an outstanding restraining order against his wife, while the wife had been free to leave implicitly, the officers then obtained the wife's consent to search her purse, containing a drug pipe. The Oregon Supreme Court concluded that the wife-defendant had been seized lawfully, because a reasonable person in her position would not have believed that the police had intentionally and significantly restricted her liberty or freedom.

See also Commercial Premises in **Section 4.6.1** and *State v Backstrand*, 354 Or 392 (2013), where an officer asked shoppers in a "XXX store" for their ages and identification, which he kept for 10-15 seconds. The court concluded: "A mere request for identification made by an officer in the course of an otherwise lawful police-citizen encounter does not, in and of itself, result in a seizure." *Id.* at 410-11.

State v Campbell, 263 Or App 315 (5/29/14) (Multnomah) (De Muniz SJ, Hadlock, Sercombe) Disheveled defendant stood before a public park bench associated with drug activity. Two officers got out of their patrol car and said: "Hey, how are you doing? What's going on? Hey, do you have anything on you you're not supposed to have?" Defendant said no. (Note: This opinion does not recite whether the officers were armed and in uniform, or why they parked their car and began pelleting defendant with questions. The opinion's legal analysis states that they "addressed defendant in a conversational tone consistent with the task of gathering information and cooperation from a member of the public.").

The opinion further states that while one officer was interrogating defendant, another officer "obtained defendant's identifying information and returned to his patrol car to run a warrant check." The opinion does not disclose how that second officer "obtained" defendant's identity while defendant was being interrogated by the first officer. The opinion does not state if defendant was, or was not, aware that his "identifying information" had been "obtained" and the he was being checked for warrants.

The opinion states that after defendant told the first officer he did not have anything he wasn't supposed to have, the first officer challenged him, stating: "Are you sure? Do you mind if I search?" And defendant consented. Defendant put his hands on his head as ordered. Before the officer could put his hands into defendant's pants, the officer noticed a clear tube with an orange cap. Defendant "lunged" for the bag, the officer pushed the bag away and ordered defendant to put his hands back on his head, defendant reached for his bag, the officer ordered him to stop, and defendant "swung at" the officer "with a closed fist." The second officer returned from the patrol car and brought defendant to the ground and handcuffed him. Defendant made incriminating statements about two meth needles in his bag. The trial court denied his motion to suppress because defendant had not been stopped.

The Court of Appeals affirmed. Under *State v Backstrand*, 354 Or 392 (2013), this was a "mere encounter" rather than a "stop," because "requests for identification are commonplace in individuals' daily lives, as is briefly tendering information during private interactions and during interactions with the government." The two "officers did not seize defendant" when the second officer asked defendant for his identifying information because: (1) this was a "public space;" (2) they addressed defendant in a conversational tone consistent with the task of gathering information and cooperation from member of the public; (3) they did not engage in any show of coercive authority; and (4) although a person's awareness that officers are running his ID for a warrant check may be a "stop," there is no evidence in this record that defendant was aware that the officer was checking him for warrants.

State v Worthington, 265 Or App 368 (9/10/14) (Clatsop) (Ortega, Sercombe, Hadlock) Defendant's height (but not body type and clothing) fit the description of a robbery suspect and was located 75 yards from the robbery site 45 minutes after it was robbed. Police saw defendant suddenly appear from behind a van, he was extremely nervous, and gave an officer a "suspicious" story. The officer knew that persons who commit crimes sometimes change clothing to avoid detection. Police stopped defendant by taking and retaining his identification. Police officer asked if he could do a patdown, defendant consented, and the officer found a large amount of currency on his person, and defendant confessed to the robbery.

Defendant moved to suppress the currency and his confession, contending that the stop was not justified by objective reasonable suspicion. The trial court denied the motion.

The Court of Appeals affirmed. "Only those facts available before the stop are considered to evaluate whether the officer's suspicion was reasonable." "However, reasonable suspicion is a relatively low barrier." Reasonable suspicion requires "only that those facts" observed by the officer "support the reasonable inference of illegal activity by that person." The objective component is met in this case before the stop, taken as a whole. Affirmed.

4.5.5 Restrooms

A search occurs when the government invades a protected privacy interest under *State v Meredith*, 337 Or 299 (2004). The focus is on the government's conduct rather than on a

defendant's subjective expectations. In *State v Holiday*, 258 Or App 601 (2013), an officer in a public park knew that the defendant was on probation and had violated terms of his probation. Officer trotted his horse over to defendant, who quickly moved 50 feet away and entered a one-stall public restroom and locked the door. Officer pounded on the door, yelled at defendant to come out, and a few minutes later, another officer unlocked the door. Officer arrested defendant and found a crack pipe inside a box in his bag. The Court of Appeals held that unlocking and opening the door to the public restroom is a search because a "restroom is a place where a person has a protected privacy interest" regardless of what he is using it for. Contrast that analysis with *State v Lange*, 264 Or App 126 (2014) a few months later:

State v Lange, 264 Or App 126 (7/02/14) (Washington) (Nakamoto, Armstrong, Egan) Defendant paid for 30 minutes of internet time at a "cyber café," left the café, then returned and immediately locked himself in the café's single-occupancy bathroom. After he was in there for 15 or 20 minutes, with water running, clearing his throat repeatedly, and moaning loudly, the café manager called 911. An officer responded, listened for five minutes, then after defendant had been in the bathroom for a total of 25 minutes, the officer pounded on the door and stated: "Beaverton police, we need you to step out." The opinion contains no description on the officer's tone of voice.

Defendant stepped out one minute later. Having just cooked and injected himself with heroin, he was "unsteady on his feet," his voice was becoming "raspy and lost volume," he was struggling to keep his eyes open, and he was "argumentative," asking why the police were there. Police asked him to move to the café lobby. He did, and kept asking why the police were there. In response, police asked why he was in the bathroom for so long. He said he had "explosive diarrhea" and he was "sick," and he kept nodding off as police tried to talk to him. Police asked if they could do a patdown and asked if he had needles or weapons. Defendant denied possessing needles or weapons, but the officer patted him down and found a knife. Officer asked if he could search defendant's pockets. Defendant said no. Officer handcuffed him, told him he was "not under arrest" and searched the bathroom. They found a torn-off heroin balloon in the bathroom trash. Officers gave him *Miranda* warnings. When taking defendant to Hooper Detox per ORS 430.399(1), officer found, on defendant's person, another heroin bindle, a needle, and a cooking spoon with heroin on it.

Charged with possession of heroin, defendant moved to suppress all evidence from the point of his handcuffing forward. The state responded that the evidence was taken per an inventory policy, also it was not a "stop" when defendant unlocked the café bathroom door, but if it was a "stop," it was based on reasonable suspicion of criminal activity. The trial court denied the motion to suppress, reasoning that the officer had "reasonable suspicion" and that defendant was "under the influence of heroin, given the length of time, his unsteadiness, and the progression of events. Under ORS 403.399 and an order, the officer was required to take defendant to a treatment facility.

The Court of Appeals reversed. The Court of Appeals concluded that defendant was unlawfully seized when the police officer ordered him to exit the restroom (a reasonable person would not feel free to ignore the officer's order) and that the officer lacked reasonable suspicion that defendant was committing or had committed a crime.

The order to leave the bathroom was not "mere conversation" because the officer "banged on the door, identified himself as the police, and gave defendant an order: 'Beaverton Police, we need you to step out." The Court of Appeals cited two recent decisions that "both dealt with a situation in which the police ordered a defendant to step outside a *house*." *Id.* at slip op 8 (emphasis added). Those cases, *State v Dahl*, 323 Or 199 (1996) and *State v Hudson*, 253 Or App 327 (2012), *rev den*, 353 Or 562 (2013), involved police "using a loudspeaker" to repeatedly order a defendant to come out of a house "with his hands up." *Id.* at slip op 8-10. Those two cases involved private homes, not a commercial premises with a single-occupancy bathroom tied up for 25 minutes where police responded to a business manager's call for help.

Here, the Court of Appeals appeared to focus on defendant being "a paying customer of the café". The Court of Appeals did not mention the tone of the officer's voice.

The order to exit the bathroom was a stop. Stops must be supported by reasonable suspicion of criminal activity. This one was not. First, the officer did not testify that he had a subjective belief that defendant was engaging in criminal activity when he ordered him to exit. Second, such a belief, if he had one, would not have been objectively reasonable because "the only facts known" to him when he gave the directive "was [sic] that defendant was a paying customer of the café, he had in the restroom for approximately 20 minutes, he had been making banging noises, using the sink, and clearing his throat. Those facts do not give rise to an objectively reasonable belief that defendant had committed, or was committing, a crime."

The Court of Appeals responded to the state's "community caretaking" argument by once again reiterating that there is no "community caretaking" exception to the warrant requirement under the Oregon Constitution. And the Court of Appeals responded to the state's "emergency aid" exception by reciting the facts again: Although the café manager had called 911 because he was worried that defendant needed medical attention after 15 minutes of banging and moaning, the officer himself listened for five minutes without calling for help and heard only "a constant level of noise," "running water in the sink, throat clearing, and rustling and banging noises." That did not sound like distress, it "sounded like someone using a restroom" and thus the emergency-aid exception is not met.

4.5.6 Parking Lots and Roadsides

Parking-lot stops of people in cars can be based on traffic violations but also can be unrelated to traffic-code violations. In nontraffic stop cases, if the encounter is a "stop," then the stop must be supported by reasonable suspicion of criminal activity.

It's a "stop" if the police officer engages in a "show of authority" that reasonably conveys to the person that the person's freedom is significantly restricted or that she cannot terminate the encounter and go away. *State v Backstrand*, 354 Or 392, 399 (2013); *State v Anderson*, 354 Or 440, 450 (2013); *State v Highley*, 354 Or 459 (2013). That "show of authority" is evaluated based on the nature of the officer's questions, his behaviors, his actions, the "tone" of the encounter, and "other attendant circumstances." *State v Wabinga*, 265 Or App 82 (2014) (citing *Anderson*, 354 Or at 453). "Verbal inquiries" are not per se coercive. *Id.* (citing *Highley*, 354 Or at 471).

"Reasonable suspicion," requires the officer to prove that when he stopped the person, he had an objectively reasonable belief, based on specific and articulable facts, that the person committed or is about to commit a crime." *State v Martin*, 260 Or App 461, 469-70 (2014); *State v Wiggins*, 262 Or App 351 (2014).

> ***State v Wiggins***, 262 Or App 351 (4/23/14) (Linn) (Haselton, Duncan, Schuman SJ) Officers suspected that defendant was engaged in meth sales. An officer testified to these eight factors to support the basis for his stop: He saw "a suspected drug deal in a park," defendant gave a ride to a person without knowing the passenger's last name who had called from a pay phone when no pay phone was observed, the passenger got out of the car in a high drug-use area and entered a "former drug house," defendant admitted she had previously used meth and marijuana, defendant was not the registered owner of the car she was driving, the registered owner had a "drug history," defendant made statements distancing herself from potential drug activity in her car, and defendant was in a high drug use area of the city. So two officers talked to her in a parking lot, "ordered" her to move away from her car "under threat of being immediately arrested," and their drug detection dog alerted to meth in her car. Defendant had refused to consent to the drug-detection dog "sniff" and jerked her arm away from the officer when he tried to grab her arm.

The trial court denied her motion to suppress under the automobile exception to the warrant requirement.

The Court of Appeals reversed and remanded: The stop was not lawful because it was not supported by reasonable suspicion that defendant was engaged in a crime. The court addressed each of the eight circumstances the officer had based his stop on. Her admission of prior drug use, and her presence in a high drug use area of the city are of little weight under established case law. The remaining circumstances, in combination with those two, are "collectively insufficient to establish reasonable suspicion in this case." The defendant's conduct is the test, not other issues, such as who the registered owner is and that person's drug history. Further all of the circumstances in this case "establish nothing more than that defendant, who had admitted to using drugs months before the stop, was present in high drug use areas and was associating with others" who might be drug users. In short, here, defendant was stopped no later than when she was ordered to move away from the vehicle under threat of immediate arrest.

State v Beasley, 263 Or App 29 (5/21/14) (Multnomah) (Ortega, Sercombe, with Duncan, J., dissenting) (Note: The majority characterized this case as *not* a traffic stop -- not a traffic-code-based violation. The dissent noted that the officer himself said it was a traffic stop.).

Defendant was asleep in a lawfully parked car on a public street at 5:00 a.m. Officer parked across the street, turned on his spotlight, tapped on the car window, and woke defendant, who smelled of alcohol. Defendant told officer he had been drinking at his friend's house, but did not want to drive after drinking. Officer believed defendant had been driving, or perhaps later would drive, drunk, so he "asked in a casual manner for defendant's identification." Defendant gave him his driver's license, which officer held and asked defendant if he had any warrants, was on probation, and if officer could run a record's check of defendant. Defendant consented. A second officer arrived, parking behind defendant. Officer found that defendant had failed to register as a sex offender, so officer arrested him. Defendant moved to suppress. The trial court denied the motion.

The Court of Appeals (two of the three-judge panel) affirmed, characterizing this as "not initially * * * a traffic stop or a criminal stop," instead it was only a "check on his well-being." The majority concluded that "a reasonable person would not have felt that the officer was exercising his authority to significantly restrain defendant's liberty or freedom of movement as explained in the case law. Therefore, we conclude that defendant was not seized by the officer's request to see his identification, his inquiry about defendant's criminal status, his brief retention of defendant's identification, or his request to run a records check." All of that was "mere conversation," per the majority.

The dissent concluded that defendant was stopped by the officer's questions. The officer "by his own description, conducted a traffic stop" and he initiated the traffic stop by asking defendant for his driver's license; defendant was not free to leave. In addition, defendant was stopped because a reasonable person in defendant's situation would have believed that the officer had initiated a traffic stop and thus he was not free to leave. (Note: Neither the majority nor the dissent commented that defendant stated he was intoxicated, so he could not have legally driven away from the officer). "Questions and requests by an officer can have the effect of stopping a person" under *Rodgers/Kirkeby* and *Backstrand*. "If verbal inquiries communicate to a person that he or she is the subject of a traffic stop, the inquiries result in a seizure because 'a person detained for a traffic offense has a legal obligation to stop at the officer's direction and remain; the person may not unilaterally end the encounter and leave whenever he or she chooses.' *Backstrand*, 354 Or at 406-07 (describing *Rodgers/Kirkeby*). That is because a person who is the subject of a traffic stop is required by law to comply with an officer's orders

and to interact with the officer." (citing *Rodgers/Kirkeby* and ORS 811.535 (failing to obey an officer) and ORS 807.620 (false information to an officer)).

The dissent reasoned that defendant was stopped because the officer admitted that he intended to restrict defendant's liberty by investigating a DUII charge and "through his actions, actually did so."

State v Wabinga, 265 Or App 82 (8/20/14) (Multnomah) (Egan, Armstrong, Nakamoto) Two state police troopers patrolled the Sandy River area of Highway 20. Defendant's empty-looking car was on the side of a road. A trooper ran the license plate and found that the owner was on parole. Then a head popped up in the driver's seat. A trooper approached, asked defendant if he was ok, and defendant didn't answer but got out of the car, shut the door, and moved to the rear of the car. The trooper stepped back to let defendant do that. Defendant said he didn't need assistance, he "was just chillin'," and the trooper talked to him about fishing. Defendant did not make eye contact with the trooper, kept one hand in his pocket, seemed unusually nervous, and kept drinking from an empty soda can. The trooper began asking why he seemed so nervous. The other trooper got out of the police vehicle. The troopers stood 3 feet from defendant. Neither blocked defendant. A trooper asked defendant if he hand any weapons, asked if he could do a patdown search, and defendant consented to that search. That trooper asked if defendant was on parole, and defendant said he was. The other trooper saw a "thick plastic tube sitting on the floorboard of the driver's seat" through defendant's car window. The trooper recognized it as a tube to "smoke off burning narcotics." The trooper asked about the tube. Defendant "broke contact," walked away quickly, denied knowing what the tube was. A trooper asked for permission to open the door and look at the tube. Defendant said he didn't have a problem with that. The tube had brown crystals on it consistent with narcotics. Defendant then took something white out of his pocket and throw it behind him toward the river. Officer ordered defendant to turn around, put his hands behind his back, and handcuffed and arrested him. The bag defendant had thrown had cocaine or meth on it. Defendant moved to suppress all evidence from what he called an unlawful seizure. The trial court denied the motion to suppress.

The Court of Appeals affirmed. Examining "the nature of the officer's questions, behaviors, and actions, the tone of the encounter, and other attendant circumstances," per *State v Anderson*, 354 Or 440, 453 (2013), the officers' pre-arrest inquiries here engaged in mere conversation, not a "show of authority" sufficient to constitute a seizure. Their request to conduct a patdown also did not constitute a stop; defendant did not challenge the voluntariness of that request or his consent thereto. Here, "the stop occurred when [trooper] ordered defendant not to move and to put his hands behind his back after seeing the tube and seeing defendant take something out of his pocket and throw it toward the river." Further, the troopers had reasonable suspicion that defendant had committed or was about to commit a crime. Reasonable suspicion requires only facts to support an inference, not conclusive proof.

4.5.7 Hospitals

4.5.7.A Observations in ER

A 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); *State v Michel*, 264 Or App 261 (2014).

4.5.7.B Body Searches - Fourth Amendment

"The Fourth Amendment requires that a nonconsensual physical search of a suspect's body, like any other nonconsensual search, be reasonable. See *Winston v Lee*, 470 US 753, 759–60 (1985). A body search, however, requires 'a more substantial justification' than other searches. *Id*. at 767. In *Winston*, the Supreme Court rejected the state's request for a court order requiring a suspect to undergo surgery to remove a bullet from the suspect's chest. *Id*. at 755. In holding that the forced surgery would be unconstitutional, the Court identified three primary factors courts should weigh in deciding the reasonableness of a body search. Those factors are (1) "the extent to which the procedure may threaten the safety or health of the individual," (2) "the extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity," and (3) "the community's interest in fairly and accurately determining guilt or innocence." *Id*. at 761–62.

"The failure to obtain a warrant, while not necessarily fatal to a claim of reasonableness, is also relevant. See *id*. at 761; *United States v Cameron*, 538 F2d 254, 259 (9th Cir 1976). The foundational case is *Rochin v California*, 342 US 165 (1952), in which police officers entered Rochin's house and saw him swallow two capsules of morphine. *Id*. at 166. The officers took Rochin to a hospital, where "[a]t the direction of one of the officers a doctor forced an emetic solution through a tube into Rochin's stomach against his will." *Id*. Rochin vomited up the morphine capsules, which the prosecution then introduced as evidence at trial. *Id*. The Court reversed, holding that the forcible stomach-pumping "shock[ed] the conscience" and was "too close to the rack and the screw" to survive constitutional scrutiny. *Id*. at 172. Though Rochin was decided under the Due Process Clause of the Fourteenth Amendment, the Court has made clear it would now 'be treated under the Fourth Amendment, albeit with the same result.' *Cnty. of Sacramento v Lewis*, 523 US 833, 849 n. 9 (1998)." *George v Edholm*, __ F3d __ (9th Cir 2014).

4.5.7.C DUII blood draws

Under the Oregon Constitution, 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); *State v Moore*, 354 Or 493, 498 n 5 (2013) ("That holding remains good law.") But *Machuca* involved alcohol, not other drugs, the *Moore* Court footnoted, post-*Missouri v McNeely*, 133 S Ct 1552 (2013) (alcohol's metabolism rate in blood does not justify a per se exigency).

But the Fourth Amendment provides greater protection to individuals for warrantless blood draws than Article I, section 9, provides. In drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does *not* categorically constitute an exigency in every case sufficient to justify a warrantless blood draw under the Fourth Amendment. *Missouri v McNeely*, 133 S Ct 1552 (2012): "We have recognized a limited class of traditional exceptions to the warrant requirement that apply categorically and thus do not require an assessment of whether the policy justifications underlying the exception, which may include exigency-based considerations, are implicated in a particular case. *See, e.g.*, *California v Acevedo*, 500 US 565, 569-70 (1991) (automobile exception); *United States v Robinson*, 414 US 218, 224-35 (1973) (searches of a person incident to a lawful arrest). By contrast, the general exigency exception, which asks whether an emergency existed that justified a warrantless search, naturally calls for a case-specific inquiry." *McNeely*, 133 S Ct at n 3.

Note: If police officers incorrectly inform a DUII suspect that his refusal to give a blood or breath sample is not a freestanding crime – when it actually is – then Fifth Amendment due process is violated. *United States v Harrington*, __ F3d __ (9th Cir 2014).

4.5.7.D Other drug testing

See **Section 4.8.17** on Fourth Amendment "Special Needs."

In *Ferguson v City of Charleston*, 532 US 67 (2001), the Court held that a public hospital's policy of identifying and testing mothers whose children tested positive for drugs at birth was not justified under the "special needs" exception to (or carve-out from) the Fourth Amendment, because "the immediate objective of the searches was to generate evidence *for law enforcement purposes." Id.* at 83 (emphasis in original). The Court explained that the "central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment," and concluded that "the purpose actually served by the [ ] searches is ultimately indistinguishable from the general interest in crime control." *Id.* at 81.

4.5.8 Public Schools

See Section 4.8.10.

4.5.9 Jails and Juvenile Detention

See Section 4.8.11.

4.5.10 Airport and Border Searches

This category is usually governed by federal law.

"Certain kinds of warrantless searches — at the border, in airports, in stop-and-frisk searches and elsewhere — may exist even though a warrant to authorize these very same actions would indeed be unconstitutional." Akhil Reed Amar and Neal Kumar Katyal, NEW YORK TIMES Op-Ed, June 3, 2013.

4.6 Places with Increased Privacy

4.6.1 Commercial Premises

The Fourth Amendment and Article I, section 9, list four things protected from unreasonable searches and seizures: "persons, houses, papers, and effects." Both also have been extended protect other containers: sheds, trucks, offices, and the like.

The Fourth Amendment's protections apply to "commercial premises, as well as to private homes." *New York v Burger*, 482 US 691, 699 (1987).

In other words, "whether entrance to the home *or office* of a person suspected of crime be obtained by a representative of any branch or subdivision of the government of the United States by stealth, or through social acquaintance, or in the guise of a business call, and whether the owner be present or not when he enters, any search and seizure subsequently and secretly made in his absence, falls within the scope of the prohibition of the Fourth Amendment." *Gouled v United States*, 255 US 298, 306 (1921) (emphasis added). Finally: The United States Supreme "Court has held that the word 'houses,' as it appears in the Amendment, is not to be taken literally, and that the protection of the Amendment may extend to commercial premises." *Mancusi v Forte*, 392 US 364, 367 (1968).

Oregon courts have conflated "houses" with other "premises" in several cases. For example, the court used the general word "premises" when describing a search of a *residence*: "Under Article I, section 9, warrantless entries and searches of premises 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) (citing *Katz v United States*, 389 US 347, 357 (1967))." *State v Baker*, 350 Or 641, 647 (2011). The Court of Appeals has applied rules on third-party consent of "*premises*" searches to a third-party consent of a *vehicle* search in *State v Kurokawa-Lasciak*, 249 Or App 435, 439-40, *rev den* 352 Or 378 (2012). The Court of Appeals also has linked businesses with residences: The "businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property," *See v City of Seattle*, 387 US 541, 543 (1967) (citing Fourth Amendment as being consistent with Article I, section 9, on this point). *State v Mast*, 250 Or App 605 n 6 (2012).

Despite indicating similarity of analysis in all premises searches, the Oregon Supreme Court has differentiated houses from public places. *See, e.g.*, *State v Fair*, 353 Or 588 (2013) (emphasizing the sanctity of the home).

In a commercial-premises case, he Oregon Supreme Court has held: "A mere request for identification made by an officer in the course of an otherwise lawful police-citizen encounter does not, in and of itself, result in a seizure." *State v Backstrand*, 354 Or 392, 410-11 (2013) (defendant-shopper was not seized when an officer asked shoppers in an "XXX store" for their ages and identification, which the officer kept for 10-15 seconds).

4.6.2 Homes; Living Quarters

"A government intrusion into the home is at the extreme end of the spectrum [of privacy and liberty]. Nothing is as personal or private. Nothing is more inviolate." *State v Fair*, 353 Or 588, 600 (2013) (Article I, section 9). The "physical entry of the home is the chief evil against which the working of the Fourth Amendment is directed." *Payton v New York*, 445 US 573, 585 (1980).

A. Fourth Amendment: "Privacy and security in the home are central to the Fourth Amendment's guarantees as explained in our decisions and as understood since the beginning of the Republic." *Hudson v Michigan*, 547 US 586, 603 (2006) (Kennedy, J., concurring). 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 [1795]; *Boyd v United States*, 116 US 616, 626-630." *Silverman v United States*, 365 US 505, 511 (1961).

United States Supreme Court "cases establish that a warrant is generally required for a search of a home, *Brigham City v Stuart*, 547 US 398, 403 (2006), but 'the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Fernandez v California*, 134 S Ct 1126 (2014).

B. Article I, section 9: The Oregon Supreme Court has "described a person's living quarters as 'the quintessential domain protected by the constitutional guarantee against unreasonable searches.' *State v Louis*, 296 Or 57, 60 (1983). Under Article I, section 9, of the Oregon Constitution, 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. *State v Paulson*, 313 Or 346, 351 (1992)." *State v Guggenmos*, 350 Or 243, 250 (2011).

But as of August 2014, under *State v Unger*, 356 Or 59 (2014), if a person voluntarily (even if not knowingly) relinquishes his privacy rights during a police trespass by consenting to a search of his private living quarters, the search and seizure may be valid and the evidence not suppressed. If police obtain a person's voluntary consent to enter, "the court must address whether the police exploited their prior illegal conduct to obtain the evidence." *Id.* at 86. Before *Unger*, "the only considerations" to determine if "police had exploited their illegal conduct to obtain consent were

the temporal proximity between the illegal police conduct and the consent and the presence of any intervening or mitigating circumstances." *Ibid*. Now, under *Unger*, the Court has "explained" and "identified" more "considerations." *Ibid*. Those are: the nature, extent, and severity of the constitutional violation" and "the purpose and flagrancy of the misconduct" and also (block quoting from a treatise):

> "the proximity of the consent to the arrest, whether the seizure brought about police observation of the particular object which they sought consent to search, whether the illegal seizure was 'flagrant police misconduct,' whether the consent was volunteered rather than requested by the detaining officers, whether the arrestee was made fully aware of the fact that he could decline to consent and thus prevent an immediate search of the car or residence, whether there has been a significant intervening event such as presentation of the arrestee to a judicial officer, and whether the police purpose underlying the illegality was to obtain the consent." *Id*. at 87.

Now, "when a police officer violates the Oregon Constitution, a court no longer must presume that the officer gains an advantage, and the state no longer has the burden to prove that the evidence obtains by pressing that advantage should be admitted." *Id*. at 103 (Walters, dissenting). "The only apparent restriction * * * is that a court may decide * * * that the conduct of the officers was so sever, purposeful, or flagrant that, in the court's opinion, suppression must follow. But how can the police or the public know before the fact which adjective a court will attach?" *Id*. at 111 (Walters, J., dissenting).

State v Unger, 356 Or 59 (2014), *State v Lorenzo*, 356 Or 134 (2014), and *State v Musser*, 356 Or 148 (2014), decided on the same day, are detailed in **Section 4.8.5.A**.

See ***State v Sullivan***, 265 Or App 62 (2014) in **Section 4.8.3.C(1ii)**.

> ***State v Charles***, 263 Or App 578 (6/18/14) (Jackson) (Sercombe, Ortega, with Hadlock dissenting) An officer responded to a call that a truck was stuck in a ditch outside a residential driveway. Officer saw a truck in a ditch near the driveway. The truck was registered to defendant. Officer believed the driver must have been impaired. Two officers knocked on the house door, were greeted by defendant's wife, who said her husband had been driving but had swerved to avoid a dog. Officers did not believe her. One officer went to interview the caller across the street. Other officer saw a highly intoxicated defendant staggering around the house. Officer asked defendant to come out and speak with him and defendant complied.
>
> Then the officer walked with defendant to a "flat area" to have defendant perform field sobriety tests. Officer read defendant *Miranda* rights because he was conducting an investigation. Defendant acknowledged that he understood. Officer asked defendant for permission to pat him down for weapons. Defendant agreed. Defendant made incriminating statements. Officer arrested him for DUII. He "moved to suppress" (presumably all statements and evidence) on grounds that he had been unlawfully seized before the patdown. The trial court denied the motion.
>
> The Court of Appeals reversed and remanded, with one of the three judges dissenting. The Court of Appeals noted that no "stop" or "seizure" generally occurs when:
>
> > -An officer approaches and knocks on a citizen's front door, *State v Portrey*, 134 Or App 460, 464 (1995).
> >
> > -An officer asks a person to come out of a residence to talk to the officer, *State v Shaw*, 230 Or App 257, 262-63, *rev den*, 347 Or 365 (2009).

-An officer suggests that a person walk together with the officer, *State v Crandall*, 197 Or App 591, 595 (2005), *rev'd on other grounds*, 340 Or 645 (2006).

But here, the Court of Appeals phrased its legal test this way: "the question is whether all of the officer's actions combine to form a whole greater than the sum of its parts; that is, whether, based on the totality of the circumstances, a reasonable person would believe that the officer had intentionally and significantly deprived defendant of his freedom of movement." *Miranda* "warnings are associated in the public mind with the spectacle of an individual being placed under arrest," quoting a Florida case, plus "defendant's course of conduct had been altered twice by the police actions in beckoning him to the porch and then leading him into a flat area for field sobriety tests," and the request to do a patdown also in this context "contributes to the reasonable conclusion in this contest that defendant was detained" under a show of authority.

The dissent would conclude that defendant was not stopped when he consented to the patdown search.

4.6.3 Curtilage

"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*, 350 Or 461, 650 n 7 (2011).

4.6.3.A Implied Consent & Barriers

"Article I, section 9, 'provides protection not only to an individual's house proper, but also to the area surrounding the house, known as the curtilage.' *State v. Russo*, 68 Or App 760, 763, 683 P2d 163 (1984); *see also State v Baker*, 350 Or 641, 650 n 7, 260 P3d 476 (2011) (explaining that 'curtilage' of a home is the land immediately surrounding and associated with a person's residence). Under the Oregon Constitution, a warrantless intrusion onto residential curtilage is presumptively a trespass, unless the entry is privileged or the defendant has given express or implied consent. *State v Somfleth*, 168 Or App 414, 424, 8 P3d 221 (2000). A trespassory intrusion onto the curtilage of a person's home violates Article I, section 9." *State v Coffman*, 266 Or App 171, 177 (2014).

A "person does not impliedly consent to entry onto his or her private property other than to approach the front door." *State v Bistrika*, 261 Or App 385, 392 (2014). "The law assumes that, absent evidence of an intent to exclude, an occupant impliedly consents to people walking to the front door and knocking on it, because of societal and legal norms of behavior." *State v Roper*, 254 Or App 197 (2012) (quoting *State v Portrey*, 134 Or App 460, 464 (1995)). Thus an occupant "impliedly consents to people walking to the front door and knocking on it" *unless* there is evidence of the occupant's intent to exclude people. But occupants are not considered to have given implied consent to other entry points other than front doors. * * * Thus entries into backyards are considered to be trespasses and searches. *State v Unger*, 252 Or App 478 (2012), *rev'd*, 356 Or 59 (2014) (accepting state's concession that officers trespassed). However, even when police trespass, as in *Unger*, suppression is not required if the undressed homeowner gives voluntary consent to the trespassing police to enter his home. *State v Unger*, 356 Or 59 (2014).

State v Unger, 356 Or 59 (2014), *State v Lorenzo*, 356 Or 134 (2014), and *State v Musser*, 356 Or 148 (2014), decided on the same day, address police trespass followed by homeowner consent to enter, search, and seize things in his home. See **Section 4.8.5.A**.

The legal test to determine if officers trespassed is the residents' intent to exclude the public from entering the property. A "person impliedly consents to visitors approaching the front door unless

the person has manifested an intent to forbid the intrusion of casual visitors onto the property." *State v Gabbard*, 129 Or App 122, *rev den* 320 Or 131 (1994); *State v Cam*, 255 Or App 1, *adh'd to on recons*, 256 Or App 146, *rev den* 354 Or 148 (2013).

"Going to the front door and knocking [is] not a trespass. Drivers who run out of gas, Girl Scouts selling cookies, and political candidates all go to front doors of residences on a more or less regular basis. Doing so is so common in this society that, unless there are posted warnings, a fence, a moat filled with crocodiles, or other evidence of a desire to exclude casual visitors, the person living in the house has impliedly consented to the intrusion." *State v Ohling*, 70 Or App 249, 253, *rev den*, 298 Or 334 (1984); *State v Welsh*, __ Or App __ (11/19/14).

"The scope of a homeowner's implied consent to approach the home is limited to those acts reasonably undertaken to contact the residents of the home; such consent does not extend, for instance, to an exploratory search of the curtilage.' *State v Cardell*, 180 Or App 104, 108 (2002)." *State v Welsh*, __ Or App __ (11/19/14).

A "Private Property" sign alone is likely insufficient to show that intent, but a "No Trespassing" sign has been sufficient. Front doors are different than backdoors or backyards. Under Oregon law, intrusions onto residential curtilage are deemed to be trespasses *unless* the entry is privileged or has the occupant's express or implied consent. *State v Unger*, 252 Or App 478 (2012), *rev'd on other grounds* 356 Or 59 (2014) (despite officers' deliberate, flagrant trespass into backyard and bedroom door, evidence is not suppressed because the victim of the police trespass voluntarily consented to a search).

Three "No Trespassing" signs that a reasonable person would have seen, even if police officers credibly testified that they did not see the signs, has been deemed sufficient to prove residents' intent to exclude the public, even if the driveway gate was open and one of those 3 signs was not visible. *State v Roper*, 254 Or App 197 (2012) (officers trespassed because defendants made their intent to exclude objectively evident by placing "No Trespassing" signs on both sides of the driveway and posted other signs at the driveway entrance and further into the driveway, even though a boundary fence and gate were open). In contrast, a "Private Property" sign plus an open gate on a property is not sufficient to manifest intent to exclude the public. *State v Cam*, 255 Or App 1, *adh'd to on recons*, 256 Or App 146, *rev den*, 354 Or 148 (2013) (officers did not trespass because defendant had not manifested a clear intent to exclude visitors).

> ***State v Hockema***, 264 Or App 625 (08/13/14) (Coos) (Wollheim, Duncan, Schuman SJ) In this case, there "is no question that the fence in front of the house, posted with some 'no trespassing' signs, manifested defendant's intent to exclude people from his front yard. There also is no question that, if the gate is closed, defendant has manifested an intent to keep people from entering the dirt road." The issue is whether "those signs and barriers were sufficient to objectively manifest defendant's intention to prohibit all casual visitors from entering the open driveway and approaching defendant's door." The trial court concluded that they did not. The Court of Appeals affirmed. Here, "although defendant posted many signs along his property, only two signs – those posted on the fence east of the driveway – were potentially related to the driveway." All the other signs were "so far off" that they would not be visible to a person driving to defendant's home.
>
> ***State v Coffman***, 266 Or App 171 (10/08/14) (Multnomah) (Nakamoto, Armstrong, Egan) Officers went to the back of a residential house where the "front door" was in the backyard. They were investigating a marijuana grow operation in SE Taggart Street in Portland. Officers knocked on the screen door without identifying themselves, defendant said "come in" and could not see the officers. An officer testified that defendant seemed startled but did not order them to leave once they were inside. Defendant was out of compliance with his medical-marijuana permit. He was given Miranda warnings and

charged with several marijuana-related offenses. The trial court denied his motion to suppress.

The Court of Appeals vacated and remanded: "We have consistently stated that the presumption of implied consent to approach a resident's front door is based on social norms and whether an objective member of the public, i.e., a stranger, would understand there to be an implied invitation to approach the residence." *Id.* at 180. Implied consent "requires application of an objective test." *Id*. at 181. The state "has the burden of proving an implicit invitation to public entry sufficient to overcome the presumption of trespass." In this case, the state conceded that if the test is objective, the question is whether an objective visitor would have been invited to enter the backyard. Here, the state conceded that it cannot meet that standard. Thus the officers' entry "was a trespass and was a violation of defendant's right against a warrantless search."

4.6.3.B Lawful Vantage Point

"No search occurs, however, when police officers make observations from a 'lawful vantage point.' *State v Ainsworth*, 310 Or 613, 617 (1990). A 'lawful vantage point' may be within the curtilage of a property in which a defendant has a privacy interest, given that, 'absent evidence of an intent to exclude, an occupant impliedly consents to people walking to the front door and knocking on it, because of social and legal norms of behavior.' *State v Portrey*, 134 Or App 460, 464 (1995)." *State v Pierce*, 226 Or App 336, 343 (2009).

4.6.4 Entries

"Houses" are specifically listed in the Fourth Amendment and Article I, section 9, of the Oregon Constitution. However, several exceptions have arisen (or have been recognized) to a general idea that warrants are required for a home invasion. The United States Supreme Court appears to continue the "exigent circumstances" exception with subcategories. The Oregon Supreme Court copied those federally recognized exigent circumstances but in the past several decades has drifted off to separately list "exigent circumstances" and "emergency aid."

In *Missouri v McNeely*, 133 S Ct 1552 (2012), which is a warrantless *blood-draw* case (entering a vein), the US Supreme Court recited cases where exigencies allow for "acting without a warrant," "searching," and/or "seizing" in *homes or buildings*:

- "to provide emergency assistance to an occupant of a home, *Michigan v Fisher*, 588 US 45, 47-48 (2009),"
- to "engage in hot pursuit of a fleeing suspect, *United States v Santana*, 427 US 38, 42-32 (1976),"
- or to "enter a burning building to put out a fire and investigate its cause, *Michigan v Tyler*, 436 US 499, 509-10 (1978),"
- or "to prevent the imminent destruction of evidence" under *Cupp v Murphy*, 412 US 291, 296 (1973) and *Ker v California*, 374 US 23 (1963),
- to prevent a person from destroying hidden contraband in his trailer, *Illinois v McArthur*, 531 US 326, 331 (2001),
- and to search "a suspect's fingernails to preserve evidence that the suspect was trying to rub off." *Missouri v McNeely*, 133 S Ct 1552 (2012).

In *State v Davis*, 295 Or 227, 238 (1983), the Oregon Supreme Court copied federal cases on the "exigent circumstances" exception, with hot pursuit, destruction of evidence, escape, and emergency aid as examples of exigent circumstances, rather than as separate exceptions:

> "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 of a suspect, *Johnson v United States*, 333 U.S. 10 (1948), and where emergency aid was required by someone within, *United States v Goldenstein*, 456 F2d 1006 (8th Cir 1972)."

In 1994, the Oregon Supreme Court combined the "exigent circumstances" with the "emergency" subset of that general category, calling it "the emergency/exigent circumstances exception:"

> "Under Article I, section 9, '[w]arrantless entries and searches of premises are *per se* unreasonable unless they fall within one of the few specifically established and carefully delineated exceptions to the warrant requirement.' *State v Bridewell*, 306 Or 231, 235 (1988). One of those exceptions is the emergency/exigent circumstances exception. *Id.* That exception requires both probable cause and an exigency. *Id.* Here, defendant does not dispute that the officers had probable cause to believe that he had committed a felony, nor does he dispute that the officers had probable cause to believe that they would find evidence of his identity in his car. Rather, defendant argues that no exigent circumstance existed that justified the officers' failure to obtain a warrant. On that point, this court has explained that '[a]n 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)." *State v Snow*, 337 Or 219 (1994).

Much more recently, the Oregon Supreme Court has separated an "exigent circumstances exception" from an "emergency aid exception." In *State v Fessenden*, 355 Or 759, 765 (2014), the Court stated that those two now-separate exceptions

> "differ in at least one key way. The exigent circumstances exception 'requires both probable cause and an exigency. *State v Snow*, 337 Or 219, 223 (2004). The emergency aid exception does not: It permits warrantless entry, search, or seizure, regardless of whether the officer has probable cause to believe that a crime has been or is being committed, as long as the officer reasonably believes it necessary to 'render immediate aid to persons * * * who have suffered, or who are imminently threatened with suffering, serious physical injury or harm. [*State v Baker*, 350 Or 641, 649 (2011)]. Emergency aid requires only 'an objectively reasonable belief, based on articulable facts' that such an emergency exists. *Id.* The exceptions also may differ in scope." *Id.* at 765.

Also, in *Fessenden*, the Oregon Supreme Court listed three actions under the emergency aid and exigent circumstances exception. Rather than just "search or seizure," it recited "*entry*, search, or seizure," as if there is a difference between an "entry" and a "search or seizure." *State v Fessenden*, 355 Or 759, 765, 773 n 14 (2014) (emphasis added). Although a search usually involves an "entry" such as into a pocket, purse, vehicle, password-protected computer or mobile device, the Court appears to consider "entries" to be entries into buildings and curtilage.

> ***State v Fessenden***, 355 Or 759, 765 (2014) (Walters) Two codefendants jointly owned a horse. Neighbors called the sheriff to report that the horse was starving. From a lawful vantage point, an officer with training in animal welfare noticed that the horse was swaying, appeared to have kidney failure because it was straining to urinate, and had no visible fatty tissue. The officer believed that if the horse fell, it would be seriously injured or would die, and it would take 4 to 8 hours to obtain a warrant and get the horse to a

veterinarian. Officer believed that defendants were committing the crime of neglect of a horse. The statute on animal abuse or neglect applies to certain animals and horses are one of the protected animals. The officer testified to "specific, articulable facts" including that this horse was "the thinnest horse I've seen that was still on its feet" and he was "afraid it was going to fall over and not be able to get back up." Officer entered the property, seized the horse, and took it to a veterinarian who stated that it was starving and in need of immediate treatment. On charges of several first- and second-degree animal abuse and neglect crimes, defendants sought suppression of "all observations of the horse and "all fruits of said search and seizure including any information * * * including any examination of the horse." The trial court concluded that both the exigent circumstances and emergency aid exceptions to the warrant requirement in Article I, section 9, and the Fourth Amendment applied. The Court of Appeals affirmed under the emergency aid exception and in so doing extended that exception to include animals.

The Supreme Court affirmed, but held that "the exigent circumstances exception permitted the officer's actions" rather than the emergency aid exception. The Court recited that some of its recent cases state that the exigent circumstances exception "requires both probable cause and an exigency" but the emergency aid exception "does not." "Emergency aid requires only 'an objectively reasonable belief, based on articulable facts' that such an emergency exists." All the officer needs, under prior emergency-aid cases, is a reasonable belief that "warrantless entry, search, or seizure" is "necessary to render immediate aid to persons * * * who have suffered, or who are imminently threatened with suffering, serious physical injury or harm." The Court stated that the two exceptions "also may differ in scope" because under one case the Court used the word "property" for the exigent circumstances exception but the "emergency aid doctrine, on the other hand, has been described as applying to situations in which immediate action is necessary to render aid to 'persons.'"

Then the Court discussed that humans lawfully can kill animals but not other people, except in death penalty cases. Further, Oregon statutes "illustrate [that] some animals, such as pets, occupy a unique position in people's hearts and in the law." The Court continued on about horses specifically, and listed Black Beauty and the logo of the American Society for the Prevention of Cruelty to Animals, which "pictures an angel intervening to save a carriage horse from being beaten." Chimps, dolphins, also were noted, but the Court then pivoted: "at this moment in time, Oregon law does not protect animal life to the same extent or in the same way that it protects human life." Then the Court declined to decide the case based on the emergency aid exception and considered "whether the officer's entry and seizure of the horse were permitted under an existing exception to the warrant requirement." (That statement is unclear, but it seems to mean that the emergency-aid exception is not an "existing" exception if extended to horses).

Then the Court recited the exigent circumstances exception to escape, hot pursuit, destruction of evidence, and concluded that "this cases fell within that exception." That is, the "emergency circumstances." (The Court wrote that exactly: "the exigent circumstances exception to Article I, section 9, is not limited * * * to circumstances in which human life is threatened. This court implicitly has recognized that officers are permitted to take warrantless measures in instances in which those measures are necessary to enable officers to fulfill essential law enforcement responsibilities in emergency circumstances." *Id.* at 772 (emphasis added). So the "exigent circumstances exception applies in "emergency circumstances."

The Fourth Amendment also was not violated in this case based on the "exigent circumstances exception."

4.6.4.A Emergencies

1. Article I, section 9

"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) (motel room). "The linchpin in all the cases which rely upon the emergency doctrine to justify a warrantless entry is the urgent need to render aid and assistance within." *Id.* at 238.

In *State v Fessenden/Dicke*, 355 Or 759, 765 (2014), the Oregon Supreme Court separated the broad "exigent circumstances" exception (which under *Davis* had included "emergency aid" as one type of "exigency" in *Davis*) from the emergency aid exception. In *Fessenden*, the Court distinguished the two exceptions, writing: "The emergency aid exception and the exigent circumstances exception differ in at least one key way. The exigent circumstances exception 'requires both probable cause and an exigency.' * * * The emergency aid exception does not [require] probable cause to believe that a crime has been or is being committed, as long as the officer reasonably believes it necessary to 'render immediate aid to persons * * * who have suffered, or who are imminently threatened with suffering, serious physical injury or harm.'" (citations omitted). The Court further wrote that those two "exceptions also may differ in scope," in that exigent circumstances applies to "property" but "emergency aid" applies to "persons." *Ibid.*

"[A]n 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 Baker*, 350 Or 641, 649 (2011) (deciding the case under Oregon's Constitution but reciting 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)); *see also State v Rennells*, 253 Or App 580 (2012).

Under *State v Baker*, 350 Or 641 (2011), the state must prove and "the court must determine whether there are specific and articulable facts to support the officers' belief that a person required aid or assistance and whether that belief was reasonable," to fit the emergency aid exception. Reports of hearing four hours of a woman's loud crying, and when officers arrived at an apartment, seeing a woman lying in a fetal position while a male refused to consent to officers' entry, gave the officers an objectively reasonable belief that warrantless entry was necessary to assist a person who was seriously injured. *State v Wan*, 251 Or App 74 (2012).

The emergency may dissipate, however, and evidence obtained due to unlawful police presence may be subject to suppression. *State v Bistrika*, 261 Or App 385 (2014) (mother's 911 call authorized police initial presence but once that emergency dissolved, the police had no lawful right to be on the property).

Under *State v Baker*, 350 Or 641, 649 (2011), the "emergency aid exception does not require a life-threatening emergency or violence in progress. Entry is permitted if there are articulable facts reasonably indicating that a person is imminently threatened with suffering serious physical injury or harm." *State v Rennells*, 253 Or App 580 (2012).

2. Fourth Amendment

"One well-recognized exception applies when 'the exigencies of the situation' make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *Kentucky v King*, 131 S Ct 1849, 1856 (2011). 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". *King*, 131 S Ct 1849.

In short: "police officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home". *Kirk v Louisiana*, 536 US 635, 638 (2002) (per curiam).

In *Missouri v McNeely*, 133 S Ct 1552 (2012), which is a warrantless blood-draw case, the US Supreme Court recited cases where exigencies allow for "acting without a warrant," "searching," and/or "seizing" in homes or buildings:

- "to provide emergency assistance to an occupant of a home, *Michigan v Fisher*, 588 US 45, 47-48 (2009),"
- to "engage in hot pursuit of a fleeing suspect, *United States v Santana*, 427 US 38, 42-32 (1976),"
- or to "enter a burning building to put out a fire and investigate its cause, *Michigan v Tyler*, 436 US 499, 509-10 (1978),"
- or "to prevent the imminent destruction of evidence" under *Cupp v Murphy*, 412 US 291, 296 (1973) and *Ker v California*, 374 US 23 (1963),
- to prevent a person from destroying hidden contraband in his trailer, *Illinois v McArthur*, 531 US 326, 331 (2001),
- and to search "a suspect's fingernails to preserve evidence that the suspect was trying to rub off." *Missouri v McNeely*, 133 S Ct 1552 (2012).

4.6.4.B "Knock and Talk" – Fourth Amendment

Under the Fourth Amendment's "knock and talk" exception, "a police officer not armed with a warrant may approach a home and knock, precisely because that is no more than any private citizen might do." *Florida v Jardines*, 133 S Ct 1409, 1416 (2013) (quoting *Kentucky v King*, 131 S Ct 1849, 1862 (2011)). In *Carman v Carroll*, __ F3d __ (3d Cir 2014), the Third Circuit has identified three requirements for a "knock and talk" exception, quoting *Jardines*. (1) The officer must "knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." (2) The officer's purpose must be to interview, not to investigate, and that is based on the officer's "behavior" objectively viewed by a court. (3) The "knock and talk" encounter must begin at the front door of the house, not at a back door or elsewhere on curtilage no matter how convenient. In *Carman*, the appellate panel concluded that the "knock and talk" "requires that police officers begin their encounter at the front door" as a matter of law.

4.6.4.C Consent to Enter Premises

See Section 4.6.2 and 4.6.3.

1. Fourth Amendment

Although United States Supreme Court "cases establish that a warrant is generally required for a search of a home . . . the ultimate touchstone of the Fourth Amendment is reasonableness." *Fernandez v California*, 134 S Ct 1126 (02/25/14). Under the Fourth and Fourteenth Amendments, consent "by one resident of a jointly occupied premises is generally sufficient to justify a warrantless search." *Id.* The exception to that rule is when one resident refuses to consent, and another resident grants consent in the physical presence of the refuser, that is not "consent" to search. *Fernandez*, citing *Georgia v Randolph*, 547 US 103 (2006). It does not matter that "the police could readily have obtained a warrant to search the shared residence." *Fernandez*, (Ginsburg, J, dissenting).

2. Article I, section 9

"A police officer can enter a place lawfully if an individual has expressly or impliedly consented to the officer's entrance, but an individual's implied consent is limited and does not extend to 'police conduct that violates social or legal norms of behavior." *State v Danielson*, 260 Or App 601, 604 (2014). "An intrusion into a closed bedroom [for a welfare check] without an invitation was not conduct that we would consider in keeping with 'social or legal norms of behavior,'" even when a public estate sale was ongoing, the front door was open, people were wandering around unattended, the homeowner was not home. *Id.* at 606 (using the phrase "the implied consent exception" twice in this opinion; that phrase has never been used by any other Oregon appellate court before).

> ***State v Danielson***, 260 Or App 601 (Yamhill) (Ortega, Sercombe, Hadlock) People attending a public estate sale called police to report that an "unresponsive" man was laying on a couch while people wandered around the premises shopping. Hypodermic needles and "white rocks" were near him. Officers came for a "welfare check," noticed an estate sale sign on the property and that "people in front of the home were looking at sale items," and the front door was open. Sale items were inside the home. Officers heard snoring in the back room, officer announced himself, received no answer, and saw a man sleeping "on a couch in the living room." Syringes, two glass pipes with residue on them, also were present. Officers found more drug items on the man and arrested him. The owner was not home. Officers went to a back bedroom where they had heard snoring, the door was cracked open, they opened it, and saw defendant asleep under covers. A spoon with meth residue was on top of a TV and a "half-full syringe" was on a desk. Defendant said it was meth, but she refused to show her arms for track marks. Officer arrested her. The trial court denied her motion to suppress.
>
> The Court of Appeals reversed and remanded, using the phrase "the implied consent exception" twice and also using the word "approaches":
>
> > "We typically have held that the implied consent exception for approaches 'reasonable undertaken to contact' the home's residents does not apply to exploratory searches of a home's curtilage or other outside areas." (Citing three cases involving officers "meandering" or exploring outside homes).
>
> (Note: The Court of Appeals did not explain why it used the word "approaches" and this search was not of the outside or curtilage of a home – it was in a bedroom.)
>
> The Court of Appeals determined that there was no "implied consent for the officers to enter the bedroom," even if they had "implied consent to enter the home." Without any citations, the Court of Appeals explained:
>
> > "The implied consent exception is limited, and even if it was lawful for the officers to be in one part of the home (a determination we have not made here), that would not mean that they had implied permission to explore the rest of the

trailer. Indeed, a bedroom with a door almost completely shut is more private than areas outside a home like a greenhouse or an offshoot of a driveway, the exploration of which we have held were trespasses. The intrusion into a closed bedroom without an invitation was not conduct that we would consider in keeping with 'social or legal norms of behavior.'" *Id*. at 606.

4.6.4.D Officer Safety

"The potential for violence exists in all confrontations between police and private citizens. But a remote possibility of harm to the police officers cannot justify a warrantless entry into the private recesses of one's house. Absent articulable facts that evidence a compelling and urgent need for the entry, the Oregon Constitution demands a warrant be issued. We can require no less where the entry, as here, is supported with less than probable cause." *State v Davis*, 295 Or 227, 243 (1983) (entry into motel room based only on reasonable suspicion and then protective search for safety is not an exception to the warrant requirement)

4.6.5 Electronic Devices

See United States v Comprehensive Drug Testing, Inc., 579 F3d 989 (9th Cir 2009) (this case is "about the procedures and safeguards that federal courts must observe in issuing and administering search warrants and subpoenas for electronically stored information").

On search warrants for email to third-parties such as Yahoo!, see ORS 136.583 and *State v Rose*, 264 Or App 95 (2014), in Section 4.7.2.

A person who sends a text message has no privacy right in the text message as, and when, received. *State v Carle*, 266 Or App 102 (2014).

Riley v California, 573 US __ (2014).

State v J.C.L., 261 Or App 692 (2014).

State v Bray, 352 Or 24 (2012).

Schlossberg v Solesbee, 844 F Supp 2d 1165 (D Or 2012).

State v Nix, 236 Or App 32 (2010).

4.7 Warrants

> "* * *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

4.7.1 Application

The determination of "probable cause" to issue a warrant must be made by a "neutral and detached magistrate." *Coolidge v New Hampshire*, 403 US 443, 449 (1971) (Fourth Amendment); *State v Castilleja*, 345 Or 255, 269, *adh'd to on recons*, 345 Or 473 (2008) (copying

that phrase for the Oregon Constitution); *State v Pierce*, 263 Or App 515, 519-20 (2014) (so noting).

"[C]urrent constitutional standards" do not require a judge to recuse himself "when impartiality may reasonably be questioned" and "invalidate a warrant only where there is, in fact, actual bias." *State v Pierce*, 263 Or App 515, 524 (2014) (judge signed a search warrant against the defendant he'd previously represented).

Warrant applications need not be in writing. See ORS 133.545 to 133.619 on warrants. Instead of written affidavits, "the judge may take an oral statement under oath" if it is recorded, transcribed, certified, and retained. ORS 133.545(5). In addition, "the proposed warrant and the affidavit may be sent to the court by facsimile transmission or any similar electronic transmission that delivers a complete printable image of the proposed warrant. The affidavit may have a notarized acknowledgment, or the affiant may swear to the affidavit by telephone." ORS 133.545(6).

> ***State v Pierce***, 263 Or App 515 (6/11/14) (Washington) (DeVore, Nakamoto, Schuman SJ) In this case, the newly minted judge approved an application for a search warrant for defendant's property. The judge recognized the defendant's name. The judge had been a deputy public defender who had represented this defendant in prior burglary charges and had met with defendant three times. Defendant remembers telling his attorney (who became the judge) about his drug habit, how he did the burglaries, and that he had committed uncharged burglaries. The judge attested that he recognized defendant's name but did not recall any specifics. The judge signed the warrant application on his first day as a new judge. On execution of that search warrant, evidence gathered was used against defendant; a jury found defendant guilty of five counts of first-degree burglary among other charges.
>
> The Court of Appeals opinion states: "Defendant moved to suppress evidence from the searches." The opinion does not state what the basis for that motion was. The trial court – a different judge -- denied the motion to suppress. The Court of Appeals stated: "Defendant now appeals the trial court's denial of his motion to sup[p]ress."
>
> The Court of Appeals affirmed. It is bound by the trial court's findings. "Those findings mean that there was no evidence that [the issuing judge] used former client confidences to fill in the blanks on the probable cause inquiry. Instead the judge found probable cause from the affidavit itself." Further: "While broader ethical standards may require recusal when impartiality may reasonably be questioned, current constitutional standards * * * invalidate a warrant only where there is, in fact, actual bias." That is not present in this case.

4.7.2 Jurisdiction and Authority

> ***State v Rose***, 264 Or App 95 (7/02/14) (Polk) (Nakamoto, Armstrong, Egan) A 16-year old child conversed with defendant – who is her friend's stepfather – on Facebook, MySpace, instant messages, email, and telephone calls. She offered to send him a picture of her naked breasts. Defendant emailed her a picture of his bare chest. Several hours later, the teenager emailed defendant a picture of her bare breasts, then she emailed a another. The Court of Appeals opinion does not state how the police got involved. But a detective "had probable cause to believe that the victim had sent photographs of her breasts to defendant." The detective had spoken to the victim, who said she'd known defendant for years, they'd been communicating for the past few months on line and via telephone, and "during her conversations with defendant they had discussed sexually explicit details." Detective applied for and received a search warrant "seeking the e-mail records of defendant's and the victim's e-mail accounts through Yahoo" because there

was probable cause to believe that the email contained evidence of the crime of using a child in the display of sexually explicit conduct and encouraging child abuse.

The search warrant sought any and all records in defendant's username or his email address, including the IP address, and the contents of all electronic files, and any and all Yahoo IDs listed on the subscriber's Friends list, among other things.

Yahoo is headquartered in California. Detective faxed the search warrant to Yahoo's legal team in California. Yahoo sent back a computer disk to the detective with the information including a large amount of email. The detective searched the email and found the two photos of the teenager's breasts among those emails.

Defendant moved to suppress the photographs on two grounds: (1) the warrant was invalid because it was not authorized by statute and (2) the warrant was insufficiently particular. The trial court ruled that ORS 136.583 authorized the warrant and, without discussion, rejected the insufficient-particularity argument.

The Court of Appeals affirmed. That statute at ORS 136.583 by its plain terms authorized the circuit court to issue a search warrant for stored electronic files in Yahoo's California database. The statute's purpose was to allow Oregon courts to issue warrants for electronic communications in accordance with the Stored Communications Act at 18 USC sections 2701 to 2712, which Congress enacted in 1986 as part of the Electronic Communications Privacy Act. The SCA permits the government to require a provider of electronic communication services to disclose records if the entity (the government) obtains a warrant under state or federal rules. The SCA does not itself state whether a state can issue a search warrant for content in another state, but it allows states to authorize a procedure. Oregon did so in 2009, by enacting ORS 136.583, which authorizes warrants to recipients regardless if the recipient or the records are in Oregon. ORS 136.583 is a long-arm statute authorizing Oregon courts to issue search warrants. Defendant did not argue that the circuit court in this case lacked personal jurisdiction over Yahoo.

The Court of Appeals expressly did not consider the constitutionality of ORS 136.583.

As for the "insufficient particularity" argument, the Court of Appeals affirmed, see **Section 4.7.3B**, *post*.

4.7.3 Probable Cause and Particularity

4.7.3.A Probable Cause

"The probable cause requirement derives from statute, *see* ORS 133.545(4); ORS 133.555, as well as the state and federal constitutions, *see* Or Const, Art I, §9, US Const, Amend IV and XIV." *State v Huff*, 253 Or App 480, 486 n 6 (2012). "'Probable cause' has the same meaning throughout [state and federal] constitutional and statutory requirements." *State v Marsing*, 244 Or App 556, 558 n 2 (2011).

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, *aff'd* 350 Or 161 (2011).

Probable cause is based on the totality of the circumstances. Courts "consider the entire contents of the affidavit" supporting the warrant application, excised if appropriate. *State v Fronterhouse*,

239 Or App 194 (2010). "To determine probable cause, the judge may rely on facts asserted in the affidavit as well as reasonable inferences to be drawn from them." *State v Daniels*, 234 Or App 533, 538, *rev den* 349 Or 171 (2010). The legal test is "whether a neutral and detached magistrate could conclude, based on the facts and circumstances shown by the affidavit, that there was probable cause to believe that the search would discover things specified in the affidavit in the places requested to be searched." *State v Huff*, 253 Or App 480 (2012) (quoting *State v Castilleja*, 345 Or 255, 270 (2008)); *see also* ORS 133.555(2).

To encourage applications for warrants, courts "resolve marginal cases in favor of holding the warrant valid." *State v Ingram*, 251 Or 324, 329 (1968); *State v Lambert*, 263 Or App 683 (2014).

On reviewing whether an issuing magistrate could have concluded that an affidavit established probable cause, see *State v Goecks*, 265 Or App 158 (2014) and *State v Gardner*, 263 Or App 309 (2014).

4.7.4.B Particularity

The purpose behind the particularity requirement in both the Fourth Amendment and Article I, section 9, "is a prohibition against general warrants whereby administrative officers determine what is and what is not to be seized. The decision to seize must be judicial, not administrative, and the command to seize must be sufficiently particular to guide the officer to the thing intended to be seized and to minimize the danger of unwarranted invasion of privacy by unauthorized seizures." *State Rose*, 264 Or App 95, 106-07 (2014) (quoting *State v Tidyman*, 30 Or App 537, 542-43, *rev den* 280 Or 683 (1977)). "The degree of specificity required to accomplish that purpose depends on the circumstances and the nature of the property to be seized and 'may also be affected by the nature of the right which is protected.'" *Id.* (quoting *Tidyman*, 30 Or App at 543).

> ***State v Rose***, 264 Or App 95 (7/02/14) (Polk) (Nakamoto, Armstrong, Egan) A 16-year old child conversed with defendant – who is her friend's stepfather – on Facebook, MySpace, instant messages, email, and telephone calls. She offered to send him a picture of her breasts. Defendant emailed her a picture of his bare chest. Several hours later, the teenager emailed defendant a picture of her bare breasts, then she emailed a second photo of her bare breasts. The Court of Appeals opinion does not state how the police got involved. But a detective "had probable cause to believe that the victim had sent photographs of her breasts to defendant." The detective had spoken to the victim, who said she'd known defendant for years, they'd been communicating for the past few months on line and via telephone, and "during her conversations with defendant they had discussed sexually explicit details." Detective applied for and received a search warrant "seeking the e-mail records of defendant's and the victim's e-mail accounts through Yahoo" because there was probable cause to believe that the email contained evidence of the crime of using a child in the display of sexually explicit conduct and encouraging child abuse.
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> The search warrant sought any and all records in defendant's username or his email address, including the IP address, and the contents of all electronic files, and any and all Yahoo IDs listed on the subscriber's Friends list, among other things.
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> Yahoo is headquartered in California. Detective faxed the search warrant to Yahoo's legal team in California. Yahoo sent back a computer disk to the detective with the information including a large amount of email. The detective searched the email and found the two photos of the teenager's breasts among those emails.
>
> Defendant moved to suppress the photographs on two grounds: (1) the warrant was invalid because it was not authorized by statute and (2) the warrant was insufficiently

particular. The trial court ruled that ORS 136.583 authorized the warrant and, without discussion, rejected the insufficient-particularity argument.

The Court of Appeals affirmed. On ORS 136.583, see Section 4.7.2, ante. On the "insufficient particularity" issue, defendant contended that the warrant authorized a search of "all" of his Yahoo email without limit to time or subject, but the officer knew the photos were sent in June or July of 2010. The Court of Appeals held that the warrant was sufficiently particular "because it identified the place to be searched – defendant's Yahoo account – and the thing to be searched for and seized – evidence of the crimes of using a child in a display of sexually explicit conduct and of encouraging child sexual abuse." The First Amendment's "scrupulous exactitude" test is not applicable to warrants seeking evidence of crimes, further this victim told the detective that she'd known defendant for years, they'd been communicating for months, and that they'd discussed sexually explicit details. Those facts suggest evidence of defendant's crimes aside from the photos.

4.7.4.C Staleness

"Staleness" questions "whether or not the evidence sought will be there after the length of time since the event described in the affidavit occurred." *State v Lambert*, 263 Or App 683 (2014) (quoting *State v Young*, 108 Or App 196, 204 (1991), *rev den* 314 Or 392 (1992)).

Also, "staleness" refers to the information underlying an affidavit seeking a warrant. "Staleness" in an affidavit supporting an application for a warrant is determined by time, perishability, mobility, "the nonexplicitly inculpatory character of the putative evidence," and the suspect's propensity to retain the evidence. *State v Ulizzi*, 246 Or App 430 (2011), *rev den* 351 Or 649 (2012). Stale information can be refreshed by more recent evidence of current or continued illegal activity and thus properly used to support a warrant. *State v Huff*, 253 Or App 480 (2012).

The "current possession of a small amount of illegal drugs in a person's home does not give rise to probable cause to search the home for additional drugs." *State v Huff*, 253 Or App 480 (2012) (citing *State v Mepham*, 46 Or App 839 (1980)).

4.7.4 Scope

Oregon Constitution: 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)." *State v Walker*, 350 Or 540 (2011) (due to the underdeveloped record, the Court reserved "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.").

Fourth Amendment: Probable cause must be particular to the person being searched or seized. A premises warrant does not authorize police to search persons who merely happened to be at the premises when the warrant is executed. *Ybarra v Illinois*, 444 US 85 (1979).

4.7.5 Remedy

When a warrant "application includes constitutionally tainted information, the proper remedy is for the reviewing court to excise all the tainted information from the application and determine whether the remaining information in the affidavit is sufficient to establish probable cause." *State v Gardner*, 263 Or App 309, 313 (2014) (citing *State v Hitesman/Page*, 113 Or App 356, 359, *rev den* 314 Or 574 (1992)). After excising all tainted information, the reviewing court then determines, "based on the remaining information contained in the warrant, whether a neutral and detached magistrate could conclude that there is reason to believe that the facts stated are true, and that the facts and circumstances disclosed in the application sufficient to establish probable

cause to justify the requested search." *Gardner*, 263 Or App at 313 (citing *State v Castilleja*, 345 Or 255, 264-65, *adh'd to on recons*, 345 Or 473 (2008)).

4.8 Exceptions to Warrant Requirement

An encounter between a state actor and a person, house, paper, or effect may not even implicate the constitution:

"Mere conversation" between a state agent and a person is not a "stop," so no warrant and no justification for the lack of a warrant is required to engage in "mere conversation." *State v Backstrand*, 354 Or 392 (2013); *State v Highley*, 354 Or 459 (2013); *State v Anderson*, 354 Or 440 (2013).

If the encounter does implicate a constitution, then: "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); *State v Tucker*, 330 Or 85, 89 (2000); ORS 133.693(4). *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 entries and searches are *per se* unreasonable unless falling within one of the few 'specifically established and well-delineated exceptions' to the warrant requirement.").

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).

"The existence of probable cause does not relieve the state of its obligation to obtain a warrant or to establish that an exception to the warrant requirement applies." *State v Groling*, 262 Or App 585 (2014); *State v Rudder*, 347 Or 14, 21 (2009).

4.8.1 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*, 246 Or App 486, 490 (2011). "The state bears the burden of establishing the validity of a warrantless search or seizure." *State v Hebrard*, 244 Or App 593, 599 (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." *State v Hebrard*, 244 Or App 593 (2011) (citing *State v Foster*, 233 Or App 135, 144 (2010), *aff'd* 350 Or 161 (2011)). *Hebrard* involved a Class C felony.

> "What Not To Wear:"
> ***State v Martin***, 260 Or App 461 (01/02/14) (Multnomah) (Duncan, Haselton, Brewer pro tem) Plaintiff was walking on the sidewalk on 82nd Avenue from 9:45 pm to 10:50 pm in a puffy jacket, an above-the-knee skirt, and heeled boots. She repeatedly looked over her left shoulder. She did not speak or gesture. An officer followed her in an unmarked car. After walking 25-26 blocks, she paused to look at a Tundra in a Plaid Pantry parking lot. The Tundra backed out but stopped 15 feet from defendant. Officer saw her take one or two steps toward the Tundra, then she looked over her shoulder at his unmarked police car, then she went back to the sidewalk and kept walking. Officer followed her. Officer got defendant's name from other officers who had seen her before; she had multiple prior arrests – no convictions – for prostitution from 2004 to 2006. Defendant kept walking 30 blocks, then crossed the street, talked to a known prostitute for less than a minute, and after having trolled her for an hour and five minutes, officer decided to chat her up. He

got out of his car, approached her, asked to talk to her, and defendant said, "Why?" and kept walking. Officer ordered her to stop. She stopped. Officer demanded her ID, defendant asked why, he said he suspected her of trying to commit prostitution. She refused to give her ID and denied being a prostitute. Officer again demanded her ID. She again refused. Officer arrested her, handcuffed her, and gave her *Miranda* warnings.

Charges with prostitution and attempted prostitution, she moved to suppress all evidence and her statements made after her arrest. The officer testified "about the typical behavior of women working as prostitutes on 82nd Avenue." This defendant had looked over her shoulder, she paid attention to vehicles, and even though he did not see her try to contact anyone. He said that just being on 82nd Avenue and acting she like did is a substantial step toward prostitution. The trial court denied defendant's motion, calling this case "as close to the margin as I can recall." The state dismissed the attempted prostitution. The trial court convicted her on the prostitution charge.

The Court of Appeals reversed and remanded. The Court of Appeals addressed the difference between the requisite "reasonable suspicion" standard for a "stop" and "probable cause" to arrest. The Court of Appeals' discussion of "reasonable suspicion" was gratuitous because, as it stated, the officer did not discover any evidence after the stop and before the arrest.

After fact-matching to several other similar cases, the Court of Appeals concluded that walking on a public sidewalk on 82nd Avenue in a puffy jacket, above-the-knee skirt, and heeled boots is not particularly suspicious. The officer testified generally that all of 82nd Avenue is a high-vice area – he did not testify specifically about the areas defendant was walking. As to her prior arrests, she had no convictions, and she had no arrests since 2006. She looked over her shoulder and did not wave or gesture or speak to anyone: "Defendant was alone, at night, in a high-crime area. It would be common for a woman in such circumstances to monitor the movement of vehicles around her, especially those that turned in front of her." In short, the "conduct may have merited continued observation, but it was insufficient to support an arrest and all of the consequences."

4.8.2 Search Incident to Lawful Arrest

4.8.2.A Oregon Constitution

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: (1) to protect the officer's safety, (2) to prevent the destruction of evidence, and (3) to discover evidence relevant to the crime for which the defendant was arrested. *State v Hoskinson*, 320 Or 83, 86 (1994).

(Note that cases may blend or blur the three stated bases in *State v Hoskinson*, 320 Or 83, 86 (1994), for example: "The justification for this exception to the warrant requirement is that such searches are necessary in order to protect the arresting officer in case the suspect has a weapon within reach and to prevent the suspect from reaching and destroying evidence. *State v Caraher*, 293 Or 741, 759 (1982)." *State v Groom*, 249 Or App 118 (2012).)

"The arrest must be for a crime, evidence of which reasonably could be concealed on the arrestee's person or in the belongings in his or her immediate possession at the time of the arrest. * * * [I]f the person is arrested for a crime which ordinarily has neither instrumentalities nor fruits which could reasonably be concealed on the arrestee's person or in the belongings in his or her immediate possession, no warrantless search for evidence of that crime would be authorized as incident to that arrest." *State v Owens*, 302 Or 196, 200 (1986).

"In addition, a search incident to arrest is lawful if it is 'relevant to the crime for which defendant is being arrested and so long as it is reasonable in light of all the facts.'" *State v Groom*, 249 Or App 118 (2012). The "search must be reasonable in time, space, scope, and intensity." *Id.* (citing *State v Owens*, 302 Or 196, 205 (1986)).

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)). Stated differently: "The police may search closed containers 'found on or immediately associated with the arrestee, but only when it is reasonable to believe that evidence of a crime for which the person was arrested could be concealed there.' *State v Owens*, 302 Or 196, 202 (1986)." *State v Hite*, __ Or App __ (2014).

After closed containers are removed from a defendant's person, there may be neither an officer-safety need, nor a risk-of-escape need to open the container. *State v Moulton*, 266 Or App 128 (2014) (closed pouch and case); *State v Petri*, 214 Or App 138, 144-45 (2007) (sunglasses case opened a needle inside); *State v Dickerson*, 135 Or App 192, 194-95 (1995) (pocketknife opened).

On mobile-device searches incident to arrest, the Court of Appeals has held: "the 40-minute delay between defendant's arrest and the search of his cellular telephone was 'necessary and appropriate' to ensure that the cellular telephone could be expertly searched and to protect against the inadvertent destruction of evidence. Further, * * * there is no suggestion in this record of any unjustifiable delay. * * * Accordingly, the search of defendant's cellular telephone was reasonable in time for purposes of the search incident to arrest exception." *State v Nix*, 236 Or App 32, 36 (2010).

> ***State v Durando***, 262 Or App 299 (4/16/14) (Beaverton Municipal Court) (Hadlock, Ortega, Sercombe) Defendant was traffic-stopped and asked for his license, registration, and insurance papers. Defendant gave the officer a worn-out expired Washington temporary driver's license and nothing else. Officer "arrested defendant for failure to present a driver's license and took him into custody." Officer then "searched defendant's person, purportedly incident to the arrest, and found a small bag of marijuana in defendant's pocket" along with an expired Washington driver's license card. Defendant, pro se, moved to suppress the evidence. The trial court denied defendant's motion, concluding that the search was justified as incidental to the arrest.
>
> The Court of Appeals reversed, accepting the state's concession that the trial court erred. Citing *State v Hoskinson*, 320 Or 83 (1994), there are three justifications for a search incident to arrest: officer safety, prevent destruction of evidence, and discover evidence relevant to the crime. "However, a search incident to arrest for failure to display a driver's license ordinarily is 'limited to a search for weapons, because there is no reason to search an individual for evidence of that crime, which is complete upon noncompliance. *State v Bishop*, 157 Or App 33, 43 n 4 (1998)." A limited pat-down or a "limited search for weapons" to protect the officer or "to prevent escape" is justified whenever a person is taken into custody but a "search of defendant's pocket" is justified only if the officer develops reasonable suspicion that the person in custody "poses a serious threat of harm or escape and that a search would lessen or eliminate the threat." Here the record includes no testimony of any such suspicion.
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> ***State v Washington***, 265 Or App 532 (9/17/14) (Multnomah) (Lagesen, Duncan, Wollheim) Defendant was a passenger in a vehicle stopped for a traffic infraction. The driver failed field sobriety tests and was arrested on probable cause of DUII. The driver admitted taking Percocet, marijuana, and alcohol. Police then searched the vehicle, including the unlocked center console, for evidence of DUII. A loaded Ruger 9mm handgun was inside the center console. An officer asked defendant – the passenger – if she had any weapons on her. Defendant said the Ruger was hers. She was charged with

unlawful possession of a firearm (and another charge). She moved to suppress the gun because the search incident to arrest was not reasonable in scope or intensity, specifically that the center console should not have been opened. The officer testified that he was looking for evidence of DUII: pipes, pill bottles, pills, cans, receipts from bars. The trial court denied her motion to suppress.

The Court of Appeals affirmed: "DUII is a criminal offense where the instrumentalities of the crime reasonably could be concealed in the suspect's immediate possession of the passenger compartment of the car that the suspect was driving. * * * [A]n officer may search closed containers in a car incident to the driver's arrest for DUII, if those containers were in the driver's immediate control before arrest and if those containers reasonably could conceal evidence of DUII. Here * * * the center console reasonably could have concealed evidence of DUII." The officer permissibly searched that console incident to the driver's arrest for DUII.

The Court of Appeals reiterated that there are three permissible bases for a search incident to arrest under *State v Hoskinson*, 320 Or 83, 86 (1994): "(1) to protect the officer's safety; (2) to prevent the destruction of evidence; and (3) to discover evidence of the crime of arrest. * * * Where, as here, an officer seeks to search a car incident to the arrest of the driver after the driver has been secured away from the car, only the third purpose * * * provides a potential authorization for the search. * * * Under those circumstances, an officer is authorized to search a car incident to the arrest of the driver if the crime of arrest reasonably could be concealed in the car * * * and the search is otherwise reasonable 'in time, scope, and intensity.'" (Citations omitted). In Oregon, "a search incident to an arrest does not require probable cause beyond the basis for the arrest itself." (Citation omitted). The time element is reasonable if it occurs immediately after the arrest. The scope and intensity elements are reasonable if it is "sufficiently close in space" to the arrest" (the area within the suspect's immediate control).

State v Brody, 69 Or App 469, 473 (1984) is "expressly overrule[d]" in that it had used words indicating that the scope and intensity of a search incident to arrest turns on whether the "offense of arrest is a traffic offense."

State v Moulton, 266 Or App 128 (10/08/14) (Lincoln) (Duncan, Wollheim, Lagesen) Officer arrested defendant on a warrant for failure to appear, placed him in handcuffs, and patted him down for weapons and tools of escape. Officer felt a pipe in defendant's jacket pocket, knew it was not a weapon, suspected it was a pipe, but the Court of Appeals decision does not state if the officer removed the pipe or left it in the pocket. Officer continued his patdown, found a case in defendant's jacket pocket, asked him what was inside, defendant said "paraphernalia," officer opened the case, and found a glass pipe and baggies of meth. Officer continued his patdown, found a pouch in defendant's shirt pocket, removed it, opened it, and found more baggies of meth. Defendant was booked in the jail. He moved to suppress "all evidence resulting from the opening of the case and the pouch" because they were warrantless. The state contended that the closed containers were opened as valid searches incident to arrest, plus the containers would have been inevitably discovered during the jail booking process. A jail deputy testified about booking procedures, testifying that some arrested people are "booked and released" and during that process they are permitted to place small items in a locker without having those items searched. The deputy testified that he did not know what would have happened during defendant's booking. The trial court denied defendant's motion to suppress, concluding that finding the first pipe justified opening the closed containers, and the searches were valid on the failure-to-appear warrant because they could contain weapons or means of escape. Also they would have been inevitably discovered.

The Court of Appeals reversed and remanded on the state's concession of error. The state did not prove that the searches were justified as incidental to the arrest because such searches are "justified only to protect the officer's safety, prevent the destruction of

evidence, or discover evidence relevant to the crime for which the defendant is being arrested" under *State v Hoskinson*. Once removed from defendant's pockets, the containers posed no safety or escape threat, nor would they contain evidence of the failure-to-appear crime for which defendant was arrested. Moreover, the state failed to prove that the evidence would have been inevitably discovered at the jail.

State v Hite, __ Or App __ (11/05/14) (Lane) (Hadlock, Sercombe, Tookey) The inventory policy in Lane County Sheriff's Office Order "requires officers conducting an inventory to look for a broad range of items, including food and alcohol, and thus to open all closed containers that are designed to or likely to hold any of those items. Such an inventory extends well beyond that which would be reasonably related to the stated purposes of the policy, which mirror those we found permissible [in a prior case]. In other words, the policy requires officers to open and inventory closed containers that are not designed to contain or objectively likely to contain valuables or even dangerous items. It follows that the policy is overbroad. 'If an inventory policy is overbroad, an inventory conducted pursuant to that policy violates Article I, section 9.'" (Quoting *State v Cherry*, 262 Or App 612, 617 (2014).

4.8.2.B Fourth Amendment

4.8.2.B.i Mobile Devices

Officers must generally secure a warrant before conducting a search of information on a mobile device rather than as a warrantless search incident to arrest. *Riley v California*, 573 US __ , slip op at 10 (6/25/14). "Digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape. Law enforcement officers remain free to examine the physical aspects of a phone to ensure that it will not be used as a weapon—say, to determine whether there is a razor blade hidden between the phone and its case. Once an officer has secured a phone and eliminated any potential physical threats, however, data on the phone can endanger no one." *Id*. at slip op 11. "Absent more precise guidance from the founding era, we generally determine whether to exempt a given type of search from the warrant requirement 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.' *Wyoming* v *Houghton*, 526 U. S. 295, 300 (1999)." *Riley v California*, 573 US __ (6/25/14). See also

See *Schlossberg v Solesbee*, 844 F Supp 2d 1165 (D Or 2012) on warrantless police searches of personal electronic devices as searches incident to arrest. Video is at http://www.youtube.com/watch?v=rVyt4e5SNeM. Personal digital cameras cannot be searched as incident to an arrest "absent a showing that he search was necessary to prevent the destruction of evidence, to ensure officer safety, or that other exigent circumstances exist." A laptop, a cell phone, a smart phone, and a camera, are categorized the same way because a rule requiring officers to distinguish between such devices is impractical. Note: This case predated *Riley v California*, 573 US ___ (2014).

4.8.2.B.ii DNA Searches of Arrested Persons

Maryland v King,133 S Ct 1958 (2013) held that taking and analyzing DNA from an arrested person's cheek as a search incident to arrest for a "dangerous" or "serious offense," supported by probable cause, is a legitimate police booking procedure that is reasonable under the Fourth Amendment, like fingerprinting and photographing. Per the Court, such searches are *similar to and different from* "special needs" cases. *Similar* to special needs cases because "the search involves no discretion" by officers. *Different* from because special needs cases have no individualized suspicion but people are arrested for serious offenses based on probable cause. In

this case, the Court appears to have blended "special needs" analysis with the "search incident to arrest" analysis with prison-specific administrative searches.

4.8.3 Exigent Circumstances

See **Section 4.6.4** on Entering Premises. In *State v Fessenden*, 355 Or 759, 765, 773 n 14 (2014), the Oregon Supreme Court in dicta listed three separate acts: "warrantless entry, search, or seizure" under its "emergency aid exception" and "exigent circumstances" discussion. Therefore, "warrantless entries" (as if an "entry" differs from a "search") are addressed in Section 4.6.4, and this Section addresses exigent circumstances generally.

"An exigent circumstance is a situation that requires the 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).

"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, * * * the destruction of evidence, * * * flight of a suspect, * * * and where emergency aid was required by someone within." *State v Davis*, 295 Or 227, 237-38 (1983) (citing federal cases).

The exigent circumstances exception applies to property, which includes animals. *State v Fessenden*, 355 Or 759 (2014).

Note that "emergency aid" was a subset of "exigent circumstances" under *Davis*. But under more recent Oregon Supreme Court cases, "emergency aid" now is a separate exception.

4.8.3.A Fourth Amendment

4.8.3.A.i Body Searches

In a warrantless blood-draw case, the US Supreme Court recited cases where exigencies allow for "acting without a warrant," "searching," and/or "seizing" *in homes or buildings*. Those are: "to provide emergency assistance to an occupant of a home, *Michigan v Fisher*, 588 US 45, 47-48 (2009)," to "engage in hot pursuit of a fleeing suspect, *United States v Santana*, 427 US 38, 42-32 (1976)," or to "enter a burning building to put out a fire and investigate its cause, *Michigan v Tyler*, 436 US 499, 509-10 (1978)," or "to prevent the imminent destruction of evidence" under *Cupp v Murphy*, 412 US 291, 296 (1973), to prevent a person from destroying hidden contraband in his trailer, *Illinois v McArthur*, 531 US 326, 331 (2001), and to search "a suspect's fingernails to preserve evidence that the suspect was trying to rub off." *Missouri v McNeely*, 133 S Ct 1552 (2012)

4.8.3.A.ii Entries to Premises

See **Sections 4.6.2** and **4.6.3** and **4.6.4.**

"[T]he exigencies of the situation [may] make the needs of law enforcement so compelling that the warrantless search is objectively reasonable." *Michigan v Fisher*, 558 US 45, 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") (quoting *Mincey v Arizona*, 437 US 385, 393–394 (1978)). Officers "may enter a residence without a warrant when they have 'an objectively reasonable basis for believing that an occupant is . . . imminently threatened with [serious injury.]'" *Ryburn v Huff*, 132 S Ct 987, 990 (2012) (quoting

Brigham City v Stuart, 547 US 398, 400 (2006) (Fourth Amendment). The Court "explained that the need to protect or preserve life or avoid serious injury is justification for what would otherwise illegal absent an exigency or emergency." *Ibid*.

"[T]he 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." *Kentucky v King*, 131 S Ct 1849 (2011). Reiterating exigencies it had identified in *Brigham City v Stuart*, 547 US 398, 403 (2006) the Court summarized "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." The "need to 'prevent the imminent destruction of evidence' has long been recognized as a sufficient justification for a warrantless search." *Id*. (citations omitted).

Note: In April 2012, the Oregon Supreme Court wrote: "It appears that, although the United States Supreme Court has recognized an 'exigent circumstances' exception to the warrant requirement in the Fourth Amendment context, it has never attempted to summarize the exception." *State v Miskell/Sinibaldi*, 351 Or 680, 690 n 4 (2012). But in January 2011, in *Kentucky v King*, 131 S Ct 1849 (2011), the United States Supreme Court had summarized "the exigent circumstances rule." *King* is not its first US Supreme Court case to recite the "exigent circumstances" exception. The *King* Court cited *Brigham City v Stuart*, 547 US 398, 403 (2006), which listed its cases on exigent circumstances. In January 2012, in *Ryburn v Huff*, 132 S Ct 987 (2012), the US Supreme Court also had issued a per curiam opinion again emphasizing its case law on exigencies and emergencies justifying warrantless entries to houses.

4.8.3.A.iii Locking and remote wiping of mobile data

"Remote wiping can be fully prevented by disconnecting a phone from the network. There are at least two simple ways to do this: First, law enforcement officers can turn the phone off or remove its battery. Second, if they are concerned about encryption or other potential problems, they can leave a phone powered on and place it in an enclosure that isolates the phone from radio waves. Such devices are commonly called 'Faraday bags,' after the English scientist Michael Faraday. They are essentially sandwich bags made of aluminum foil: cheap, lightweight, and easy to use. They may not be a complete answer to the problem, but at least for now they provide a reasonable response. In fact, a number of law enforcement agencies around the country already encourage the use of Faraday bags." *Riley v California*, 573 US __ slip op at 14 (6/25/14) (citations omitted).

"If the police are truly confronted with a 'now or never' situation,—for example, circumstances suggesting that a defendant's phone will be the target of an imminent remote-wipe attempt—they may be able to rely on exigent circumstances to search the phone immediately. *Missouri* v. *McNeely*, 569 US ___, ___ (2013) (slip op at 10) (quoting *Roaden* v *Kentucky*, 413 US 496, 505 (1973)." *Riley v California*, 573 US __ slip op at 15 (6/25/14) (quotations omitted)

4.8.3.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).

"The Oregon Supreme Court has recognized both an emergency/exigent circumstances exception to the warrant requirement and a distinct 'emergency aid' doctrine." *State v Sullivan*, 265 Or App 62, 68 (2014). But see *State v Fessenden*, 355 Or 759, 765 (2014) where the Oregon Supreme

Court recognizes what it calls the "exigent circumstances exception" and the "emergency aid exception."

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*").

In, *State v Fair*, 353 Or 588 (2013), a woman called 911, then the line went dead. Police traced the call, went to the house, saw a man and woman in the house, and ordered the woman out, and separated the two. She had obviously been beaten in the head. While her husband yelled at her not to speak to police, she answered police that she had been arrested before. She also allowed a search of her pockets and a syringe cap fell out. She moved to suppress the drug evidence. The Supreme Court, using the words *house*, *home*, or *private residence* 47 times in this opinion, upheld the trial court's denial of defendant's motion to suppress. The Court decided that defendant was seized on her porch but the seizure was reasonable as "a patent exigency excusing a warrant" because the defendant had called 911 and her face was beaten up by the man who had retreated into the home. The police were authorized to detain her because she was a potential witness to her own beating. So the Court found it reasonable that the police asked her if she'd been arrested, what the charges were, and because she did not have a driver's license.

4.8.3.C Specific Exigencies

4.8.3.C(i) Emergency Aid

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).

In the home-entry context, "an emergency aid exception to the Article I, section 9, warrant requirement is justified when police officers have an objective 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 Baker*, 350 Or 641, 649 (2011).

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).

State v Fessenden/Dicke, 355 Or 759 (8/07/14) (Walters) – **Section 4.6.4**.

State v McCullough, __ Or App __ (8/06/14) (Jackson) (Sercombe, Ortega, Hadlock) The Court of Appeals wrote that "Kimball" (the court did not state if that was a trooper, or a random person on the roadway, or a friend) "saw a pickup truck belonging to defendant parked the wrong way on Highway 62. Kimball did not see defendant, but he did see blood on and around the truck. Kimball went to defendant's trailer to check on him. He saw blood near the trailer and leading up to the trailer; however, no one answered the door when he knocked." The opinion

does not state how Kimball knew the truck was defendant's, or describe the trailer, or where the trailer was in relation to the pickup truck. Kimball called 911.

Apparently a trooper and a fire chief went to "the scene" – the pickup truck. The trooper saw blood spatter, a substantially damaged truck flipped around, and lot of junk inside the passenger side of the truck. The opinion states that the trooper and fire chief "then drove to the defendant's trailer," again without describing where that was, or how they knew where it was. Trooper knocked on the door, no one responded, so he looked through a window and he saw blood spatters in the trailer entryway and a blood-smeared rag on the floor. He wanted to "check on their well-being," so he knocked several more times, then opened the trailer door and went inside. The fire chief, who was "emergency medical personnel" did not go in immediately.

Defendant was on the floor, under blankets, with blood on his face, and a bandage on his nose. Trooper asked if he was ok, how he got there, how he was doing, and smelled alcohol. Defendant said fine but "I don't really want you inside my trailer. I just want to go to sleep." Trooper asked him about drinking. Defendant said he had "plenty" to drink before coming home. Defendant declined the trooper's invitation to perform some field sobriety tests. Trooper arrested him for DUII. Defendant stood, turned around, and put his hands behind his back. Trooper did not render any medical attention to defendant, call for an ambulance, or take him to the hospital. Trooper took defendant to a detox center.

The trial court granted defendant's motion to suppress, finding that the blood spatters at the truck and trailer did not "rise to the level of a true emergency."

The Court of Appeals affirmed: the record contains no evidence that could allow a reasonable factfinder to find that the trooper had the requisite subjective belief to support the emergency aid exception. Under *State v Baker*, 350 Or 641, 649 (2011), the emergency aid exception applies "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." After "*Baker*, to support the emergency aid exception, the stat must prove that the officer, at the time of entry, believed that there was an immediate need to aid or assist a person who has suffered (or is imminently threatened with suffering) serious physical injury or harm."

The Court of Appeals noted that the trooper's purpose in entering the trailer was to check on defendant's well-being. The trooper's "warrantless entry would have been justified under the emergency aid exception only if he believed that his entry was necessary to render aid to someone who had suffered serious physical injury or harm."

4.8.3.C(ii). Destruction of, or Damage to, Evidence

Basic Article I, section 9, standard. If the warrantless search is 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).

"Exigent circumstances exist when a reasonable person in the police officer's position would determine under the circumstances that immediate action is necessary to prevent the disappearance, dissipation, or destruction of evidence. *State v Snow*, 337 Or 18 219, (2004); *State v Meharry*, 342 Or 173, 177 (2006); *State v Miller*, 300 Or 203, 229, 709 (1985); *State v Parras*, 110 Or App 200, 203, (1991); *see United States v Alaimalo*, 313 F3d 1188, 1192-93 (9th Cir 2002), *cert den*, 540 US 895 (2003) (exigent circumstances 'are present when a reasonable person [would] believe that entry * * * was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts')." *State v J.C.L.*, 261 Or App 692 (3/26/14) (computer hard drive connected and ready to be deleted).

"[W]hen the claimed exigency is the need to prevent a suspect's escape or to prevent the destruction of evidence, warrantless entry is permissible only when the escape or destruction "was *imminent*." *State v Matsen/Wilson*, 287 Or 581, 587, 601 P2d 784 (1979) (emphasis added). In some cases, it is easy to identify the circumstance that creates the demand for immediate police action: drugs may be flushed down the toilet or a forged document may be burned in a relative instant. That is not so where a suspect's intoxication is the potential evidence sought; depending on the time that the warrant would have taken to obtain, the alcohol in the bloodstream might have dissipated entirely, not at all, to a degree that impaired the efficacy of testing, or to a degree that had no material effect." *State v Sullivan*, 265 Or App 62 (2014).

Probable Cause + Imminent Destruction of Highly Destructible Evidence. Under the Fourth Amendment, when a suspect is not arrested, but is attempting to destroy evidence and refuses to consent to a search and seizure of his body (fingernail scrapings for DNA evidence), a very limited intrusion of scraping his fingernails at the police station does not violate the Fourth and Fourteenth Amendments. *Cupp v Murphy*, 412 US 291 (1973).

> ***State v J.C.L.***, 261 Or App 692 (3/26/14) (Yamhill) (Duncan, Wollheim, Schuman) (Defendant is 16, therefore he is called "Youth" in the opinion). Youth's uncle was arrested for possession of child porn. Uncle inculpated Youth. Youth took his (Youth's) computer to another high school student's house for repairs. Detective tried to contact Youth, but could not, so he went to the other student's house and seized Youth's computer (apparently he knew the other student had the computer).
>
> Eight days after seizing Youth's computer, detectives obtained a warrant to search that computer. The computer had "Limewire" software that lets users search shared folders when running Limewire online. Youth had the same child porn on a shared folder on his computer that his uncle had, although they were hidden and not shareable through Limewire. There was no evidence that Youth had shared child porn.
>
> Youth, charged with sex offenses, moved to suppress. The detective described the uncle's explanation for child porn (uncle was looking for music, not children) and that Youth had tried to remove the child porn from both of their computers because neither of them really wanted child porn, just music, even though they had placed the child sex photos into hidden folders on their computers. The uncle had told the detective that the high school student would periodically remove such images from the computers. When detective went to the student's house, the student was trying to remove a virus from Youth's computer, not remove porn, he said, although the day after the uncle's arrest Youth had told the student to delete all contents of the computer including backups.
>
> The detective saw that the hard drive was removed and connected to the student's computer by a cable. He believed that "the destruction of evidence was imminent" and thus seized the computer and hard drive. One hour later, the detective returned and obtained the student's consent to seize the student's own computer. The juvenile court denied Youth's motion to suppress.
>
> The Court of Appeals affirmed, citing *State v Machuca*, 347 Or 644 (2010) (on warrantless blood draws in DUII cases). Youth contended that the officer could have phoned in a warrant application while at the student's house. The Court of Appeals disagreed: the detective knew that the student had previously helped the uncle delete child porn off his computer, Youth had instructed the student to delete everything including back up files, and a cable was hooked up from Youth's to the student's computer. That is sufficient to establish that destruction of evidence was imminent.
>
> ***State v Sullivan***, 265 Or App 62 (8/20/14) (Beaverton Municipal Court) (Egan, Armstrong, Nakamoto) A clerk called police to report that defendant was drunk driving

with his son, a police officer observed defendant at his apartment slurring his words and yelling, and yelled "stop." Defendant did not stop but urged or pushed his son up the stairs and slammed his door shut. Defendant had a concealed weapons permit. Three officers pounded on the door then kicked in defendant's door and arrested him. Defendant moved to suppress "all evidence." The municipal court concluded that the entry was lawful to protect defendant's son from harm. The municipal court also found that telephone warrants are not available in Washington County and the officer did not attempt to apply for one. Motion granted.

On appeal, the state contended that *State v Machuca*, 347 Or 644 (2010) applies. *Machuca* held that the state is not required to prove that there was insufficient time for an officer to obtain a warrant before ordering a blood draw of an arrested DUII defendant.

The Court of Appeals reversed and remanded. *Machuca* is a case involving a warrantless blood draw of a defendant who already was validly seized. *Machuca* does not control warrantless home entries made to make arrests. That is because blood draws and home entries are "fundamentally different" intrusions. "A government intrusion into the home is at the extreme end of the spectrum [of privacy and liberty]. Nothing is as personal or private. Nothing is more inviolate. *State v Fair*, 353 Or 588, 600 (2013)." "Put simply, the home is different," this court wrote.

The Court of Appeals wrote: "the state does not attempt to justify the home entry under the emergency-aid doctrine" but then the Court of Appeals addressed the "emergency-aid doctrine" and "thus reject[ed] the trial court's conclusion that a threat of imminent harm to defendant's son constituted an exigent circumstance" for the entry.

The Court of Appeals focused on its interpretation of "exigent circumstances." "One [warrant] exception applies when police have probable cause to arrest a suspect and there are 'exigent circumstances.' *State v Kruse*, 220 Or App 38, 42, 184 P3d 1182 (2008); *see also [State v Bridewell*, 306 Or 231, 236 (1988)] ('Securing a warrant before entry is unnecessary if exigent circumstances, in addition to probable cause, exist, *i.e.*, if an 'emergency' exists.'). 'An exigent circumstance is a situation that requires the 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, 806 P2d 92 (1991). 'The state has the burden of proving that circumstances existing at the time were sufficient to satisfy any exception to the warrant requirement.' *State v Baker*, 350 Or 641, 647, 260 P3d 476 (2011)." Id. at 67.

The Court of Appeals then stated: "The Oregon Supreme Court has recognized both an emergency/exigent circumstances exception to the warrant requirement and a distinct "emergency aid" doctrine." As one or both of those ideas apply to home entries, the Court of Appeals wrote: "We conclude that those circumstances form an insufficient basis upon which to form an objectively reasonable conclusion that there was a risk of *imminent* harm to the child at the moment that [the officer] kicked the door in." *Id.* at 69. (Emphasis in original). In short: no exigent circumstance here.

The Court of Appeals next considered the "destruction of evidence" subcategory of "exigent circumstances," citing *State v. Meharry*, 342 Or 173, 177 (2006) ("Exigent circumstances include, among other things, situations in which immediate action is necessary to prevent the disappearance, dissipation, or destruction of evidence."). The Court of Appeals wrote: "the dispositive question is whether *Machuca* operates in this context to relieve the state from any need to show that [the officer]could not have obtained a warrant without sacrificing the evidence." *Id.* at 75. The Court of Appeals "conclude[d] that *Machuca* does not control in the present circumstances." *Id.* at 76. "*Machuca* was explicitly decided in the warrantless blood-draw context and that it was

also the last in a line of Oregon search-and-seizure cases to address a recurring and very particular dynamic: a blood draw taken from a suspect who had been seized and was at the hospital at the time that the blood draw was sought." *Id.* "Here, we are confronted with a fundamentally different type of government intrusion, a home entry. As the Oregon Supreme Court has recently observed,

> "[t]he degree to which law enforcement conduct intrudes on a citizen's protected interest in privacy and liberty is significantly affected by where the conduct occurs, such as in the home, in an automobile, or on a public street. *A government intrusion into the home is at the extreme end of the spectrum: Nothing is as personal or private. Nothing is more inviolate.*" *State v Fair*, 353 Or 588, 600, 302 P3d 417 (2013) (internal quotation marks omitted) (emphasis added)." *Id.* at 79.

DUII blood draws: Emergencies. 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).

Under Article I, section 9, the state need not prove that destruction of blood-alcohol evidence is imminent in each case to justify a warrantless search and seizure of it: "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); *State v McMullen*, 250 Or App 208 (2012) (urine test).

In contrast with Oregon, the US Supreme Court held that "the natural metabolization of alcohol in the bloodstream" does not present "a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." Each case is evaluated individually to determine if a warrant was required under the Fourth Amendment: "In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." *Missouri v McNeely*, 133 S Ct 1552 (2013).

In *McNeely*, the Court footnoted that in contrast with the automobile exception and searches incident to arrest (which are <u>not</u> evaluated on a case-by-case basis), "the general exigency exception, which asks whether an emergency existed that justified a warrantless search, naturally calls for a case-specific inquiry." *Id*. at n 3.

In response, the Oregon Supreme Court has written: "In our view, the [*McNeely*] Court's rejection of a per se exigency rule is not inconsistent with our statement in [*State v Machuca*, 347 Or 644 (2010] that, while exigent circumstances are 'ordinarily' present in a case involving alcohol, that may not be true, depending on the facts of a particular case." *State v Moore*, 354 Or 493, 497 n 5 (2013) (*Moore* involved voluntariness of implied consent after warnings of consequences of refusal of blood and urine samples, rather than an emergency directly).

See Section 4.8.5 on Consent to DUII blood and urine samples.

Field Sobriety Tests

Administering Field Sobriety Tests is a search under the Oregon Constitution. *State v Nagel*, 320 Or 24, 30-31 (1994); *State v McCrary*, __ Or App __ (2014). Accordingly, "an officer must have either a search warrant to conduct the tests or the authority to conduct them must come within one of the recognized exceptions to the warrant requirement." *State v. Rutherford*, 160 Or App 343, 346 *rev den*, 329 Or 447 (1999).

State v Mazzola, 260 Or App 378 (12/26/13), *rev allowed*, 355 Or 380 (2014) (Josephine) (Duncan, Schuman, Wollheim) Review of this case was allowed and oral argument was heard at La Grande High School on 10/09/14. The Oregon Supreme Court's Media Release states: "On review, the issue is: Does an officer's suspicion that a person is driving under the influence of a controlled substance constitute a *per se* exigency such as to always allow the warrantless administration of FSTs?" The Court of Appeals had stated: "the issue is whether the rate of dissipation of defendant's physical, observable symptoms of intoxication – that is, the type of evidence collected pursuant to a FST – created an exigency."

A police officer stopped defendant for traffic violations and formed probable cause to conclude that she was drugged. He did not smell alcohol. Officer had been a certified paramedic for 15 years and received training regarding drug and alcohol intoxication. He knew that drugs dissipate in the body. Officer asked defendant to take a Horizontal Gaze Nystagmus test. She said she'd taken sleeping pills the night before. The HGN test showed no signs of impairment which did not surprise the officer. Defendant said "ok" when officer asked her to do a few more tests. He administered the walk-and-turn, the one-leg-stand, and the finger-to-nose tests. He did not seek a warrant first. He testified that "we don't do search warrants in this county."

Defendant moved to suppress the FSTs. The trial court concluded that the FSTs were justified under the exigent-circumstances exception which requires probable cause and exigent circumstances which include destruction of evidence.

The Court of Appeals affirmed, citing *State v Machuca*, 347 Or 644, 657 (2010) (alcohol dissipation in blood is an exigent circumstance that ordinarily permits warrantless blood draws), *State v Nagel*, 320 Or 24, 33 (1994) (warrantless FSTs justified because alcohol would be dissipating from the blood while officer would seek a warrant), *State v McMullen*, 250 Or app 208 (2012) (probable cause that a drug is in urine, and it is dissipating, an exigency normally exists for a warrantless urine test), *State v Fuller*, 252 Or App 245, 253 (2012) (same). The court concluded: "given the evanescent nature of controlled-substance intoxication, the warrantless administration of the FSTs in this case was justified by exigent circumstances."

Unidentified Controlled Substances

"Once police have probable cause to believe that evidence of a controlled substance will be in a suspect's urine * * * the exact identity of the substance is of no consequence in determining whether exigent circumstances exist. That is so because we cannot reasonably expect police officers, even drug recognition experts, to be able to determine which controlled substance, alone or in combination, is causing a person to act in such a way as to indicate intoxication." *State v McMullen*, 250 Or App 208 (2012); see also *State v Fuller*, 252 Or App 245 (2012) (same).

4.8.3.C(iii) 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). That "drugs are usually of a destructible nature, and the fact that suspects are likely to run out the back door when police enter the front door does not *ipso facto* create exigent circumstances." *Id*.

See *State v Pellar*, 287 Or 255 (1979) (if police have no indication that a suspect is attempting to "make a break" then the exigent circumstances exception is not justified to enter a home to retrieve car keys).

See *State v Snow*, 337 Or 219 (2004), which the Oregon Supreme Court later parenthetically recited to have meant that the "risk that defendant might escape created exigent circumstance justifying warrantless search." *State v Fessenden/Dicke*, 355 Or 759, 772 (2014).

"[W]hen the claimed exigency is the need to prevent a suspect's escape or to prevent the destruction of evidence, warrantless entry is permissible only when the escape or destruction "was *imminent*." *State v Matsen/Wilson*, 287 Or 581, 587, 601 P2d 784 (1979) (emphasis added). In some cases, it is easy to identify the circumstance that creates the demand for immediate police action: drugs may be flushed down the toilet or a forged document may be burned in a relative instant. That is not so where a suspect's intoxication is the potential evidence sought; depending on the time that the warrant would have taken to obtain, the alcohol in the bloodstream might have dissipated entirely, not at all, to a degree that impaired the efficacy of testing, or to a degree that had no material effect." *State v Sullivan*, 265 Or App 62 (2014).

4.8.3.C(iv) Hot Pursuit

"It is preposterous to assert that a police officer in hot pursuit * * * must stop as soon as the pursued drives upon private property * * * and get a search warrant in order to apprehend the [suspect]." *State v Roberts*, 249 Or 139, 143 (1968); *State v Fessenden/Dicke*, 355 Or 759, 772 (2014) (so quoting).

4.8.4 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).

The state has the burden of establishing that "the officer subjectively believed that a defendant posed an immediate threat of serious physical injury and that the officer's belief was objectively reasonable" based on the totality of the circumstances at the time. *State v Zumbrum*, 221 Or App 362, 366 (2008). Without "uncharitably second-guessing" the officers, *Bates*, 304 Or at 524, there must be "specific and articulable facts to justify the officer's conclusion that a particular person presents an immediate threat of harm." *Id.* at 366-67.

Note: Based on the way the Oregon Supreme Court has categorized exceptions to the warrant requirement, there now are several subsets of what the Oregon Supreme Court considers "Officer Safety Exceptions." Note the overlap with "exigent circumstances."

4.8.4.A Closed Containers

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

1. Inventory
2. Search incident to arrest for officer safety or to preserve evidence
3. Abandonment

For officer safety purposes, 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)).

4.8.4.B Inquiries or Consent

"Questions and requests by an officer can have the effect of stopping a person." *State v Beasley*, 263 Or App 29 (2014) (citing *State v Rodgers/Kirkeby*, 347 Or 610, 627-28 (2010) (parked car). An officer's initiation of "inquiries" to a traffic-stopped defendant, under the officer-safety exception, may implicate Article I, section 9. *State v Jimenez*, 263 Or App 150 (2014). But "verbal inquiries are not searches and seizures," according to the Oregon Court of Appeals, quoting *Rogers/Kirkeby*, 347 Or at 622. *State v Pichardo*, 263 Or App 1, 5 (2014).

State v Jimenez, 263 Or App 150 (5/21/14) (Multnomah) (Schuman SJ, Duncan, Wollheim) Midafternoon, defendant crossed 122nd Avenue and Division, a busy commercial intersection in Portland, despite a "Don't Walk" light. That is a Class D traffic code violation. Defendant sat on a bench at a bus stop in his "baggy clothing" in a high crime area. Officer approached him in his car. Defendant walked away. Officer honked at him. Defendant stopped. Officer asked him why he crossed against the "Don't Walk" sign. Defendant said he thought it was ok. Officer asked defendant if he had any weapons. Defendant said he had a gun in his right front pocket and leaned forward and put his hands on the officer's patrol car. Officer handcuffed him, took his ID, and arrested him on an active warrant. Defendant, charged with unlawful possession of a firearm, moved to suppress the evidence because the officer had discovered the gun during an unjustified extension of the traffic stop. The trial court denied the motion.

The Court of Appeals reversed and remanded. No one disputed that this was a traffic stop of a pedestrian to cite him for a traffic code violation. The officer had no reasonable suspicion that defendant had committed any crime when he asked about weapons, which was unrelated to the traffic stop. No one argued that that an "unavoidable lull" was ongoing when the officer asked about weapons. The state contended that the officer-safety exception justified the officer's weapons questions.

The Court of Appeals once again inexplicably recited that "uncharitably second-guess" statement before doing its job of second-guessing officers to determine whether a person's civil rights have been violated. Here, the facts the officer attested to support this warrant exception were: (1) the intersection is a high-crime area with gang activity; (2) defendant left the bus bench when the officer approached and honked at him; (3) officer knew that gang members wear baggy gray pants and white shoes like defendant was wearing; (4) defendant's "extremely baggy jacket and pants" allowed for hiding weapons; (5) officer was all alone when he contacted defendant; (6) several people were at the bus stop and maybe they were gang members.

The Court of Appeals addressed each fact to determine if the officer had reasonable suspicion that the officer's safety was at risk: (1) High crime areas alone are insufficient to justify a search without other factors, moreover this was mid-day at a busy commercial intersection, not a late-night, dark area with armed gang members, see *State v Miglavs*, 337 Or 1, 13 (2007). (2) Defendant walking away from the officer following and honking at him from his patrol car does not show a danger to the officer who was following and honking at defendant. (3) The officer actually did not testify that defendant's clothes were similar to gang members'. He instead "testified that he 'did not know for sure' if that was the case.'" (4) The officer testified – or the Court of Appeals interpreted the officer's testimony to be – that his suspicion of concealed weapons in the baggy clothing "became a concern of [the officer] only after he learned, as a result of his inquiry, that defendant had a gun." (5) The officer's alone-ness is "relevant" but it is not "of major significance." (6) The officer did not notice the 6 to 8 people at the bus stop who were "transferring bus lines," "wait[ing] for the Walk sign," and getting off a bus, until after he had questioned defendant about weapons. So, in short, in broad daylight, defendant, wearing baggy clothing, jaywalked in a high crime area, then walked away after the officer honked his car horn at him, and stopped when the officer indicated he should do so.

That is not "sufficient to create in [the officer's] mind a reasonable suspicion that defendant presented a risk" to officer safety. And in any event, the officer testified that "he routinely asked everybody that he stopped if they have weapons."

Note on "uncharitable second guessing": The phrase "uncharitably second-guess" first appeared in *State v Bates*, 304 Or 519 (1987), when *Bates* condensed a tenet in *State v Riley*, 240 Or 521, 525 (1965) that when a search or seizure is legal, an "officer should be permitted to take every reasonable precaution to safeguard his life in the process of making the arrest."

State v Easton, 264 Or App 339 (7/16/14) (Washington) (Ortega, Sercombe, Hadlock) At 4:30 a.m.,, officers received a 911 call about a woman with a firearm outside an apartment. They found a meth-intoxicated woman lying on the ground in front of that apartment with a 9mm handgun a few feet from her. Officers arrested her. She told officers that defendant gave the gun to her and he was still at *her* apartment, which was 100 feet across the parking lot from where they all were. Officers said they were concerned for their safety because the meth-infused woman's door was open and a light was on, and defendant could shoot them if he had a gun. No one said that he had a gun, but officers testified "where there's one weapon, there's often more than one." They transferred over to the woman's apartment, knocked, received no answer, entered the apartment, entered a bedroom, and found defendant apparently passed out face-down on a bed. Because he might have been fake passed-out, they "detained defendant in handcuffs," then "he woke up and struggled slightly." Officers rolled his body over and found a small bag of meth that had been under his body. He moved to suppress all evidence resulting from the "search and seizure" arguing that police had no reason, including no officer safety concerns, to enter the apartment after they'd arrested the woman. The trial court denied the motion, concluding that the officers had the woman's consent to enter her apartment and they would have inevitably discovered the meth under him.

The Court of Appeals reversed and remanded: The officers did not have an objectively reasonable basis to believe that defendant posed an immediate risk of serious physical injury. There was no evidence in the record that defendant was violent, under the influence of meth, or that a man sleeping at about 5:00 a.m. on a bed was a threat. Defendant "was not required to respond to the officers." (In other words, he could fake sleeping.) The officers did not articulate any basis to indicate that defendant had weapons, even though one thought that based on his experience, "where there's one gun, there may be more."

As for inevitable discovery of the meth under defendant's body, that too fails. Waking defendant was not reasonably necessary for officer safety. The Court of Appeals again stated: "Although the officers may have been entitled to communicate with defendant * * * defendant was not required to respond to the officers."

State v Lee, 264 Or App 350 (7/23/14) (Marion) (Sercombe, Ortega, Hadlock) Defendant was a passenger in a vehicle stopped for a traffic infraction. A lone deputy walked up to the vehicle. Three people were in the car, "moving around" and a passenger began reaching to his side. The deputy saw that defendant was wearing a "Gypsy Joker" shirt associated with "an outlaw criminal biker gang in the Salem area" whose members carried weapons and drugs. Deputy asked the three to keep their hands where he could see them, he asked the driver for his ID, registration, and insurance, and wrote that information down before handing the items back to the driver. Deputy returned to his car, called for backup, ran the driver's information, and saw a passenger moving around and saw defendant "reaching onto the floorboard." The men appeared to be putting something in their pants, or getting rid of something." Deputy received information back that the driver's license was valid, but he did not yet have his insurance check back. The

second deputy arrived and the first walked back to the car to follow up on safety concerns. Both the driver and the other passenger consented to step out of the car for a patdown, and nothing was found on them. But when the deputy asked defendant if he had anything illegal, defendant said he had a couple of knives and the deputy saw a shotgun on the floorboard. Defendant consented to let the deputy check, and the deputy found "a knife with a four-inch blade that opened with centrifugal force" and knew from prior encounters that defendant was a convicted felon prohibited from possessing that knife. Deputy arrested defendant and also found a meth pipe near where defendant had been sitting. Defendant said he had smoked meth three hours earlier and that he'd found the knife on the road.

The trial court denied defendant's motion to suppress based on an alleged illegal *search*. On appeal, defendant alleged that the trial court erred based on an alleged illegal *seizure*. The Court of Appeals did not mention anything about that difference (a search versus a seizure). On appeal defendant contended that he had been seized illegally when the officer requested consent to search because the officer did not have reasonable suspicion of a crime or a valid officer safety concern.

The Court of Appeals affirmed as "an officer-safety related search of seizure," citing *State v Bates*, 304 Or 519 (1987) and *State v Rudder*, 347 Or 14 (2009). The issue is whether the deputy's precautions were reasonable under the circumstances. The Court of Appeals fact-matched several cases then concluded that the car occupants' "moving around" and "reaching to the side, "defendant's "wearing a shirt associated with an area gang whose members were known to carry weapons and drugs," the deputy's knowledge that defendant was a convicted felon, and the passengers' continued "moving around" in ways that suggested hiding something even after the deputy told them to keep their hands in sight all contributed to a reasonable and immediate safety concern. The Court of Appeals also noted that there were 2 officers and 3 vehicle occupants.

4.8.4.C Patdowns and Intrusions into Clothes

Terry v Ohio, 392 US 1 (1968) created an exception to the Fourth Amendment's probable cause requirement. On the lesser standard of reasonable suspicion (that is: specific and articulable facts that the person is involved in criminal activity), police may briefly stop a person for investigatory purposes. And if the police have reasonable suspicion that a person is armed and dangerous, the police may frisk for weapons.

The Oregon Supreme Court has copied the Fourth Amendment standard into the Oregon Constitution: "Article I, section 9, of the Oregon Constitution, does not forbid an officer to take reasonable steps to protect himself or others if, during the course of a lawful encounter with a citizen, the officer develops a reasonable suspicion, based upon specific and articulable facts, that the citizen might post an immediate threat of serious physical injury to the officer or to others then present." *State v Bates*, 304 Or 519, 524 (1987); *State v Russell*, 265 Or App 381 (2014). But without objective reasonable suspicion that a person poses an immediate threat of serious physical injury, even a "frisk" during an initially lawful stop will not be justified under the officer-safety doctrine. *State v Rodriguez-Perez*, 262 Or App 206 (2014).

ORS 131.625 permits a peace officer to frisk a stopped person for dangerous or deadly weapons if the officer reasonably suspects that the person is armed and presently dangerous. If during the frisk, the officer feels an object that reasonably feels like a dangerous or deadly weapon, the peace officer may take possession of the weapon. A "frisk" is "an external patting of a person's outer clothing" under ORS 131.605(2).

An officer who pulls everything out of car occupants' pockets rather than patting down their outer clothing, may exceed the scope of ORS 131.605(2). Article I, section 9, "does not forbid an officer to take reasonable steps to protect himself or others if, during the course of a lawful encounter

with a citizen, the officer develops a reasonable suspicion, based upon specific and articulable facts, that the citizen might pose an immediate threat of serious physical injury". *State v Rickard*, 150 Or App 517 (1997).

"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 [such as a boot] requires something more – either probable cause or some greater justification than was present here [where defendant was handcuffed when searched and thus did not have access to anything hidden under her pant leg and inside her boot]." (Emphasis in original). *State v Coffer*, 236 Or App 173 (2010) (quoting *State v Rudder*, 347 Or 14, 25 (2009)).

State v Rodriguez-Perez, 262 Or App 206 (4/09/14) (Multnomah) (Nakamoto, Armstrong, Egan) Defendant and his brother carried a box of beer on a sidewalk. Two Portland police officers in a car thought they looked underage. The police pulled over, got out of their car, and asked the men for identification. The brother had a prior arrest for carrying a concealed loaded gun but neither was underage. Officer returned their ID and "immediately" stated that he knew about the prior arrest, and asked if he had weapons and asked to search him for weapons. Defendant's demeanor changed, he became agitate, his eyes got big. Brother consented to a search. Defendant stepped back, looked over his shoulder, and seemed nervous. Officer asked "are you ok," defendant did not respond, and the officer kept asking "what's going on." Defendant said, "Why do you have to search us? We didn't do anything wrong." He stepped backwards. Officer testified that he thought defendant would run or was armed. Another officer continued asking defendant if he had weapons, defendant continued not responding, then officer ordered defendant to put his hands behind his head, turn around, and officer "took control of defendant's hands." Officer asked if he had a weapon, defendant said he had a pistol in his pants. Officer searched, found the pistol, and also found brass knuckles and a knife in defendant's pocket.

The trial court denied defendant's motion to suppress all statements and physical evidence on grounds that the officer-safety doctrine permitted the warrantless frisk.

The Court of Appeals reversed and remanded. The officers lacked the requisite objective reasonable suspicion that defendant posed an immediate threat of serious physical injury. The initial encounter was a "stop" under *State v Backstrand*, 354 Or 392 (2013) because the officers approached defendant and his brother, told them they were suspected of violating a law, and asked for ID. Then one officer took their ID. That is "sufficiently coercive to result in a seizure of defendant."

Then, under *State v Bates*, 304 Or 519 (1987), which defined the officer-safety exception, the state is required to prove that the encounter was lawful, the officer had reasonable suspicion that the person posed an immediate threat of serious physical injury and the officers' steps were reasonable. The state proved the subjective part of reasonable suspicion but failed to prove the objective aspect of it. Furtive movements may lead to subjective feelings of suspicion but are not part of the objective aspect. Defendant did not make "any aggressive, hostile, or threatening movements, nor did he make any threatening remarks." He tried to step away. He failed to respond to questions. The brother consented to a search and his actions were not threatening. Defendant's prior arrest does not support an objective reasonable suspicion that defendant was dangerous.

State v Russell, 265 Or App 381 (9/10/14) (Curry) (Sercombe, Ortega, Hadlock) Defendant was a passenger in a stopped vehicle. A detection dog was present. Defendant is 6' 4"and weighs 225+ pounds. Officers knew he'd been released from prison, was "not a nice guy," and had been involved in a burned-vehicle case and "some sort of a dispute" involving "menacing. The dog alerted to drugs where defendant was sitting with the door locked, the window up, talking on his mobile phone, smoking a cigarette in the car. The encounter was recorded on video: Officer tapped on the window and told defendant to

get out. Defendant didn't open the door for about 45 seconds, and did so with one hand with the mobile to his ear and the other holding the lighted cigarette. Officer immediately clasped defendant's wrist and with other officers present, began to patdown and put defendant into a position to handcuff him. Simultaneously, the officer asked him: "Do you have any weapons on you?" Defendant said, "Yeah." Officer asked: "What is it?" Defendant said, "I don't know." Officer handcuffed defendant and found a gun from his front pants pocket. Defendant was charged as a felon in possession of a firearm. He moved to suppress on grounds that the patdown for officer safety was not justified by reasonable officer-safety concerns. The trial court denied the motion.

The Court of Appeals affirmed. The state pointed out the defendant's size, criminal history, the officers' prior experiences with defendant, and the dog's positive alert as justifying the officer-safety patdown which requires the state to prove that the officers had an objectively and subjectively reasonable suspicion based on specific facts that defendant posed an immediate threat of serious physical injury. Defendant's vague response to the officer's question about weapons was a factor here, with the Court of Appeals stating: It "is well within the realm of the possible that an officer, confronted with a vague response about weapons, would repeat a question in order to try to obtain a more clear response." Among the facts the officer knew before he began the patdown were that he'd asked defendant if he had a weapon and defendant responded that he had something. Affirmed.

4.8.4.D "Protective Sweeps of a House"

With a warrantless search, 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." *State v Guggenmos*, 350 Or 243 (2011) (citing *State v Paulson*, 313 Or 346, 351 (1992)).

A "protective sweep" is <u>not</u> an exception to the warrant requirement. A protective sweep can be justified under the Oregon Supreme Court's "standards for an officer safety search." *State v Guggenmos*, 350 Or 243 (2011) (citing *State v Cocke*, 334 Or 1 (2002)). 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); *State v Guggenmos*, 350 Or 243 (2011).

4.8.4.E Use of Force – Fourth Amendment

"It stands to reason that, if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended." *Plumhoff v Rickard*, __ S Ct __ (2014) (police officers chased a car that been pulled over for having one headlight and the driver sped off rather than step out of the car; police chased the car, then fired 15 shots into the car, killing the two occupants; no Fourth Amendment violation).

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).

"A claim that law-enforcement officers used excessive force to effect a seizure is governed by the Fourth Amendment's "reasonableness" standard. See *Graham v Connor*, 490 US 386 (1989); *Tennessee v Garner*, 471 US 1 (1985). In *Graham*, we held that determining the objective reasonableness of a particular seizure under the Fourth Amendment "requires a careful balancing

of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." 490 US at 396. * * * We analyze this question from the perspective "of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Ibid*." *Plumhoff v Rickard*, 134 S Ct 2012, 2020 (5/27/14) ("if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended").

4.8.5 Consent

Note: Consent to "enter," search, or seize must be voluntary, but it need not be knowing. In other words, under current Article I, section 9, interpretation, a person can waive his privacy rights while police are actively violating his privacy rights, simply by voluntarily consenting to the violation and thereby converting it into no violation, even if the person has no idea he has the right not to waive his right to privacy. For example, under Article I, section 9, four Justices of the Oregon Supreme Court have decided that four armed detectives may illegally trespass onto an man's private backyard, wake him by banging on his glass door at his bedroom, ask for his "consent" to inspect the house, and if the man's "consent" is voluntary, the evidence gleaned from such a search can be used against the homeowner, even if the homeowner did not know that he could deny the police access to his bedroom. *State v Unger*, 356 Or 59 (2014). In contrast with Article I, section 9, Article I, section 12, still requires a voluntary *and* knowing waiver of the right to remain silent, with *Miranda* warnings required. *State v Moore/Coen*, 349 Or 371, 382 (2010).

4.8.5.A Generally

Consent is a recognized exception to the warrant requirement. *State v Paulson*, 313 Or 346, 351 (1992). 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). The "consent to a search or seizure is invalid if it is the product of illegal police conduct." *State v Pierce*, 226 Or App 336, 350 (2009). However, in August 2014, the Oregon Supreme Court altered its analysis. Now, "when a defendant challenges the validity of his or her consent based on a prior police illegality, the state bears the burden of demonstrating that the consent was voluntary and was not the product of police exploitation of that illegality. [*State v Unger*, 356 Or 59, 74-75 (2014)]." *State v Musser*, 356 Or 148, 150 (2014). Whether "police have exploited their unlawful conduct to obtain a defendant's consent depends on the totality of the circumstances." *Ibid*. That analysis "should recognize the importance of the voluntariness of the consent and should consider not only the temporal proximity between the unlawful conduct and the consent and any intervening or mitigating circumstances * * * but also the nature of the unlawful conduct, including its purpose and flagrancy." *Ibid*.

The Oregon Court of Appeals categorizes consent cases into four categories. Those are cases involving: (1) voluntariness; (2) authority; (3) scope; and (4) vindication of rights violated by earlier police misconduct. Three of those four categories (except "authority") involve autonomous choice. *State v Marshall*, 254 Or App 419 (2013) (In *Marshall*, the Court of Appeals applied Article I, section 12, self-incrimination reasoning to this Article I, section 9, consent case).

"The existence of probable cause does not relieve the state of its obligation to obtain a warrant or to establish that an exception to the warrant requirement applies." *State v Groling*, 262 Or App 582 (2014) (citing *State v Rudder*, 347 Or 14, 21 (2009)).

"In assessing voluntariness, we examine the totality of the circumstances to determine whether a defendant's consent was the product of the defendant's free will or was the result of express or implied coercion. *State v Parker*, 317 Or 225, 230 (1993)." *State v Moore*, 265 Or App 1 (8/20/14). "Drug use may be a relevant factor in determining whether consent is voluntary if it impairs a defendant's capacity to make a knowing, voluntary and intelligent choice. Drug use,

however, is not determinative." *Id*. (quoting *State v Larson*, 141 Or App 186, 198, *rev den*, 324 Or 229 (1996)).

State v Unger, 356 Or 59 (2014) (Balmer) (Landau, J., concurring) (Walters, J., dissenting) (Brewer, J., dissenting), (Baldwin, J., dissenting) Police received a complaint about drug activity and young children at defendant's house. Four detectives went to defendant's house on a Sunday morning without a warrant. One detective knocked on the front door and received no response after about three minutes. Another detective knocked on a basement door and received no response. Another detective followed a path around the lower level of the house, entered the backyard, followed a wrap-around porch in back, and came to a sliding glass door with partially closed drapes to defendant's bedroom where he and his girlfriend were sleeping. The detective knocked. Apparently waking defendant up, defendant came to the door undressed, and detective identified himself. At least two other detectives joined the first detective at the back door. "Defendant asked to put on a robe and then gave the detectives permission to enter the house." A woman was in the bed. Defendant, now clothed, walked with detectives to the kitchen. Detectives asked if defendant would "show them around the house." Defendant consented. Detectives noticed a torn piece of a bag with white powder, one detective read defendant a "consent to search" card, which defendant declined to sign until he had talked to his attorney. Defendant called his attorney while detectives continued to search his house and tested the bag, which showed meth. Defendant told detectives his attorney wanted the detectives to leave. Detectives argued with defendant. Defendant called his attorney a second time, then told detectives that he wanted everybody out of the house. Detectives arrested defendant, obtained a search warrant, and found additional incriminating evidence.

Defendant moved to suppress because his consent was involuntary and the detectives had exploited their unlawful entry to his backyard to obtain the consent. The trial court denied the motion on grounds that consent was voluntary and did not address exploitation. Defendant was convicted on several charges.

The Court of Appeals reversed and remanded, concluding that the evidence should have been suppressed under *State v Hall*, 339 Or 7 (2005). Everyone agreed that the detectives had trespassed on defendant's property. The issue under was whether the evidence was to be suppressed because defendant had met *Hall*'s minimal factual nexus test between the police illegality and the evidence obtained. If, as here, the defendant made that showing, then the state must (and here did not, in the Court of Appeals' analysis) show that the evidence (1) would have been inevitably discovered; or (2) police obtained evidence independently of their illegal acts; or as here (3) the illegal conduct was independent of or only tenuously related to the evidence. Under that third way out of police misconduct, per *Hall*, courts may suppress if a "causal connection" exists between the police misconduct significantly affected defendant's decision to consent. The Court of Appeals concluded that the police misconduct was ongoing when police obtained defendant's consent: "Indeed, he was facing a trespass by the very persons he would call to report a trespass." Suppression was the appropriate remedy, in the Court of Appeals' opinion.

In 79 pages of opinions, the Oregon Supreme Court reversed and remanded back to the Court of Appeals. The Court did <u>not</u> accept the state's request that the Court "should overrule *Hall* by eliminating the exploitation analysis and instead holding that evidence obtained during a voluntary consent search necessarily is admissible despite prior unlawful police conduct." But the Court did "agree that *Hall*'s test for exploitation is flawed" and overruled part of it. That is, if the stop or search was illegal, and the consent to the search was voluntary, the question is how to determine "whether the police exploited the illegality" to get the evidence.

The Court "disavow[ed] the 'minimal factual nexus' part of the Hall test." *Id.* at 74. "Instead, we hold that, when a defendant has established that an illegal stop or an illegal search occurred and challenges the validity of his or her subsequent consent to a search, the state bears the burden of demonstrating that (1) the consent was voluntary; and (2) the voluntary consent was not the product of police exploitation of the illegal stop or search." *Id.* at 74-76.

But there is more to *Hall*'s exploitation test besides the now-disavowed minimal factual nexus test. That is the third test (noted in the Court of Appeals' opinion) that "requires the state to prove 'that the defendant's consent was independent of, or only tenuously related to, the unlawful police conduct.'" *Id.* at 76. "Hall identified several considerations relevant to determining whether the 'causal connection' between the unlawful police conduct and the defendant's decision to consent is sufficiently strong that the police can be said to have 'exploited' their unlawful conduct to gain the consent, thus requiring suppression of the evidence obtained". *Id.* at 76-77. Those factors are the "temporal proximity", any intervening circumstances, and "other circumstances – such as, for example, a police officer informing the defendant of the right to refuse consent – that mitigated the effect of the unlawful police conduct." *Id.* at 77. The Court here decided that those factors were incomplete to determine if police misconduct was causally connected to a defendant's consent to the search.

As to whether a defendant volunteers, or is asked to consent: Even if "an officer requested consent," during police misconduct, that "does not demonstrate that the officer *necessarily exploited* the prior illegal conduct to gain consent." *Id.* at 78-79. "Properly considered, then, a voluntary consent to search that is prompted by an officer's request can be sufficient to demonstrate that the consent is unrelated or only tenuously related to the prior illegal police conduct." *Id.* at 79.

As to temporal proximity: "Hall erred in focusing exclusively on 'temporal proximity' and the presence of mitigating or intervening circumstances in determining whether the police exploited unlawful conduct to obtain consent to search." *Id.* at 79. The Court wrote: "If the conduct is intrusive, extended, or severe, it is more likely to influence improperly a defendant's consent to search. In contrast, where the nature and severity of the violation is limited, so too may the extent to which the defendant's consent is tainted." *Id.* at 81.

As to the "purpose and flagrancy" of the police misconduct: This factor is taken from *Brown v Illinois*, 422 Or 590, 603-04 (1975) where the Supreme Court described the purpose and flagrancy of the misconduct as "relevant" to the Fourth Amendment exploitation analysis. *Id.* at 81. In Hall, the Oregon Supreme Court had written that the "purpose and flagrancy" elements relate only to the Fourth Amendment's deterrence rationale and have "no applicability to the exclusionary rule under Article I, section 9," which is a "rights-based" rationale. *Id.* This Court – the *Unger* Court – now adopted the "purpose and flagrancy" elements to the "rights-based" rationale of Article I, section 9, without adopting (or admitting that it was adopting) the deterrence rationale.

In sum, to determine if police misconduct exploited a defendant's consent to a search, the *Hall* Court had only considered temporal proximity and intervening or mitigating factors. Now, other factors are relevant: "the nature, extent, and severity of the constitutional violation are relevant, as are the purpose and flagrancy of the misconduct." *Id.* at 86. In addition, per a treatise, "account must be taken of the proximity * * *, whether the illegal seizure was 'flagrant police misconduct,' whether the consent was volunteered rather than requested by the detaining officers, whether the arrestee was made fully aware of the fact that he could decline to consent and thus prevent an immediate search of the car of residence, whether there has been a significant intervening event * * * and whether the police purpose underlying the illegality was to obtain the consent." *Id.* at 87.

In this case, the Court decided that the police did not exploit their unlawful conduct to obtain defendant's consent to search. The "focus should remain on whether the totality of the circumstances indicates that the detectives exploited their unlawful conduct to obtain consent." *Id*. at 90. A factor is whether the police told defendant he could decline to consent. Here, detectives did not tell defendant he could decline to consent, he was asleep and undressed with a girlfriend in his bed when detectives banged on his backyard bedroom door and obtained his consent, but that was not exploitation, in the majority's opinion. "Subjective intent or motivations of the detectives" is not examined in the exploitation analysis, only objective facts are. This was not "flagrant or egregious" nor was their purpose in trespassing to obtain consent to search, the Court decided.

Justice Landau, concurring (not dissenting), wrote: "The problem is that the personal rights rationale for Oregon's exclusionary rule is incomplete. * * * Sometimes, regardless of whether a defendant consented, the court should exclude evidence otherwise unlawfully obtained to prevent police from reaping the benefits of their misconduct." *Id*. at 95. "[T]his court, in staking out the position that deterrence has no role in determining whether evidence must be excluded, stands almost alone. Nearly all the state courts that have adopted an exclusionary rule under their state constitutions recognize that deterrence is, at the very least, a relevant consideration". *Id*. at 98 & n 1 (only Oregon, New Mexico, and Pennsylvania have rejected deterrence as a justification for a state exclusionary rule." "In my view, the personal rights explanation for exclusion fails to explain why a defendant's voluntary consent does not suffice to justify the search." *Id*. at 101.

Justice Walters dissented, writing: "What [the majority] means is that the officers may violate the constitution without consequence in this and other circumstances in the future and, consequently, that the state may benefit from the officers' constitutional violations." *Id*. at 111. "This case illustrates the significance of the change that the majority has engineered. In this case, as the state concedes, the court must adhere to a century of jurisprudence and acknowledge that the officers violated defendant's Article I, section 9, rights when they entered his backyard. But under the majority's rule, the court need not engage in the analysis necessary to overrule that precedent; rather, it may describe the violation as 'limited' and thereby permit it. This court has an obligation to demonstrate to the people of Oregon that our constitution is enduring: That it is made of sterner stuff than four votes represent; that it can withstand the forces of the day that call, always call, for an understanding and flexibility to permit the government to act. " *Id.* at 113.

Justice Brewer, dissenting, wrote: "When a person consents to a warrantless search of his or her person or property and the person's capacity for self-determination has not been overborne or critically impaired, the consent is voluntary. *State v Stevens*, 311 Or 119, 133-38 (1991). However, that does not necessarily mean that the person has knowingly relinquished his or her right under Article I, section 9, to be free from unreasonable searches and seizures." *Id*. at 114. Justice Brewer disagrees with the majority's adoption of the "purpose and flagrancy" elements into Article I, section 9. Defendant knew that the officers' purpose was investigation of drugs with children in the premises. "However, there is no evidence that defendant knew that the officers' presence at his bedroom door was unlawful." *Id*. at 117. Knowing that the police were trespassing, and that he could have declined consent, may have affected his decision to give consent. Further, flagrancy focuses on the officer's knowledge rather than the defendant's. Even where police misconduct is not flagrant – such as an officer who is oblivious to his misconduct – "there still remains a risk that the unlawful conduct will significantly affect the giving of consent." *Id*. at 119. "I cannot rule out the possibility that nonflagrant but unlawful police conduct that is relatively brief in duration and 'minor' in its nature and degree of severity might not significantly affect a suspect's decision to give consent yet still qualify as an unreasonable search or seizure for constitutional purposes." *Id*. Justice Brewer finds "space for deterrence" in the purpose of suppression under Article I, section 9.

Justice Baldwin, dissenting, wrote: "Today, by declining to suppress the evidence obtained as a result of that deliberate violation of defendant's privacy rights, the majority departs from longstanding precedents of this court protecting the privacy rights of citizens in their homes from warrantless governmental intrusions." *Id.* at 122. "According to the rule now adopted by the majority, police officers may deliberately violate the privacy rights of citizens in their homes when, as here, they knock on a private back door, startle an occupant, ask to search the occupant's home, and the exploit the fiction of a consensual search if evidence of a crime is found in the home. If no evidence of a crime is found, the occupants will simply be required to endure the unreasonable governmental intrusion without a legal remedy. Article I, section 9, now provides no protection against such a warrantless search if the officers are well-mannered and courteous as they violate the constitutional rights of the occupants. *Id.* at 123.

State v Lorenzo, 356 Or 134 (8/28/14) (Balmer) Police received a 911 call from a suicidal man's ex-fiance, who said the man was outside her apartment with a noose around his neck, threating to hang himself. Police arrived, removed the noose, and learned that he lived with a roommate (defendant) in an apartment complex directly across from the ex-fiance's apartment. Officer went to that apartment, knocked on the outer door, identified himself and asked for defendant by name. No one responded to the knock or to subsequent telephone calls. The officer was worried that "suicidals" sometimes hurt others. Officer opened the apparently unlocked front door, reached inside, and knocked on defendant's bedroom door that was just inside. The officer did not step inside the apartment. About 10 seconds later, defendant came out of his bedroom, said he's ok, and the officer then asked if he could come in and talk. Defendant said yes. Officer entered, smelled a strong odor of marijuana, asked for defendant's ID, and saw a plastic bag containing marijuana on the floor. Officer ran the ID, questioned defendant about his suicidal roommate, and asked if he was selling marijuana. Defendant said he wasn't selling. Officer asked for consent to search the bedroom. Defendant said yes and stepped aside. Officers found drugs and a firearm. Defendant moved to suppress. The trial court denied the motion under the emergency aid doctrine. The trial court did not rule on the exploitation issue. The Court of Appeals reversed: the emergency aid exception did not apply and the consent was not independent of the police illegality in entering.

The Oregon Supreme Court reversed: The state conceded that the officer violated Article I, section 9, by reaching inside defendant's apartment to knock on his bedroom door. After a recitation of *Unger* and *Musser* (decided the same day), the Court considered it important that "the consent to the officer's entry into the apartment came very shortly after he unlawfully had reached into the apartment and knocked on defendant's bedroom door." The Court wrote that while "the events here were compressed in time, * * * the officer's 'search,' by opening the exterior apartment door and knocking on defendatn's bedroom door, had ended. Moreover, the officer was not standing inside the apartment or exercising control over defendant." This was "temporal proximity" but the "unlawful search was limited in time and severity, which suggests that its illegality was unlikely to have had a significant effect on defendant's consent." "The state concedes that there were no mitigating or intervening circumstances * * * that might have clearly 'purged' the taint of the unlawful conduct. As we did in *Unger*, we observe that police would be very well served by giving Miranda warnings or advising individuals that they need not consent to a request to search or enter. Such warnings would make it easier for reviewing courts to determine that, notwithstanding any prior illegality, the individual knew that he or she had a constitutional right to refuse consent." *Id.* at 144. The Court further mused that it is another "significant circumstance in the exploitation analysis" is that "the officer did not gain any information about potentially criminal activity as a direct result of his unlawful search." Further moving on to "purpose and flagrancy" of police conduct, the Court noted that the officer's concern about a suicidal person harming defendant was "reasonable" without any citation to anything. This case is "similar (although not identical) to *Unger*." The purpose here is "even more benign than in *Unger*." *Id.* at 145.

Finally the Court considered the placement of the officer's feet, as "apparently" remaining outside the apartment. The state has shown that defendant's consent was not the result of exploitation.

State v Musser, 356 Or 148 (8/28/14) (Balmer) A police officer stopped defendant at 10pm in an alley behind a shopping center, asked for and obtained consent to enter and search pouches in her purse, and found drugs, a burned cooking spoon, a metal scraping tool, and white meth residue. He had stopped defendant by putting on his spotlight, getting out of his car, and telling defendant, "Hey, I need to talk to you." Defendant kept walking. Officer pursued her in a "more direct, firm tone:" "Hey, come back here. I need to talk to you." Defendant said she wanted to go back to her friends. Officer asked for her ID, she got nervous, fidgety, and couldn't stand still, he saw two Crown Royal pouches in her purse, and thought she had used meth and had meth in the purse bags. Another officer arrived, searched again, and found more meth. Defendant moved to suppress it all. The trial court denied her motion, concluding that the officer had reasonable suspicion of criminal activity, and did not rule on her further argument that her consent to search was neither knowing nor voluntary.

The Court of Appeals reversed, concluding that the officer did not have reasonable suspicion to stop defendant.

The Oregon Supreme Court affirmed, after a lengthy recitation of its lengthy *Unger* opinion of the same date. The Court accepted suppression in this case because the evidence would not have been inevitably discovered but for the officer's illegal search, and no intervening or mitigating circumstances occurred between the unlawful stop and the discovery of the evidence. Further the Court then stated: "We did not * * * suggest that voluntary consent always would 'trump' the effect of prior police misconduct." *Id*. at 157. Exploitation occurred here because the officer pursued several lines of inquiry spurred by his observations of defendant's purse contents during his unlawful seizure. "In contrast to the facts in *Unger*, where the trespass onto defendant's property only brought the police into contact with the defendant * * * the unlawful police conduct here led directly to observations, including observation of the pouches that the officer suspected contained drugs, and then to the request for consent to search. Here, there was not simply 'but for' causation * * *. Instead, the unlawful conduct led to the request for identification, which led to the observation of pouches * * * which led to the search". As to the Court's adoption of Fourth Amendment case law that added "purpose and flagrancy" to the analysis of exploitation, the Court stated that the officer violated defendant's rights not based on the unsubstantiated complaint of drugs and children being in a home as in *Unger*, (purpose ok?) but here it was based apparently on drugs on a person in an alley (purpose not ok?). The Court did not spend more than a few words on "flagrancy" in this case except for the general statement: "We agree with defendant that police may not purposefully and severely interfere with a person's Article I, section 9, rights – even if they do so politely." *Id*. at 159.

4.8.5.B 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).

4.8.5.C *Other* 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). See *State v Fair*, 353 Or 588 (2013) on consent to a patdown on a home porch.

4.8.5.D Third-Party Consent

"[C]ommon authority to validly consent to a search rests on mutual use of the property by persons generally having joint access or control for most purposes." The state has the burden of proving by a preponderance of the evidence that the consenting person has the requisite authority. One joint occupant of a premises has assumed the risk that another occupant might permit a search of those premises. And conversely where one co-occupant has limited another co-occupant's authority, the question under Article I, section 9, is "whether the search is within that limited authority." *Held*: defendant's girlfriend knew she did not have authority to consent to a search of a van, and gave consent only did so when badgered by the officer. *State v Kurokawa-Lasciak*, 249 Or App 435 (2012).

4.8.5.E Consent by Conduct versus Mere Acquiescence

Merely failing to oppose officers' efforts to search does not establish consent. *State v Mast*, 250 Or App 605 (2012); *State v Ry/Guinto*, 211 Or App 298, 303-07 (2007).

The act of opening a *vehicle* door may reasonably be viewed as giving the officer access to the inside of the vehicle – "as manifesting nonverbal consent for the officer to search it" – under some circumstances. *State v Pickle*, 253 Or App 235 (2012).

That differs from a consent-search of a *premises* where an officer knocks on the front door and an occupant opens the door. That is not consent to search a premises under *State v Martin*, 222 Or App 138 (2008), *rev den*, 345 Or 690 (2009). *State v Pickle*, 253 Or App 235 (2012).

Words matter in consent-by-conduct cases. *State v Jepson*, 254 Or App 2990 (2012); *State v Martin*, 222 Or App 138, 142 (2008). "When [an officer's] words do not provide the listener with a reasonable opportunity to choose to consent, or when the words leave the listener with the impression that the search is inevitable, absent strong countervailing factors, we have consistently found acquiescence rather than consent." The difference is in saying, "I'd like to come in" versus "I'm coming in." *State v Briggs*, 257 Or App 738 (2013).

4.8.5.F Implied Consent

See **Section 4.6.4 on Consent to Enter Premises** and **Section 4.8.3 on Exigent Circumstances**.

See ORS 813.100 and 813.130 on consent to provide blood, breath, and urine samples**.**

It is a crime to drive under the influence of intoxicants, see ORS 813.130. Anyone driving in Oregon has impliedly consented to a chemical test for alcohol on his breath, and sometimes in his blood or urine, upon arrest for DUII, see ORS 813.130 and 813.131 The statute on rights and adverse consequences that the state actor must read to a DUII suspect before administering a test to determine intoxication levels. It is a violation to refuse, plus the driver's license is immediately confiscated, his license is suspended, and he is ineligible for a hardship permit for up to 3 years, and his refusal or failure of the test "may also be offered against" him. *State v Moore*, 354 Or 493 (2013).

When an officer recites to a DUII suspect, "If you refuse or fail a test, evidence of the refusal or failure may be offered against you," that is true and the defendant's consent to state's seizure of blood and urine is not coerced by those words. *State v Moore*, 354 Or 493 (2013) (emphasis on the word "may" rather than "is admissible"); *State v Wieboldt*, 260 Or App 583 (2014); *State v Geren*, __ Or App __ (6/25/14).

> ***State v Moore***, 354 Or 493 (12/12/13) (Tillamook) (Balmer) (Kistler and Walters dissenting) On remand, see *State v Moore*, __ Or App __ (8/20/14) (below).
>
> An officer did not recite to defendant, a DUII suspect, the consequences of refusing a blood alcohol test but instead gave this warning: "If you refuse or fail a test, evidence of the refusal or failure may be offered against you." *Held*: Defendant's consent to state's seizure of blood and urine was not involuntary. (The trial court had held that defendant's consent was involuntary under *State v Machuca*, 347 Or 644 (2010) and the Court of Appeals had affirmed that decision on an interlocutory appeal.).
>
> An OSP trooper witnessed defendant collide head-on with an oncoming car, killing a woman in the other vehicle and injured him. At the scene, defendant was dazed and his speech was slow, which caused the trooper to suspect defendant had been driving under the influence of something. An hour or two later, armed with probable cause but not a warrant, the trooper went to the emergency department, read defendant his *Miranda* rights, and read warnings from the ORS 813.130 "implied consent" law. Defendant orally consented, stating "of course," when the officer asked for blood and urine samples, which showed "controlled substances" (the particular drugs are not in the record). Charged with homicide, defendant moved to suppress, and the trial court found that there was no evidence that the officer could not have obtained a warrant, and no evidence of the evanescent nature of the drugs, thus the state had failed to prove exigent circumstances. But defendant's consent was not voluntary only because under the Court of Appeals opinion in *State v Machuca*, 231 Or App 232 (2009), *rev'd*, 347 Or 644 (2010), "implied consent warnings are inherently coercive, because they induce consent through a threat of economic harm from loss of privileges resulting from the failure to consent."
>
> The Oregon Supreme Court reversed, noting that "at least under some circumstances, use of evidence of defendant's refusal against him would violate his Article I, section 9, right to be free from unreasonable searches or seizures." The Court also noted that the officer informed defendant that his refusal "may" be admissible, rather than "is" admissible. The statute states that the refusal to consent "is" admissible, which could result in an involuntary (coerced) consent. But "is" is not the case here. The Court concluded: "The advice of rights and consequences that [the officer] read to defendant contained accurate statements of the lawful consequences of refusing to submit to the tests. * * * we conclude that defendant's consent to provide blood and urine samples to be tested for intoxicants was voluntary and that the trial court's suppression of the results of those tests was error."

4.8.5.G Probation Searches

A probationer's "prior consent to a home visit," as part of a probation condition, does "not also encompass a more intrusive consent to search the private areas of a residence" under *State v Guzman*, 164 Or App 90 (1999), *rev den* 331 Or 191 (2000). "Under Article I, section 9, a probation condition requiring a probationer to consent to a home visit is not the same as a consent to search; the latter is more intrusive and is conditioned on the existence of 'reasonable grounds to believe that evidence of a violation will be found.' ORS 137.540(h) and (i). Further, a consent to search is not self-executing; if a probationer refuses to consent, the officer has no authority under the probation condition to search, although the probationer may be subject to a sanction for violating the condition." To determine voluntariness of consent in probation-

condition situations, the court considers "whether the probationer was effectively denied a reasonable opportunity to refuse the search or whether the environment was sufficiently coercive to preclude him from doing so." *State v Brock*, 254 Or App 273 (2012). See also Section 4.8.12.

4.8.5.H Suppression as Remedy, or No Remedy

"[W]hen a defendant has established that an illegal stop or an illegal search occurred and challenges the validity of his or her subsequent consent to a search, the state bears the burden of demonstrating that (1) the consent was voluntary; and (2) the voluntary consent was not the product of police exploitation of the illegal stop or search." *State v Unger*, 356 Or 59, 75, 85 (2014). Even "if the consent is voluntary, the court must address whether the police exploited their prior illegal conduct to obtain the evidence." *Id*. at 86. A "voluntary consent to search that is prompted by an officer's request can be sufficient to demonstrate that the consent is unrelated or only tenuously related to the prior illegal police conduct." *Id*. at 79. In determining "exploitation," if the illegal police "conduct is intrusive, extended, or severe, it is more likely to influence improperly a defendant's consent to search. In contrast, where the nature and severity of the violation is limited, so too may be the extent to which the defendant's consent is 'tainted.'" *Id*. at 81. Another "concern relevant to whether a defendant's consent resulted from exploitation of police misconduct is the 'purpose and flagrancy' of the misconduct. The 'purpose and flagrancy' inquiry comes from *Brown v Illinois*, 422 US 590, 603-04 (1975)." *Id*. at 81. The federal "purpose and flagrancy" inquiry is compatible with the federal deterrence rational for suppression and also with the rights-based rationale under the state constitution. *Id*. at 82. "Flagrancy" includes excessive use of force, unlawful forcible entry into a home, lengthy in-custody interrogation "is more likely to affect the defendant's decision to consent than more restrained behavior." *Ibid*. "Purpose" can be "expressed through conduct or comments." *Id*. at 83.

"Exploitation may be found" if there is "a direct causal connection between the prior illegal stop and the consent" if "the request for consent itself (and the evidence gathered) resulted from police knowledge of the presence" of the evidence itself. *Id*. at 86. Further, "evidence may be subject to suppression if the police obtained the consent to search through less direct exploitation of their illegal conduct." *Ibid*. Close timing between the illegal police conduct and consent, the presence of intervening or mitigating circumstances, plus "the nature, extent, and severity of the constitutional violation are relevant, as are the purpose and flagrancy of the misconduct." *Id*.

That inquiry applies even when it is undisputed that police trespassed onto the threshold of a man's bedroom door at his back yard without a warrant, *State v Unger*, 356 Or 59 (2014), or when police trespass by opening an apartment's front door, then knock on a bedroom door from the threshold of the apartment front door without a warrant, *State v Lorenzo*, 356 Or 134, 145 (2014).

The Oregon Supreme Court has stated that *Unger* was "an attenuation analysis." *State v Bailey*, 356 Or 486, 504 n 13 (2014).

4.8.5.I Comparison to Fourth Amendment

The Oregon Court of Appeals has stated: the "test under the Fourth Amendment for the voluntariness of consent to search is 'essentially the same' as the test under Article I, section 9." *State v Brock*, 254 Or App 273 (2012) (quoting *State v Ry/Guinto*, 211 Or App 298, 309, *rev den* 343 Or 224 (2007) (which had cited *Schneckloth v Bustamonte*, 412 US 218, 248-49 (1973)). Note: Proceed with caution on the idea of "sameness" of two distinct constitutions; the Oregon Supreme Court could change that.

But "in contrast to the Fourth Amendment, which requires that the state establish that the person giving consent had apparent authority to do so, Article I, section 9, requires actual authority to

give consent." *State v Brown*, 264 Or App 592 n 6 (8/13/14) citing *State v Ready*, 148 Or App 149, 154, *rev den* 326 Or 68 (1997)).

4.8.6 Inventories: Administrative Searches

A. **Generally**. "One exception to the warrant requirement is the 'inventory' exception.'" *State v Cherry*, 262 Or App 612 (2014). An inventory is a common type of administrative "search." "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).

Courts "first consider whether the officers complied with the [inventory] policy; if they did so, we then consider whether the policy was constitutionally permissible." *State v Brown*, 229 Or App 294, 302-03 (2009); *State v Hockersmith*, 264 Or App 560, 561 n 1 (2014). Inventory policies "governing inventories in each case vary in language and scope." *Hockersmith*, 264 Or App at __ (quoting *State v Swanson*, 187 Or App 477, 483 (2003)). "Undoubtedly, many inventory policies employ some version of the phrase 'designed to carry' (or 'to hold') particular items or valuables." *Ibid*. "Language has meaning" and the Court of Appeals has "been scrupulously rigorous" in construing the words of inventory policies. *Ibid*. (citations omitted).

B. **Elements**. 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 three elements are met: (1) the state lawfully possesses the property being inventoried; (2) a valid statute, ordinance, or policy authorizes the state to do so; and (3) 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, 8-10 (1984). The state has the burden of proving the lawfulness of an inventory. *State v Tucker*, 330 Or 85, 89 (2000).

The "inventory" situation most commonly arises when police impound an auto or when a person is booked into custody. *State v Taylor*, 250 Or App 90 (2012). Police departments may adopt policies that authorize officers to itemize the personal property 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).

C. **Search Only**. Inventories are an exception to the warrant requirement for searches, not for seizures. Inventory policies govern the search which is "the examination of property and not its seizure." *State v Komas*, 170 Or App 468, 478 (2000); *State v Stinstrom*, 261 Or App 186 (2014). An "inventory policy does not give an officer the authority to seize an item; rather, the inventory policy governs the scope of the examination once the officer already lawfully possesses it." *Komas*, 170 Or App at 478; *State v Stinstrom*, 261 Or App 186 (2014).

D. **Clothing and Closed Containers**. "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).

E. 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 Jansen, 261 Or App 117 (02/12/14) (Douglas) (per curiam) (Wollheim, Haselton, Schuman SJ) Douglas County Jail's inventory policy does not describe the kids of closed containers that jailers may or must search when inventorying arrestee's personal property. Officers opened a "pouch" belonging to defendant per that inventory policy and found heroin. The trial court denied her motion to suppress. On appeal, the state conceded that the inventory policy did not "pass constitutional muster" and the search was invalid. The Court of Appeals reversed and remanded.

State v Stinstrom, 261 Or App 186 (02/20/14) (Lane) (Duncan, Wollheim, Schuman, SJ) A man wore a backpack on his back in a public park. A police officer asked him for identification. He reached for that backpack, said "Oops I grabbed the wrong bag," and placed that backpack on the ground next to defendant stating, "This is your bag." Defendant reached for the backpack, but the officer told defendant to stop. Defendant's first name is Henry. Officer learned that there was a warrant for defendant's arrest, so he took him into custody, walked with him to the patrol car, and then said to defendant, "Oh, I forgot your backpack." Officer returned to the place the backpack had been. Defendant said, "that's not my backpack." Officer retrieved it anyway and inventoried it at the patrol car, where he found a syringe missing its plunger cap, a plastic bag, a shortened plastic straw with meth crust on it. He also found a syringe plunger in defendant's pants, and a spiral notebook with a letter that began: "Greetings, mother, it is I Henry, youngest child." Officer booked defendant at jail and charged him for possession of meth. Defendant moved to suppress under the state constitution. Officer said he took the backpack because leaving it in the park would be "littering" and he protected the city from liability if it was left behind. The trial court denied the motion.

The Court of Appeals reversed and remanded. No one disputes that the officer's retrival of the backpack was a "seizure." And it was warrantless. That places the burden on the state. The only exception the state contended applied was the inventory exception. But the "inventory exception does not apply to the seizure of the backpack." An "inventory policy does not give an officer the authority to seize an item; rather, the inventory policy governs the scope of the examination once the officer already lawfully possesses it" under *State v Komas*, 170 Or App 468 (2000). The officer did not already lawfully possess the backpack because his "seizure of the backpack was not specifically authorized by law, as administrative seizures must be." "An officer cannot seize and search property simply because it is in the state's interest to do so. The interest that the state cites in support of the seizure of the backpack – protection from liability – also underlies inventories, but to be constitutional, an inventory must not only serve a state interest, it must also satisfy the Atkinson requirements." (The case also involved "abandonment" as an exception to the warrant requirement).

State v Davis, 262 Or App 555 (4/30/14) (Lane) (Egan, Armstrong, Nakamoto) A police officer arrested defendant, put him in handcuffs, patted him down for weapons and escape tools, and felt a 4" cylinder with a bulbous end in defendant's coat pocket. The officer removed the cylinder, which was encased in a sock, and noted that it felt like glass when he placed it on the car hood. Officer believed it was a pipe, opened the sock, saw carbonized meth residue on the pipe, asked defendant what it was, and defendant said "meth." Officer took him to the Lane County Jail, which has an inventory policy. Defendant moved to suppress his statements and the pipe. The state contended that

opening the sock was justified as an inventory per jail policy. The trial court denied the motion on grounds that this was a valid inventory search.

The Court of Appeals reversed and remanded. Defendant did not argue that the officer's seizure of the sock was invalid. The sock was a closed container. The only issue is whether the inventory policy was valid. It is not, because it requires arresting officers to inventory "all pocket property" and to "thoroughly search" the person's "clothing" and to inventory "personal property excluding clothing items." This inventory policy provides no limit and no guidance on when an officer may open a closed container. Instead it authorizes a search of all property including closed containers regardless what the container is likely to contain.

State v Cherry, 262 Or App 612 (5/07/14) (Marion) (Duncan, Wollheim, Schuman) A police officer arrested defendant, brought him to the police station, and inventoried his property, which included taking 10 checks out of defendant's pocket. That turned out to be evidence of identity theft. Defendant moved to suppress the checks and statements he made about the checks as an invalid, warrantless search. The trial court denied the motion without discussion, apparently per the Marion County Sheriff's Office Policy on inventorying inmates' property. That Policy allowed officers to open all closed containers.

On appeal, the state conceded that the Policy is "invalid because it is overbroad because it authorizes deputies to open all closed containers." The Court of Appeals agreed and reversed.

State v Hockersmith, 264 Or App 560 (8/06/14) (Josephine) (Tookey, Hadlock, Sercombe) A sheriff's deputy "removed a wallet from a pair of shorts during a motor vehicle inventory after defendant had run away from them into a remote area. The deputy apparently pulled the wallet out of the shorts that apparently were in the vehicle. The deputy then pulled defendant's driver's license out of the wallet and was able to identify defendant. The trial court noted that there is no evidence in the record about where the shorts were in the vehicle, where or how the deputy found them, or if he could see a bulge in the pants.

The Josephine County Sheriff's inventory policy allows deputies to conduct a "motor vehicle inventory without a warrant or probable cause" when the vehicle is towed, seized, or impounded, and under it "the deputy shall open and inventory any container that based upon its context and/or physical appearance would reasonably be expected to contain valuables" such as "wallets, purses, fanny packs, briefcases, coin purses."

Defendant was charged with, among other things, criminal driving while suspended. He moved to suppress "the evidence of his identity, revealed by his driver's license" because the inventory policy did not authorize the warrantless search of his shorts. The trial court denied the motion, concluding that the deputy "may very well have concluded a pants pocket is designed to hold valuables and reasonably so."

The Court of Appeals reversed and remanded: "the record does not support a determination that the inventory was conducted pursuant to the inventory policy and does not satisfy the constitutional requirements for a warrantless search." The state argued that "the pocket on *every* pair of men's shorts" is "designed to hold valuables" but the inventory policy at issue does not use those words. The text of the policy itself requires evidence that the container was opened "based upon the container's context and/or physical appearance." But the record contains no such evidence. The state has not met its burden here: "The state presented no evidence about the context or the physical appearance of the shorts from which it could be concluded that the inventory policy was properly applied in this case." "Language has meaning" and "given the constitutional implication of inventories," courts "have been scrupulously rigorous" in construing the terms of inventory policies. (String cite omitted).

4.8.7 Other Administrative Searches or Seizures

4.8.7.A Searches

"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).

"Typical examples include health and safety inspections and certain inventory searches of lawfully seized automobiles" and schools' student search policies if they are noncriminal and otherwise meet administrative-search requirements. *State v B.A.H.*, 245 Or App 203, 206 (2011); *cf. Donovan v Dewey*, 452 US 594, 598 (1981) (administrative inspections of private property, constitute searches under the Fourth Amendment).

One requisite element of the administrative search exception is that there must be "a source of legal authority permitting the administrative search," per *State v Atkinson*, 298 Or 1 (1984) and *Nelson v Lane County*, 304 Or 97 (1987). *State v Mast*, 250 Or App 605 (2012)

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).

"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." *State v B.A.H.*, 245 Or App 205 (2011) (school search); *see also State v Spring*, 201 Or App 367, 373 (2005) (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 in that every person denying paternity must provide a DNA sample).

A search conducted pursuant to a "statutorily authorized administrative program * * * may justify a search without a warrant and without any individualized suspicion at all." *Clackamas County v M.A.D.*, 348 Or 381, 389 (2010) (citing *State v Atkinson*, 298 Or 1, 8-10 (1984)).

Note that under the Fourth Amendment, suspicion of criminal activity will not defeat an otherwise permissible administrative search. *United States v Villamonte-Marquez*, 462 US 579, 584 n 3 (1983).

4.8.7.B Seizures

"To invoke the administrative seizure exception to the warrant requirement, the state must show not only that the seizure was authorized by law but that 'suspicions of criminal activity play[ed] no part in the officer's decision to seize the property.'" *State v Lambert*, 263 Or App 683, 695, *rev'd in part and aff'd in part on recons*, 265 Or App 742, (2014) (citing *State v Gaunce*, 114 Or App 190, 195-97, *rev den* 351 Or 271 (1992)).

> ***State v Lambert***, 263 Or App 683 (2014) and 265 Or App 742 (10/01/14) (Multnomah) (Garrett, Ortega, DeVore) Defendant was arrested for two burglaries. One involved cutting a hole in a fence. A "4 x 4 decal" that appeared to have fallen off of a vehicle, was

lying on the ground near the hole in the fence. A Jeep was parked nearby. Police towed the Jeep to the police impound lot and put a "hold" on it. Four days later, an officer took the 4 x 4 decal to the Jeep, and the decal fit on the exterior of the Jeep "like a puzzle" piece. The officer applied for a warrant to search the inside of the Jeep for items reported stolen from the two victims. The warrant issued, and police discovered an item that was identical to an item reported as stolen. Defendant moved to suppress based on the unlawful seizure of the Jeep and also based on the unlawful search pursuant to the search warrant. The trial court denied both motions, including denying motion for the seizure of the Jeep, ruling that the vehicle was seized as a lawful "administrative seizure" under Portland City Code.

The Court of Appeals reversed and remanded in 263 Or App 683 (June 18, 2014), concluding that the state had failed to demonstrate that the administrative seizure exception applied. Defendant petitioned for reconsideration, and the Court of Appeals allowed that petition. In its October 1, 2014, opinion, its former disposition was withdrawn: "On reconsideration, we conclude that it was error to remand in order for the trial court to consider whether the evidence would have been inevitably discovered. A remand in this situation is appropriate only if the record contains potentially conflicting evidence that needs to be resolved. * * * If the seizure was unlawful and the record does not support the conclusion that police would have inevitably discovered the evidence, we must reverse because the state had that obligation to 'develop a record sufficient to substantiate any and all grounds on which it might seek to justify the admission of that evidence.' *State v Marshall*, 254 Or App 419, 434 (2013)."

The Court of Appeals concluded that "the only conclusion to be drawn from this record is that, by unlawfully towing defendant's vehicle, police gained access to evidence – the 4 x 4 decal match – that otherwise would not have been available to them. That evidence must be suppressed. Without that evidence, the affidavit in support of the warrant would not have established probable cause to believe that the specified items would be in defendant's vehicle, because the 4 x 4 decal match was the only concrete evidence linking defendant, and his vehicle, to the theft of the items listed in the search warrant."

"When police obtain evidence of a crime after having violated a defendant's rights under Article I, section 9, of the Oregon Constitution, it is presumed that the evidence is tainted and must be suppressed. *See State v Unger*, 356 Or 59, 84 (2014). That presumption, however, is rebuttable." The state may rebut that presumption by showing that the police independently obtained the evidence. The state had not done so in this case – it was required to prove that suspicions of criminal activity played no part in the officers' discretion to seize the property, under *State v Gaunce*, 114 Or App 190, 195-97, *rev den* 351 Or 271 (1992).

4.8.8 Abandonment

"Abandonment of property is an intentional permanent relinquishment of one's interests in the property without vesting those rights in another person." *State v Stinstrom*, 261 Or App 186, 192 (2014) (backpack); *State v Pidcock*, 306 Or 335, 339 (1988) (briefcase); *State v Tanner*, 304 Or 312, 323 (1987); *State v Cook*, 332 Or 601, 608-09 (2001). "Lost Property" is a related exception.

"A defendant's rights are not violated if the defendant abandoned his or her possessory or privacy interests in an item before it was searched, but it is the state's burden to show that the defendant is not entitled to suppression because he or she abandoned those rights." *State v McClatchey*, 259 Or App 531 (2013) (citing *State v Tucker*, 330 Or 85, 990-91 (2000)).

Abandoning something does not necessarily allow it to be searched or seized as an exception to the warrant requirement. Rather, abandonment results in relinquishing a constitutionally

protected privacy interest in the item, so it is not a "search" or a "seizure." *Cf. State v Stinstrom*, 261 Or App 186, 192 & 195 n 2 (2014).

A. Papers or Effects.

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). But "a "disclaimer of ownership is not a disclaimer of all protected interests" under *State v Cook*, 332 Or 601, 608-09 (2001).

The Court of Appeals has cautioned that the word "abandonment" may lead to imprecise analysis, because abandonment may be temporary or permanent: "For example, if a person simply sets a bag down and walks away from it, the person has not abandoned the bag itself; the person retains protected interests in the bag and an officer may not search or seize the bag unless the officer does so pursuant to a warrant or an exception to the warrant requirement." *State v Stinstrom*, 261 Or App 186, 196 n 2 (2014) (dicta) (citing *State v Cook*, 332 Or 601, 607-08 (2001)).

> ***State v McClatchey***, 259 Or App 531 (11/20/13) (Lane) (Hadlock, Ortega, Sercombe) A motel manager called police to report that two men had passed out in a room that was not rented out. The manager opened the motel room door for the police, who observed defendant passed out on a bed, and the other man passed out on the floor. An LG cell phone was next to defendant on the bed. Cash, meth, and evidence of both drug use and drug sales were in the room and on defendant's person. Officers seized all of that evidence, including the phone, which defendant told officers belonged to him. A police forensic examiner examined the phone and found 150 saved text messages, some of which pertained to stolen property and drug sales. Defendant later was arrested and more meth, cash, stolen property was found on his person, along with what he said was his girlfriend's Blackberry. Officer put both defendant and the girlfriend in the patrol car, questioned the girlfriend, and defendant kept yelling to the girlfriend to stop talking. Police later obtained a search warrant for the motel room, that produced more meth sales records and drug distribution evidence. A police officer later obtained a warrant to search the LG cell phone that already had been searched, but that warrant was supported by the officer's affidavit that it had already been examined and it contained data supporting delivery of drugs. At trial for burglary and various drug crimes, defendant orally moved to suppress the evidence from his LG cell phone because no warrant was obtained for the first search. The trial court denied the motion because defendant had not claimed a privacy interest in the phone. He was convicted despite his trial theory that his girlfriend was the drug dealer and he was just a drug user.
>
> The Court of Appeals reversed and remanded: "The defendant is not required to assert a privacy interest in order to invoke the protections of Article I, section 9, and 'a defendant's denial of a protected interest is not necessarily dispositive of whether the state has met its burden of proving the validity of a warrantless search.'" (Citing *State v Tucker*, 330 Or 85, 91 (2000)). A defendant may abandon his interest in an item before it is searched, resulting in no Article I, section9, implication, but "it is the state's burden to show that the defendant is not entitled to suppression because he or she abandoned those rights." "In short, defendant has established that the trial court erred in ruling that he was not entitled to suppression because he did not claim a privacy interest in the LG cell phone."
>
> ***State v Stinstrom***, 261 Or App 186 (02/20/14) (Lane) (Duncan, Wollheim, Schuman SJ) A man wore a backpack on his back in a public park. A police officer asked him for identification. He reached for that backpack, said "Oops I grabbed the wrong bag," and placed that backpack on the ground next to defendant stating, "This is your bag." Defendant reached for the backpack, but the officer told defendant to stop. Defendant's

first name is Henry. Officer learned that there was a warrant for defendant's arrest, so he took him into custody, walked with him to the patrol car, and then said to defendant, "Oh, I forgot your backpack." Officer returned to the place the backpack had been. Defendant said, "that's not my backpack." Officer retrieved it anyway and inventoried it at the patrol car, where he found a syringe missing its plunger cap, a plastic bag, a shortened plastic straw with meth crust on it. He also found a syringe plunger in defendant's pants, and a spiral notebook with a letter that began: "Greetings, mother, it is I Henry, youngest child." Officer booked defendant at jail and charged him for possession of meth. The trial court denied defendant's motion to suppress which was based on the inventory exception.

The Court of Appeals reversed and remanded. No one disputes that the officer's retrival of the backpack was a "seizure." And it was warrantless. That places the burden on the state. The Court of Appeals spent five pages addressing "abandonment of property," and opined that the record "suggests that defendant did not abandon the backpack before" the officer seized it. But the court then "declined" to address the state's abandonment theory because it was raised for the first time on appeal and the record may have developed differently. Therefore the Court of Appeals' discussion is likely dicta. It wrote:

"If a person has abandoned property, the person has no protected possessory or privacy interests in it, and, therefore, a seizure or search of the property does not violate the person's Article I, section 9, rights. A person does not abandon property by stepping away from it in response to a police order or by denying ownership of it; indeed, those actions do not even constitute a disclaimer of the person's protected possessory and privacy interests in the property. *State v Cook*, 332 Or 601, 608-09 (2001)." A "disclaimer of ownership is not a disclaimer of all protected interests" under *Cook*.

B. Houses

Under the Fourth Amendment, several factors should be considered to determine if a house has been abandoned, such as after a fire: "the type of property, the amount of fire damage, the prior and continued use of the premises, and, in some cases, the owner's efforts to secure [the home] against intruders." *Michigan v Clifford*, 464 US 287, 292 (1984).

See also *United States v Harrison*, 689 F3d 301 (3d Cir 2012): "Before the government may cross the threshold of a home without a warrant [under the abandonment theory in the Fourth Amendment], there must be clear, unequivocal and unmistakable evidence that the property has been abandoned. Only then will such a search be permitted." The police need not be factually correct (that the house was abandoned) but they must be reasonable in so believing. (Note: A mistake of law, even if reasonable, is *not* permitted in the Third Circuit, although this court may be incorrect in so stating, given the good-faith exception to the exclusionary rule). It is unreasonable to assume that a poorly maintained home is abandoned just because it is a dump: "There simply is no 'trashy house exception' to the warrant requirement." However, when the police know more – the house was a "drug den," there was nothing in the house except one mattress, it was awash in urine and crack bags, human feces filled the bathtub and toilets, there was no running water and no electricity, squatters came and went, all over the course of several summer month -- that together is sufficient to form probative evidence of abandonment for Fourth Amendment purposes.

4.8.9 Mobile Automobiles

4.8.9.A Article I, section 9

What it is:

"The automobile exception is 'a subset of the exigent circumstances exception' under which the 'mobility of a vehicle, by itself, creates an exigency.' *State v Meharry*, 342 Or 173, 177 (2006)." *State v Tovar*, 256 Or App 1 (2013).

"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). Automobiles may be searched and seized without a warrant, under Article I, section 9, if the automobile is mobile when police stop it and they 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).

The test for whether the police had probable cause to conduct a search under the mobile auto exception is "whether a magistrate could issue a constitutionally sound search warrant based on the probable cause articulated by the officers," under *State v Brown*, 301 Or 268, 277 (1986). *State v Tovar*, 256 Or App 1 (2013).

A vehicle remains "mobile" even if blocked by a police car when 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).

What it isn't:

An auto is not mobile if it is "parked, immobile, and unoccupied" when police first encounter it. *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").

The mobile auto exception is not met if the officer's encounter with the moving auto was not "in connection with a crime" but instead the officer was "merely randomly 'running' license plates." *State v Groom*, 249 Or App 118 (2012).

Its Scope:

Under the mobile auto exception, "the police may search any area of the vehicle or any container within the vehicle in which they have probable cause to believe that [] contraband or crime evidence may be found." *State v Tovar*, 256 Or App 1 (2013) (quoting *State v Smalley*, 233 Or App 263, 267, *rev den*, 348 Or 415 (2010)). Probable cause to believe that either "contraband or crime evidence" is contained in a mobile auto is sufficient to justify a mobile auto search. *Smalley*, 233 Or App at 270 (search of backpack in auto was lawful because officer had probable cause that defendant possessed < 1 oz. marijuana, which is contraband) (quoting *State v Brown*, 301 Or 268, 277 (1986)).

A lawful auto search may become unlawful if it is unreasonable in scope. The scope is defined by "the object of the search and the places in which there is probable cause to believe that it may be found." *State v Tovar*, 256 Or App 1 (2013) (quoting *State v Brown*, 301 Or 268, 279 (1986) (*Brown* quoted *United States v Ross*, 456 US 798, 824 (1982)).

The mobile auto exception has not been extended to "a search of a defendant's person while the defendant is standing outside the car." *State v Jones*, __ Or App __ (2012) (citing *State v Brown*, 301 Or 268 (1986) and *State v Foster*, 350 Or 161 (2011)).

The mobile auto exception has been extended to mobile containers (a trailer) attached to a mobile auto by a hitch. *State v Finlay*, 257 Or App 581 (2013).

> ***State v Bennett/McCall***, 265 Or App 448 (9/10/14) (Marion) (Devore, Ortega, Garrett) An informant helped two officers on the Street Crimes Team set up a buy-bust operation of two roommates with medical marijuana cards who grew and sold marijuana

illegally. They used a Cadillac to deliver drugs. At the buy-bust location they'd set up with the informant, the officers arrived in unmarked vehicles, watched one defendant walk to the store while the other defendant remained in the driver's seat. An officer opened the driver's door, told defendant-driver he was under arrest, and grabbed his arm. That defendant broke the officer's grip, leaned toward the center of the car, and then the officers forcibly removed him, handcuffed him, and got him into his wheelchair. The officers found a gallon-sized bag full of marijuana plus other drug-sales items. A backpack was on the front passenger floorboard. Officer opened it, found a loaded handgun and more marijuana. An officer searched one defendant's mobile phone and found text messages regarding the sale of prescription narcotics. The wheelchair-using defendant asked for his backpack to get his catheter to go to the bathroom. Another officer removed the backpack, checked it for weapons, and found two prescription narcotics bottles.

As relevant here, the trial court granted defendant's motion to suppress the gun and drugs in the backpack during the first and second searches. The state appealed. The Court of Appeals reversed in part. Under the mobile auto exception, and *State v Smalley*, 233 Or App 263, 267, *rev den* 348 Or 415 (2010), the police can search any container or place in the vehicle that they have probable cause to believe "that the contraband or crime evidence may be found." The officers had probable cause to believe the Cadillac contained evidence related to defendants' criminal activities. At the time of the buy-bust, the officers subjectively believed that drugs would be in the car. The belief was objectively reasonable as well. No error in denying defendants' motion to suppress evidence in the car.

The trial court erred, though, in determining that the auto exception did not extend to the initial search of the backpack. The scope of a mobile auto search "does not require an officer to have probable cause to believe that a discrete container holds evidence of crime" instead the proper scope is defined by the warrant that the officer could have obtained.

The trial court did not err in suppressing the evidence from the second backpack search, because it was not justifiable under the officer safety exception. Defendant was handcuffed in his wheelchair under a store awning when the officer searched the backpack for his catheter. There was no immediate threat. "If officer safety was a concern, the backpack could have been withheld while emergency medical services were summoned to provide a catheter, or police could have sought [defendant's] express and voluntary consent to search the backpack."

4.8.9.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).

4.8.9.C Detection Dogs and Probable Cause

If the record does not establish a particular detection dog's reliability to any degree, the state will not prove probable cause. The Oregon Supreme Court has decided two K-9 search cases, *State v Foster*, 350 Or 161 (2011) and *State v Helzer*, 350 Or 153 (2011), which held that an alert by a properly trained and reliable drug-detection dog can provide probable cause to search, but that

the particular alert by the particular dog must be determined on a case-by-case basis. In *State v Farmer*, 258 Or App 693 (2013), the Court of Appeals wrote:

"Together, *Foster* and *Helzer* establish several principles []: (1) whether a particular alert by a particular drug-detection dog is reliable must be determined on a case-by-case basis; (2) the factors relevant to that determination include the dog-handler team's training, testing, and certification; but (3) the simple fact that a team has been trained, tested, and certified is not enough to establish that an alert is reliable; rather, the type of training, testing, and certification matters. That is because, as *Foster* and *Helzer* illustrate, a dog-handler team must be trained in a manner that ensures that the dog alerts in response to drug odors, as opposed to, for example, a desire for a reward, non-drug odors, or handler cues or physical or scent trails left by the person who hid the drugs. Similarly, a dog-handler team must be tested in a controlled environment, where precautions against human cuing have been taken and the dog's accuracy can be assessed because the persons conducting the test know where the dog should alert and where it should not.

"*Foster* and *Helzer* also establish that the value of a dog's field records may depend on whether their significance is sufficiently developed through testimony at the hearing or is self-evident * * * and that, in all events, the value of field records is limited because it is unlikely that either false positives or false negatives will be detected in the field." (internal quotes omitted).

An unpreserved, alleged error -- that a drug detection dog's abilities were sufficiently reliable to establish probable cause for a search – is not plain error. *State v Gillson*, 259 Or App 428, 530 n 2 (2013).

Note: The Ninth Circuit has held that there is "no doubt" that a drug detection dog's history of making erroneous scent identifications is exculpatory evidence under *Brady v Maryland*, 373 US 83 (1983). *Aguilar v Woodward*, No. 09-55575 (9th Cir 2013). Impeachment, as well as exculpatory evidence, falls within *Brady*'s definition of evidence favorable to the accused. *Ibid*.

4.8.9.D Containers

A trailer attached to a mobile auto – while not an auto itself – is still a searchable container despite being attached to the vehicle rather than inside it. *State v Finlay*, 257 Or App 581 (2013).

Probable cause to believe that either "contraband or crime evidence" is contained in a container in a mobile auto is sufficient to justify a mobile auto search. *State v Smalley*, 233 Or App 263, 267, *rev den* 348 Or 415 (2010) (search of backpack in auto was lawful because officer had PC that defendant possessed < 1 oz. marijuana, which is contraband).

4.8.10 Public Schools

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

4.8.10.A Random Student Searches

1. Oregon Constitution

Random urine testing in public schools for drug evidence is a search and seizure under the state constitution, even if it is obtained and used for noncriminal purposes. *Weber v Oakridge School District*, 184 Or App 415 (2002) (the primary purposes of the district's drug-testing policy are noncriminal. They are to deter student use of alcohol and illicit drugs, to encourage participation in treatment programs, and to avoid injuries to student-

athletes."). See "Administrative Searches" for requisite criteria that, when met, allow a search to be conducted in a school under a "statutorily authorized administrative program" that "may justify a search without a warrant and without any individualized suspicion at all." *Clackamas County v M.A.D.*, 348 Or 381, 389 (2010) (so noting); *State v Atkinson*, 298 Or 1, 8-10 (1984).

Contrast with *Clackamas County v M.A.D.*, 348 Or 381, 389 (2010), where the school's search was for a criminal purpose.

2. Fourth Amendment "Special Needs"

See Section 4.8.17.

"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. *Board 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.

4.8.10.B Particular Student Searches

1. 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.

"The Fourth Amendment generally requires searches to be conducted pursuant to probable cause, or at least 'some quantum of individualized suspicion.' S*kinner 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. Other 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).

2. 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." *State 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*.

Note: In *State v M.A.D.*, 348 Or 381 (2010), the Oregon Supreme Court essentially grafted the Fourth Amendment's "Special Needs" exception to the warrant requirement into the Oregon Constitution through the state's "Officer Safety" exception. But it did so under vague reasoning that both linked to (officer-safety and school exceptions are "somewhat coextensive") and separated from (the school context is "sufficiently different from") the "Officer Safety" exception (which itself is basically part of the "Emergency" exception to the Fourth Amendment's warrant requirement). Consider those aspects of *M.A.D.*, which the Oregon Supreme Court quoted in *State v A.J.C.*, 355 Or 552, 560 (2014):

> "Notably, although we drew guidance from the officer-safety exception in formulating the school-safety standard in *M. A. D.*, we recognized that the school context is 'sufficiently different from the setting in which ordinary police-citizen interactions occur.' *M. A. D.*, 348 Or at 391."
>
> "Thus, although we announced an exception that is somewhat coextensive with the officer-safety exception to the warrant requirement, we articulated a standard applicable to school settings that takes into account the unique environment of those settings." *A.J.C.*, 355 Or at 561.
>
> ***State v A.J.C.***, 355 Or 552 (5/30/14) (Washington) (Baldwin) (Brewer not participating) One night, a high school student called a female student he had had a relationship with and told her he was going to bring a gun to shoot her and other students. The female student informed the school counselor. Counselor told the principal. The principal was not familiar with the female student, but he was familiar with the threatening student, A.J.C., who had had past discipline problems, although the principal was not sure he believe the student would carry out the threat or that he could disregard it. Principal called a deputy sheriff who arrived within minutes, called A.J.C.'s mother, and searched A.J.C.'s locker (nothing was in the locker). Principal went to A.J.C.'s classroom, picked up his backpack that had been under his seat, and asked A.J.C. to come with him. A.J.C. calmly did so while principal carried the backpack. Back at the principal's office, the deputy sheriff in uniform, A.J.C.'s mother, and a family friend joined A.J.C. and principal while principal kept the backpack near his desk. Principal told A.J.C. about the threat, A.J.C. denied the threat, but upon questioning admitted that he had had a relationship with the female student and said "she called me, too, and she texted me, too." Principal said he had to follow through on his process so he was going to search the backpack. A.J.C. neither consented nor objected. Nothing was in the backpack's main compartment, then principal opened a smaller compartment that was 8"x8" which contained several .45-caliber bullets. In a third compartment, a .45-caliber handgun was wrapped in a bandanna. Principal handed the gun to the deputy, and then the deputy handcuffed A.J.C.
>
> The trial court denied A.J.C.'s motion to suppress the warrantless search under the "school-safety exception" because the report about the gun was a credible threat (both the potential victim and the perpetrator were identified by name, the threat had just been made the night before, and when interviewed, A.J.C. admitted he had had some sort of relationship with the female student he had threatened). The Court of Appeals affirmed.
>
> The Supreme Court affirmed. The court deemed this "the school-safety exception" that it had "announced" in *State v M.A.D*, 348 Or 381 (2010). The Court recited and reiterated the correlation between the officer-safety exception and the school-safety exception for

several pages, then "recognized" that "the school context is sufficiently different from the setting in which ordinary police-citizen interactions occur," but without explaining what that is or how it works. The Court then wavered back to the similarities between "the concerns that police officers face in the field" with those of "school officials confronting credible safety threats in a school setting." A.J.C. argued that the search was not justified because he no longer posed an immediate safety risk when the backpack was searched. The Court then raised "the differences between an officer-citizen context and a school context matter in assessing whether protective measures are reasonable" and discussed "the fact that young students are confined in close-quarters on a school campus that they are compelled to attend, and the fact that school officials have a heightened standard of care to students and adults." Held: Smith's search of the student's backpack compartments where a gun could be contained was reasonable.

4.8.11 Jails and Juvenile Detention

4.8.11.A Fourth Amendment

i. Adults

Maryland v King, 133 S Ct 1958 (2013) held that taking and analyzing DNA at a jail from an arrested person's cheek as a search incident to arrest for a "dangerous" or "serious offense," supported by probable cause, is a legitimate police booking procedure that is reasonable under the Fourth Amendment, like fingerprinting and photographing. Per the Court, such searches are similar to and different from "special needs" cases. (See Section 4.8.17). The Court recited special needs cases because "the search involves no discretion" by officers. But this is not a special needs case, and differs from special needs cases, because special needs cases have no individualized suspicion. The buccal swab at issue in this Maryland statute occurs upon arrest for serious offenses based on probable cause.

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).

Jails may have search policies that require detainees, before being held with the general jail population, to undergo a strip search and intimate visual inspection without any reasonable suspicion that they are doing anything dangerous or illegal (such as drugs, weapons, tattoos, or disease or infectious wounds). Regardless of the arrest, the level of offense, the detainee's behavior or criminal history, jails do not violate the Fourth Amendment by requiring detainees to open their mouths, lift their tongues, lift their genitals, cough and squat, spread the buttocks or genital areas, while jail officers watch. "Jails are often crowded, unsanitary, and dangerous places." *Florence v Board of Chosen Freeholders*, 566 US __ (2012). (Note: This case does not involve any touching by jailers – just visual inspections. This case also does not address "the types of searches that would be reasonable in instances where, for example, a detainee will be held without assignment to the general jail population and without substantial contact with other detainees.").

ii. Juveniles

"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 F3d 964, 980-82 (9th Cir 2010 (en banc). *Mashburn v Yamhill County*, 698 F Supp 2d 1233 (D Or 2010) (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).

4.8.11.B Article I, section 9

Note: Case law on this subject is underdeveloped under the Oregon Constitution. The block quotations in this section are not directly on point.

i. Adults

In *State v Tiner*, 340 Or 551 (2006), the Court wrote: "Neither the United States Constitution nor the Oregon Constitution requires a search warrant or its equivalent before the state may take pictures of or inspect defendant's torso because, once defendant became a prisoner, he enjoyed few rights regarding his privacy. *See Hudson v Palmer*, 468 US 517, 526 (1984) (prisoner does not have subjective expectation of privacy in prison cell); *Bell v Wolfish*, 441 US 520, 558 (1979) (visual cavity search of prisoner does not violate Fourth Amendment); *Sterling v Cupp*, 290 Or 611, 620 (1981) ("Those sentenced to prison forfeit many rights that accompany freedom."). In *Tiner*, the Court decided that when the defendant was imprisoned, he lacked the right to privacy that he enjoyed when he was not in prison. Among the rights that he forfeited was the right to keep his personal appearance—including any distinguishing marks such as tattoos—from being known to the state. The state reasonably could compel defendant to remove his shirt so that he could be photographed.

A buccal swab is akin to fingerprinting a person in custody, so that the seizure of DNA of an arrestee via buccal swab "did not constitute an unreasonable seizure under either constitution." *State v Brown*, 212 Or App 164, 1167 (2007).

> ***State v Moore***, 260 Or App 303 (12/26/13) (Coos) (Sercombe, Ortega, Haselton) Defendant was detained at a jail pending many counts of first-degree child rape of a stepdaughter, being a felon in possession of a firearm, fleeing from police in a vehicle, and 27 counts of violating a restraining order. He handwrote a 224-page tome entitled "Voices in the Dark" from his jail cell. He let another inmate read it. That inmate reported it because it described rape allegations and the notebook stated "Some of the things [victim] says are true." The book was not contraband. Police seized the book. The book was used against him in his rape trial; he was convicted after the trial court denied his motion to suppress the book.
>
> The Court of Appeals reversed and remanded regarding suppression of the handwritten book. This defendant was not in jail based on a conviction, but was being held before his criminal trial. The seized item also was not contraband. The Court of Appeals did not establish parameters of whether and when a pretrial detainee retains a privacy interest in a jail cell.
>
> Under *State v Tiner*, 340 Or 551 (2006), a defendant has "diminished privacy interests," but still has privacy interests, while a jail inmate. The state bears the burden of proving that an exception to the warrant requirement applies when evidence is seized without a warrant and used in a criminal prosecution. The state did not establish that any exception applied. The state contended that a "pretrial detainee retains no protected right in a jail cell." The Court of Appeals declined to agree, citing its recent decision in

State v Hartman, 238 Or App 582 (2010), *adh'd to as modified on recons*, 241 Or App 195 (2011), in which the court affirmed the suppression of evidence (a boot print) obtained without a warrant from a pretrial detainee in a jail cell.

The error was not harmless as to the rape charges: the state referenced defendant's handwritten notebook and defendant took the stand to testify that it "was a fictional book that he was writing about a mafia hit man named 'Danny Moris.'" And the protagonist sounds a lot like defendant's life story, including the same or similar names and rape allegations by a child. The error was harmless as to other charges.

ii. Juveniles

Generally: "Routine searches of prisoners and probationers without probable cause are reasonable if there is a penological objective. *See State v. Culbertson*, 29 Or App 363, 563 P2d 1224 (1977)." *State v Orozco*, 129 Or App 148, 151 (1994), *rev den* 326 Or 58 (1997) (juvenile case).

4.8.12 Probation Searches

A. Oregon

ORS 137.545(2) allows a police officer or parole and probation officer to arrest a probationer without a warrant upon reasonable suspicion that the probationer is violating any condition of probation. 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. Even if a defendant is not actually violating a probation condition but the officer believes that he is, "[r]easonable suspicion, as a basis for an investigatory stop, [requires] only that those facts support the reasonable inference of illegal activity by that person." *State v Hiner*, 240 Or App 175 (2010); *State v Faubion*, 258 Or App 184, 194 & n 5 (2013); *State v Steinke*, 88 Or App 626, 629 (1987).

ORS 144.350(1)(a) allows a probation officer to order the arrest of a probationer when the officer has reasonable grounds to believe that the probationer has violated the conditions of probation. The officer may tell a defendant that he may refuse consent, and that such a refusal could subject him to arrest for a probation violation. *State v Hiner*, 240 Or App 175 (2010); *State v Davis*, 133 Or App 467, 473-74, *rev den* 321 Or 429 (1995).

"Under Article I, section 9, a probation condition requiring a probationer to consent to a home visit is not the same as a consent to search; the latter is more intrusive and it is condition on the existence of 'reasonable grounds to believe that evidence of a violation will be found.' ORS 137.540(h) and (i). Further, a consent to search is not self-executing; if a probationer refuses to consent, the officer has no authority under the probation condition to search, although the probationer may be subject to a sanction for violating the condition." *State v Brock*, 254 Or App 273 (2013) (citing *State v Dunlap*, 215 Or App 46, 54 (2007)).

"Under Article I, section 9, a probation condition requiring a probationer to consent to a home visit is not the same as a consent to search; the latter is more intrusive and is conditioned on the existence of 'reasonable grounds to believe that evidence of a violation will be found.' ORS 137.540(h) and (i). Further a consent to search is not self-executing; if a probationer refuses to consent, the officer has no authority under the probation condition to search, although the probationer may be subject to a sanction for violating the condition." To determine voluntariness of consent in probation-condition situations, the court considers "whether the probationer was effectively denied a reasonable opportunity to refuse the search or whether the environment was sufficiently coercive to preclude him from doing so." *State v Brock*, 254 Or App 273 (2012).

B. Fourth Amendment

See **Section 4.8.17 on Special Needs**.

In *Griffin v Wisconsin*, 483 US 868 (1987), the Court concluded that a state's operation of its probation system was a "special need" that justified the warrantless search of a probationer's home, based on reasonable grounds to suspect the presence of contraband. *Id*. at 872. The Court held that the operation of a probation system was a valid "special need," in that the system worked towards genuine rehabilitation through intensive supervision and a "warrant requirement would interfere to an appreciable degree." *Id*. at 873-76. *Cf. Wyman v James*, 400 US 309, 317-18 (1971) (social worker's home visits are not a "search" if done to verify eligibility for benefits rather than for a criminal investigation).

Under the Fourth Amendment, police need only show a "reasonable suspicion that an [effect] to be searched is owned, controlled, or possessed by probationer, in order to the [effect] to fall within the permissible bounds of a probation search." *United States v Bolivar*, 670 F3d 1091 (9th Cir 2012). To search a residence, "officers must have 'probable cause' that they are at the correct residence but, once validly inside, they need only 'reasonable suspicion' that an [effect] is owned, possessed, or controlled by the parolee or probationer." *Id*.

4.8.13 Lawful Vantage Point or Plain View

A. Search

"Plain View" is not an exception to the warrant requirement. Instead, usually the circumstance is not a search implicating any constitutional rights.

"A search, for purposes of Article I, section 9, occurs when 'a person's privacy interests are invaded.' *State v Owens*, 302 Or 196, 206 (1986). No search occurs, however, when police officers make observations from a 'lawful vantage point.' *State v Ainsworth*, 310 Or 613, 617 (1990). A 'lawful vantage point' may be within the curtilage of a property in which a defendant has a privacy interest, given that, 'absent evidence of an intent to exclude, an occupant impliedly consents to people walking to the front door and knocking on it, because of social and legal norms of behavior.' *State v Portrey*, 134 Or App 460, 464 (1995)." *State v Pierce*, 226 Or App 336, 343 (2009).

B. Seizure

"Under the plain-view doctrine, an officer may seize an item if the officer can do so from a position where that officer is entitled to be and the incriminating character of the item to be seized is 'immediately apparent.' *State v Carter*, 200 Or App 262 (2005), *aff'd*, 342 Or 39 (2006)." *State v Currin*, 258 Or App 715 (2013) (plain white envelope contents do not meet plain-view exception).

> ***State v Newcomb***, 262 Or App 256 (4/16/14) (Multnomah) (Sercombe, Ortega, Hadlock) A police officer received a tip from the Humane Society that defendant was beating and starving her dog at her house. Officer went to defendant's apartment, entered with her consent, and saw the dog in the yard. It was nearly emaciated, trying to eat "at random things" and "trying to vomit" but nothing was coming up. Defendant said that she was "out of dog food but was going to get more food that night." Officer concluded that the dog needed medical care and was certainly neglected. Defendant refused to sign a temporary medical release to take the dog to the vet. Officer took the dog anyway. A Humane Society vet took the dog's blood and scooped some feces and sampled both. The dog's near emaciation was the result of lack of feeding rather than disease. Defendant was charged with animal neglect. The trial court denied her motion

to suppress the dog and "all derivative evidence" because the seizure was justified under the plain view exception.

The Court of Appeals reversed and remanded. All agree that the dog is personal property and was "seized" when removed from the apartment. The dog is an "effect." The dog was in plain view because defendant consented to the officer entering her apartment and officer saw the dog from that place. Then when the officer saw the dog, it was evidence of the crime, so the trial court did not err in seizing it under the plain view exception.

But the trial court erred when it denied the motion to suppress the blood-draw evidence from the dog. The vet was a state actor because she acted under the police officer's direction. The blood draw and blood testing was a "search" of the effect because it was a physical intrusion into defendant's property. The dog was in essence a container that stores information even though owners do not use dogs like briefcases or mobile phones. The information in the dog was "beyond that available to an ordinary observer."

Weighing the dog was not a search because it was at most an "incremental intrusion beyond what was readily apparent to the veterinarian."

The dog's fecal material was extracted or deposited. That difference matters, but the record does not indicate how it was collected. If either side pursues the dog's fecal evidence on remand, the "trial court should reassess whether the fecal matter should be suppressed."

4.8.14 Container That "Announces its Contents"

"In some circumstances, a container by its nature or transparency 'announces its contents' so that there is no privacy interest to protect, and an examination of the contents by the state is not a search for constitutional purposes" under *State v Owens*, 302 Or 196, 206 (1986).

This "exception to the warrant requirement is 'analogous to the plain view exception; it depends only on the nature of the container itself – i.e. whether by its smell, appearance, or other directly observable features, it "announces its contents" – and is thus independent of the context in which the container was found or the subjective knowledge and experience of the officer who found it.' * * * The nature of the container, however, must be such as to announce 'that contraband is [its] sole content.'" *State v Edmiston*, 229 Or App 411 n 3 (2009) (quoting *State v Stock*, 209 Or App 7, 12 (2006) and *State v Krucheck*, 156 Or App 617, 622 (1998), *aff'd by an equally divided court*, 331 Or 664 (2001)).

Containers that announce their contents have included: a clear plastic baggie with leafy greens, a transparent vial with powder, and a ripped-out magazine page folded into a one-inch by one-half-inch container with a "unique shape and character." Such containers give probable cause to believe that the containers contain contraband. In contrast, a plain white envelope is "uniquely associated with drugs, for the universe of items that tends to be contained in a purse or an envelope is vastly larger than that which tends to be contained in a small paperfold." *State v Currin*, 258 Or App 715 (2013).

4.8.15 Lost-and-Found Property

Finders of lost property have a duty to try to return lost-and-found property to its owner. ORS 98.005. *State v Pidcock*, 306 Or 335 (1988), *cert denied*, 489 US 1011 (1989). The "finder" may claim lost property if the owner is unknown. When a finder turns property over to officers, the officers become the "finder" with the duty to identify the owner. When a private citizen as a finder gives officers the found property, and officers open the property to try to identify the owner

(rather than opening it to search) without a warrant, police may be excused from the warrant requirement.

> ***State v Vanburen***, 262 Or App 715 (5/14/14) (Curry) (Nakamoto, Armstrong, Edmonds SJ) Officers went to defendant's ground-floor multi-unit apartment complex to investigate him for making harassing telephone calls. They saw a bag on the ground about 3 to 5 feet outside his door. It was not visible from the street. It was 75 feet from the street. All tenants have access to the walkway, which is accessible by the public. Two minutes after seeing the bag, police officers searched it and found marijuana, psilocybin mushrooms, and prescription pills with defendant's name on the bottle. He apparently had valid cards for all drugs except the mushrooms, for which he was charged with unlawfully possession. He moved to suppress the mushrooms. The trial court denied the motion, concluding that the state had established that it searched the bag under the "lost property" exception to the warrant requirement.
>
> The Court of Appeals reversed and remanded under ORS 98.005, 164.065, and *State v Pidcock*, 306 Or 335 (1988), *cert denied*, 489 US 1011 (1989). It held that "the officer's subjective belief that the property is lost must be objectively reasonable under the circumstances. It was not objectively reasonable under the circumstances here for the police to believe that defendant's bag was lost." *Pidcock* did not expressly require an "objective reasonableness" element in the "lost property" exception, but the Court concluded that it implicitly did, or should. The "objectively reasonable" element includes what, where, and how the property was found, plus how long it may have been separated from its owner, and "the presence or absence of any other measure taken to determine ownership before searching it."

Note: The Oregon Court of Appeals has applied *State v Pidcock*, 306 Or 335, 340 (1988), *cert denied*, 489 US 1011 (1989) inconsistently, as both "lost property" and "abandoned property." For example, in *State v Rowell*, 251 Or App 463, *rev den* 353 Or 127 (2012), the Court of Appeals wrote:

> *Pidcock* was a case "involving *lost*, as opposed to *abandoned* property" and it allows officers to open a closed container to determine ownership of lost property. But "[n]either *Pidcock* nor any other case establishes an exception to the warrant requirements that would allow police to open a closed container in order to determine whether its contents were or were not stolen, and we decline to create such an exception here." *State v Rowell*, 251 Or App 463, *rev den* 353 Or 127 (2012).

But in *State v Stinstrom*, 261 Or App 186 (2014), the Court of Appeals cited *Pidcock* as an "abandonment of property" case, stating that in *Pidcock*, "defendant did not abandon his briefcase, which fell out of his truck, until he stopped actively trying to locate it." *See also State v Morton*, 110 Or App 219, 222 (1991) (interpreting *Pidcock* as meaning that "a finder of lost or abandoned property has a statutory duty * * * to return it to its owner and, should that finder turn the property over to the police, they in turn are placed in the position of the finder").

4.8.16 Community Caretaking – Fourth Amendment

A "community caretaking" exception to the warrant requirement exists under the Fourth Amendment. *Cady v Dombrowski*, 413 US 433, 441 (1973) (police officers sometimes may "engage in what may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."). *See MacDonald v Town of Eastham*, 745 F3d 8, 14 (1st Cir 2014) ("the scope and boundaries of the community caretaking exception are nebulous.").

No such exception has been recognized under the Oregon Constitution. *State v Bridewell*, 306 Or 231, 239-40 (1988); *State v Christenson*, 181 Or App 345 (2002); *State v Bistrika*, 261 Or App 385 (2014).

An Oregon statute, ORS 133.033, allows officers to perform certain "community caretaking functions." But Article I, section 9, limits that statute. Oregon's "community caretaking statute does not authorize an officer to enter or remain on private property without a warrant or an exception to the warrant requirement." *State v Bistrika*, 261 Or App 385 (2014). ORS 133.033 authorizes only "lawful acts that are inherent in the duty of the peace officer to serve and protect the public." *State v Lange*, 264 Or App 126 (2014) (quoting *State v Martin*, 222 Or App 138, 146, *rev den*, 345 Or 690 (2009) (emphasis in *Martin*).

Impounding and inventorying a car without a warrant, rather than leaving it in a high-crime area, may be justified under the Fourth Amendment's "community caretaking" exception to the warrant requirement. *State v ONeill*, 251 Or App 424 (2012).

4.8.17 Other Fourth Amendment "Special Needs"

See **Section 4.8.10 (Schools)** and **Section 4.8.12 (Probation)**.

The "special needs" exception to the warrant requirement in the Fourth Amendment is "an exception to the general rule that a search [or seizure] must be based on individualized suspicion of wrongdoing." *Friedman v Boucher*, 580 F3d 847, 853 (9th Cir 2009) (quoting *City of Indianapolis v Edmond*, 531 US 32, 54 (2000)). "Under this exception, suspicionless searches [and seizures] may be upheld if they are conducted for important non-law enforcement purposes in contexts where adherence to the warrant-and-probable cause requirement would be impracticable." *Id.*; *see also Griffin v Wisconsin*, 483 US 868, 873 (1987) ("[W]e have permitted exceptions when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."

The U.S. Supreme Court described the "Special Needs" exception to the warrant requirement in *Skinner v Railway Labor Executives' Ass'n*, 489 US 602, 619-20 (1989):

> "We have recognized exceptions to this rule, however, when 'special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable.' *Griffin v Wisconsin*, 483 US 868, 873 (1987), quoting *New Jersey v T.L.O.*, 469 US at 351 (Blackmun, J., concurring in judgment). When faced with such special needs, we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable cause requirements in the particular context. *See, e.g., Griffin v. Wisconsin, supra*, at 873 (search of probationer's home); *New York v Burger*, 482 US 691, 699-703 (1987) (search of premises of certain highly regulated businesses); *O'Connor v. Ortega*, 480 US at 721-725 (work-related searches of employees' desks and offices); *New Jersey v T.L.O., supra*, at 337-342 (search of student's property by school officials); *Bell v Wolfish*, 441 U.S. 520, 558-560 (1979) (body cavity searches of prison inmates)."

Some courts have recognized a "workplace exception" to the warrant requirement as "special needs" cases under the Fourth Amendment. A plurality in *O'Connor v Ortega*, 480 US 709, 722 (1987) concluded that a warrantless search of a public employee's office, desk, or file cabinets in a public workplace for work-related reasons did not violate the Fourth Amendment, because requiring a government employer to obtain a warrant would be "simply unreasonable" and "would be unduly burdensome." That opinion appears to rest on the "special needs" doctrine.

See Al Haramain Islamic Foundation v United States, 686 F3d 965 (9th Cir 2012) ("We hold that the "special needs" exception does not apply to the seizure of AHIF–Oregon's assets" by the Office of Foreign Assets Control).

New York has followed *O'Connor v Ortega* and has applied it to random urinalysis testing of police officers, *Caruso v Ward*, 72 NY2d 432 (1988). New York courts have applied it when the state of New York attached a GPS tracker to a public employee's car 24 hours/day for 30 days. That was considered a "workplace search" but in that case, it was unconstitutionally unreasonable in scope because "it tracked petitioner on all evenings, on all weekends and on vacation" and "surely it would have been possible to stop short of seven-day, twenty-four hour surveillance for a full month. *Cunningham v New York Dep't of Labor*, 2013 NY Slip Op 04838 (2013).

On "Special Needs" reasoning in the 11-member Foreign Intelligence Surveillance Court, known as the FISA court, see Eric Lichtblau, *In Secret, Court Vastly Broadens Powers of N.S.A.*, N.Y.TIMES, page A1 (July 07, 2013), www.nytimes.com/2013/07/07/us/in-secret-court-vastly-broadens-powers-of-nsa.html?pagewanted=all&_r=1&:

> "The special needs doctrine was originally established in 1989 by the Supreme Court in a ruling allowing the drug testing of railway workers, finding that a minimal intrusion on privacy was justified by the government's need to combat an overriding public danger. Applying that concept more broadly, the FISA judges have ruled that the N.S.A.'s collection and examination of Americans' communications data to track possible terrorists does not run afoul of the Fourth Amendment, the officials said.
>
> "That legal interpretation is significant, several outside legal experts said, because it uses a relatively narrow area of the law — used to justify airport screenings, for instance, or drunken-driving checkpoints — and applies it much more broadly, in secret, to the wholesale collection of communications in pursuit of terrorism suspects. 'It seems like a legal stretch,' William C. Banks, a national security law expert at Syracuse University, said in response to a description of the decision. 'It's another way of tilting the scales toward the government in its access to all this data.'"

4.9 Remedies

Evidence obtained in violation of Article I, section 9, or the Fourth Amendment may be suppressed. But suppression is not necessarily required for statutory violations. In 1997, the Oregon legislature limited courts' authority to exclude evidence in criminal cases "on the grounds that it was obtained in violation of any statutory provision" unless exclusion is required under the state or federal constitutions, or the evidence rules on privileges and hearsay, or the rights of the press. ORS 136.432; *State v Holdorf*, 355 Or 812, 819 (2014); *State v Rodgers*, 347 Or 610, 621 (2010) ("ORS 136.432 prohibits the judicial branch from excluding evidence obtained by government conduct that exceeds statutory authority.").

4.9.1 The "Fourth-Fifth Fusion"

In *Weeks v United States*, 232 US 383 (1914), the United States Supreme Court established the rule that excludes in a federal criminal prosecution evidence obtained by federal agents in violation of a defendant's Fourth Amendment rights. Professor Akhil Amar cites Justice Black's concurrence in *Mapp* for the idea that Justice Black "had come to believe that the exclusionary rule flowed from the Fourth Amendment in tandem with the Fifth Amendment self-incrimination clause." Akhil Reed Amar, AMERICA'S UNWRITTEN CONSTITUTION 176 (2012). But the Fifth Amendment is an "exclusionary" amendment, whereas the Fourth Amendment is not, textually or historically. *Id.* at 114-15, 172-83. *Mapp* fused two "distinct amendments" that do not "add up to form a proper exclusionary rule." *Id.* at 180. When *Mapp* was decided, 24 states rejected an exclusionary rule, 4 others had only limited exclusion, and those 28 states accounted for about 55% of the U.S. population. *Id.* at 115 (*Mapp* was unusual in that, unlike other constitutional

rights the Supreme Court extended to the States through its cases, *Mapp* did not "merely codify a preexisting national consensus" and had "no deep roots in America's lived Constitution").

Nevertheless, in 1961, when *Mapp v Ohio*, 367 US 643 (1961) extended *Weeks* through the Fourteenth Amendment to the States, 26 states had adopted *Weeks*' exclusionary rule. See *State v Davis*, 234 Or 227, 234 n 7 (1983) (citing *Elkins v United States*, 363 US 206 (1960)).

4.9.2 Purpose of Suppression

"Every rule of law, of course, is intended to deter contrary conduct, and it is successful when it achieves that objective. But, as we * * * stated, '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 McMurphy*, 291 Or 782, 785 (1981). Thus this court has looked, rather, to the character of the rule violated in the course of securing the evidence when deciding whether the rule implied a right not to be prosecuted upon evidence so secured." *State v Davis*, 295 Or 227, 234-35 (1983).

In *State v Unger*, 356 Or 59 (2014), the Oregon Supreme Court appears to have at least superficially ratified its stated purpose of the exclusionary rule under Article I, section 9. The Oregon Supreme Court has held that the purpose of the exclusionary rule is to protect individuals' rights and to restore individuals to the positions they would have had if the "government's officers had stayed within the law." *State v Davis*, 295 Or 227, 234 (1983); *State v Hall*, 339 Or 7, 2425 (2005); *State v Murphy*, 291 Or 782, 785 (1981) (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.").

However, in *Unger*, the Oregon Supreme Court criticized *Hall*: "Although the court in *Hall* reiterated the 'rights-based' rationale of Article I, section 9, and contrasted it with the 'deterrence' rationale of the Fourth Amendment * * * it did not explain why 'purpose and flagrancy' is not compatible with the 'rights-based' approach. On reflection, we think that it is." *State v Unger*, 356 Or 59, 81-82 & n 9 (2014). The *Unger* Court mimicked – and now instructs Oregon courts to mimic - Fourth Amendment analysis (under the Fourth Amendment, courts are to consider the "purpose and flagrancy" of police misconduct to determine if evidence should be suppressed; the *Unger* Court liked that and imported it into Article I, section 9). The *Hall* Court had stated that the "purpose and flagrancy" test applied only to Fourth Amendment rules and does not apply to Article I, section 9. But continuing a backwards slide toward concealed dependence on federal courts, the *Unger* Court took Fourth Amendment rationale for suppression while claiming to adhere to "the rights-based rationale underlying Article I, section 9."

> ***State v Unger***, 356 Or 59 (2014) (Balmer) (Landau, J., concurring) (Walters, J., dissenting) (Brewer, J., dissenting), (Baldwin, J., dissenting) Police received a complaint about drug activity and young children at defendant's house. Four detectives went to defendant's house on a Sunday morning without a warrant. One detective knocked on the front door and received no response after about three minutes. Another detective knocked on a basement door and received no response. Another detective followed a path around the lower level of the house, entered the backyard, followed a wrap-around porch in back, and came to a sliding glass door with partially closed drapes to defendant's bedroom where he and his girlfriend were sleeping. The detective knocked. Apparently waking defendant up, defendant came to the door undressed, and detective identified himself. At least two other detectives joined the first detective at the back door. "Defendant asked to put on a robe and then gave the detectives permission to enter the

house." A woman was in the bed. Defendant, now clothed, walked with detectives to the kitchen. Detectives asked if defendant would "show them around the house." Defendant consented. Detectives noticed a torn piece of a bag with white powder, one detective read defendant a "consent to search" card, which defendant declined to sign until he had talked to his attorney. Defendant called his attorney while detectives continued to search his house and tested the bag, which showed meth. Defendant told detectives his attorney wanted the detectives to leave. Detectives argued with defendant. Defendant called his attorney a second time, then told detectives that he wanted everybody out of the house. Detectives arrested defendant, obtained a search warrant, and found additional incriminating evidence.

Defendant moved to suppress because his consent was involuntary and the detectives had exploited their unlawful entry to his backyard to obtain the consent. The trial court denied the motion on grounds that consent was voluntary and did not address exploitation. Defendant was convicted on several charges.

The Court of Appeals reversed and remanded, concluding that the evidence should have been suppressed under *State v Hall*, 339 Or 7 (2005). Everyone agreed that the detectives had trespassed on defendant's property. The issue under was whether the evidence was to be suppressed because defendant had met *Hall*'s minimal factual nexus test between the police illegality and the evidence obtained. If, as here, the defendant made that showing, then the state must (and here did not, in the Court of Appeals' analysis) show that the evidence (1) would have been inevitably discovered; or (2) police obtained evidence independently of their illegal acts; or as here (3) the illegal conduct was independent of or only tenuously related to the evidence. Under that third way out of police misconduct, per *Hall*, courts may suppress if a "causal connection" exists between the police misconduct significantly affected defendant's decision to consent. The Court of Appeals concluded that the police misconduct was ongoing when police obtained defendant's consent: "Indeed, he was facing a trespass by the very persons he would call to report a trespass." Suppression was the appropriate remedy, in the Court of Appeals' opinion.

In 79 pages of opinions, the Oregon Supreme Court reversed and remanded back to the Court of Appeals. The Court did <u>not</u> accept the state's request that the Court "should overrule *Hall* by eliminating the exploitation analysis and instead holding that evidence obtained during a voluntary consent search necessarily is admissible despite prior unlawful police conduct." But the Court did "agree that *Hall*'s test for exploitation is flawed" and overruled part of it. That is, if the stop or search was illegal, and the consent to the search was voluntary, the question is how to determine "whether the police exploited the illegality" to get the evidence.

The Court "disavow[ed] the 'minimal factual nexus' part of the Hall test." *Id.* at 74. "Instead, we hold that, when a defendant has established that an illegal stop or an illegal search occurred and challenges the validity of his or her subsequent consent to a search, the state bears the burden of demonstrating that (1) the consent was voluntary; and (2) the voluntary consent was not the product of police exploitation of the illegal stop or search." *Id.* at 74-76.

But there is more to *Hall*'s exploitation test besides the now-disavowed minimal factual nexus test. That is the third test (noted in the Court of Appeals' opinion) that "requires the state to prove 'that the defendant's consent was independent of, or only tenuously related to, the unlawful police conduct.'" *Id.* at 76. "Hall identified several considerations relevant to determining whether the 'causal connection' between the unlawful police conduct and the defendant's decision to consent is sufficiently strong that the police can be said to have 'exploited' their unlawful conduct to gain the consent, thus requiring suppression of the evidence obtained". *Id.* at 76-77. Those factors are the "temporal proximity", any intervening circumstances, and "other circumstances – such as, for

example, a police officer informing the defendant of the right to refuse consent – that mitigated the effect of the unlawful police conduct." *Id.* at 77. The Court here decided that those factors were incomplete to determine if police misconduct was causally connected to a defendant's consent to the search.

As to whether a defendant volunteers, or is asked to consent: Even if "an officer requested consent," during police misconduct, that "does not demonstrate that the officer *necessarily exploited* the prior illegal conduct to gain consent." *Id.* at 78-79. "Properly considered, then, a voluntary consent to search that is prompted by an officer's request can be sufficient to demonstrate that the consent is unrelated or only tenuously related to the prior illegal police conduct." *Id.* at 79.

As to temporal proximity: "Hall erred in focusing exclusively on 'temporal proximity' and the presence of mitigating or intervening circumstances in determining whether the police exploited unlawful conduct to obtain consent to search." *Id.* at 79. The Court wrote: "If the conduct is intrusive, extended, or severe, it is more likely to influence improperly a defendant's consent to search. In contrast, where the nature and severity of the violation is limited, so too may the extent to which the defendant's consent is tainted." *Id.* at 81.

As to the "purpose and flagrancy" of the police misconduct: This factor is taken from *Brown v Illinois*, 422 Or 590, 603-04 (1975) where the Supreme Court described the purpose and flagrancy of the misconduct as "relevant" to the Fourth Amendment exploitation analysis. *Id.* at 81. In Hall, the Oregon Supreme Court had written that the "purpose and flagrancy" elements relate only to the Fourth Amendment's deterrence rationale and have "no applicability to the exclusionary rule under Article I, section 9," which is a "rights-based" rationale. *Id.* This Court – the *Unger* Court – now adopted the "purpose and flagrancy" elements to the "rights-based" rationale of Article I, section 9, without adopting (or admitting that it was adopting) the deterrence rationale.

In sum, to determine if police misconduct exploited a defendant's consent to a search, the *Hall* Court had only considered temporal proximity and intervening or mitigating factors. Now, other factors are relevant: "the nature, extent, and severity of the constitutional violation are relevant, as are the purpose and flagrancy of the misconduct." *Id.* at 86. In addition, per a treatise, "account must be taken of the proximity * * *, whether the illegal seizure was 'flagrant police misconduct,' whether the consent was volunteered rather than requested by the detaining officers, whether the arrestee was made fully aware of the fact that he could decline to consent and thus prevent an immediate search of the car of residence, whether there has been a significant intervening event * * * and whether the police purpose underlying the illegality was to obtain the consent." *Id.* at 87.

In this case, the Court decided that the police did not exploit their unlawful conduct to obtain defendant's consent to search. The "focus should remain on whether the totality of the circumstances indicates that the detectives exploited their unlawful conduct to obtain consent." *Id.* at 90. A factor is whether the police told defendant he could decline to consent. Here, detectives did not tell defendant he could decline to consent, he was asleep and undressed with a girlfriend in his bed when detectives banged on his backyard bedroom door and obtained his consent, but that was not exploitation, in the majority's opinion. "Subjective intent or motivations of the detectives" is not examined in the exploitation analysis, only objective facts are. This was not "flagrant or egregious" nor was their purpose in trespassing to obtain consent to search, the Court decided.

Justice Landau, concurring (not dissenting), wrote: "The problem is that the personal rights rationale for Oregon's exclusionary rule is incomplete. * * * Sometimes, regardless of whether a defendant consented, the court should exclude evidence otherwise unlawfully obtained to prevent police from reaping the benefits of their misconduct." *Id.* at 95. "[T]his court, in staking out the position that deterrence has no role in determining

whether evidence must be excluded, stands almost alone. Nearly all the state courts that have adopted an exclusionary rule under their state constitutions recognize that deterrence is, at the very least, a relevant consideration". *Id.* at 98 & n 1 (only Oregon, New Mexico, and Pennsylvania have rejected deterrence as a justification for a state exclusionary rule." "In my view, the personal rights explanation for exclusion fails to explain why a defendant's voluntary consent does not suffice to justify the search." *Id*. at 101.

Justice Walters dissented, writing: "What [the majority] means is that the officers may violate the constitution without consequence in this and other circumstances in the future and, consequently, that the state may benefit from the officers' constitutional violations." *Id*. at 111. "This case illustrates the significance of the change that the majority has engineered. In this case, as the state concedes, the court must adhere to a century of jurisprudence and acknowledge that the officers violated defendant's Article I, section 9, rights when they entered his backyard. But under the majority's rule, the court need not engage in the analysis necessary to overrule that precedent; rather, it may describe the violation as 'limited' and thereby permit it. This court has an obligation to demonstrate to the people of Oregon that our constitution is enduring: That it is made of sterner stuff than four votes represent; that it can withstand the forces of the day that call, always call, for an understanding and flexibility to permit the government to act. " *Id.* at 113.

Justice Brewer, dissenting, wrote: "When a person consents to a warrantless search of his or her person or property and the person's capacity for self-determination has not been overborne or critically impaired, the consent is voluntary. *State v Stevens*, 311 Or 119, 133-38 (1991). However, that does not necessarily mean that the person has knowingly relinquished his or her right under Article I, section 9, to be free from unreasonable searches and seizures." *Id.* at 114. Justice Brewer disagrees with the majority's adoption of the "purpose and flagrancy" elements into Article I, section 9. Defendant knew that the officers' purpose was investigation of drugs with children in the premises. "However, there is no evidence that defendant knew that the officers' presence at his bedroom door was unlawful." *Id.* at 117. Knowing that the police were trespassing, and that he could have declined consent, may have affected his decision to give consent. Further, flagrancy focuses on the officer's knowledge rather than the defendant's. Even where police misconduct is not flagrant – such as an officer who is oblivious to his misconduct – "there still remains a risk that the unlawful conduct will significantly affect the giving of consent." *Id*. at 119. "I cannot rule out the possibility that nonflagrant but unlawful police conduct that is relatively brief in duration and 'minor' in its nature and degree of severity might not significantly affect a suspect's decision to give consent yet still qualify as an unreasonable search or seizure for constitutional purposes." *Id*. Justice Brewer finds "space for deterrence" in the purpose of suppression under Article I, section 9.

Justice Baldwin, dissenting, wrote: "Today, by declining to suppress the evidence obtained as a result of that deliberate violation of defendant's privacy rights, the majority departs from longstanding precedents of this court protecting the privacy rights of citizens in their homes from warrantless governmental intrusions." *Id.* at 122. "According to the rule now adopted by the majority, police officers may deliberately violate the privacy rights of citizens in their homes when, as here, they knock on a private back door, startle an occupant, ask to search the occupant's home, and the exploit the fiction of a consensual search if evidence of a crime is found in the home. If no evidence of a crime is found, the occupants will simply be required to endure the unreasonable governmental intrusion without a legal remedy. Article I, section 9, now provides no protection against such a warrantless search if the officers are well-mannered and courteous as they violate the constitutional rights of the occupants. *Id.* at 123.

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.")

When a defendant moves to suppress evidence police obtained without a warrant, then the state must prove that the state' action did not violate Article I, section 9. *State v Davis*, 295 Or 227, 237 (1983) (search); *State v Wan*, 251 Or App 74 (2012) (search); *State v Sargent*, 323 Or 455, 461 (1996) (seizure); *State v Ordner*, 252 Or App 444 (2012) (seizures).

However, even if the state did violate Article I, section 9, suppression may not be the remedy – there might be no remedy. On August 28, 2014, the Oregon Supreme Court "disavowed" parts of *State v Hall*, 339 Or 7 (2005) in *State v Unger*, 356 Or 59 (2014). *Unger* is a significant change in Article I, section 9, analysis when consent follows illegal police conduct. Just four years earlier, the Oregon Supreme Court had written:

> "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." *State v Ayles*, 348 Or 622, 631-32 (2010).

Now, under *Unger*, police may illegally search or seize a person and use the circumstance of that search or seizure as a guarantee of an opportunity to ask him to further surrender his liberty:

"[W]hen a defendant has established that an illegal stop or an illegal search occurred and challenges the validity of his or her subsequent consent to a search, the state bears the burden of demonstrating that (1) the consent was voluntary; and (2) the voluntary consent was not the product of police exploitation of the illegal stop or search." *State v Unger*, 356 Or 59, 75, 85 (2014). Even "if the consent is voluntary, the court must address whether the police exploited their prior illegal conduct to obtain the evidence." *Id.* at 86. A "voluntary consent to search that is prompted by an officer's request can be sufficient to demonstrate that the consent is unrelated or only tenuously related to the prior illegal police conduct." *Id*. at 79. In determining "exploitation," if the illegal police "conduct is intrusive, extended, or severe, it is more likely to influence improperly a defendant's consent to search. In contrast, where the nature and severity of the violation is limited, so too may be the extent to which the defendant's consent is 'tainted.'" *Id*. at 81. Another "concern relevant to whether a defendant's consent resulted from exploitation of police misconduct is the 'purpose and flagrancy' of the misconduct. The 'purpose and flagrancy' inquiry comes from *Brown v Illinois*, 422 US 590, 603-04 (1975)." *Id*. at 81. The federal "purpose and flagrancy" inquiry is compatible with the federal deterrence rational for suppression and also with the rights-based rationale under the state constitution. *Id*. at 82. "Flagrancy" includes excessive use of force, unlawful forcible entry into a home, lengthy in-custody interrogation "is more likely to affect the defendant's decision to consent than more restrained behavior." *Ibid*. "Purpose" can be "expressed through conduct or comments." *Id*. at 83.

"Exploitation may be found" if there is "a direct causal connection between the prior illegal stop and the consent" if "the request for consent itself (and the evidence gathered) resulted from police knowledge of the presence" of the evidence itself. *Id.* at 86. Further, "evidence may be subject to suppression if the police obtained the consent to search through less direct exploitation of their illegal conduct." *Ibid*. Close timing between the illegal police conduct and consent, the presence of intervening or mitigating circumstances, plus "the nature, extent, and severity of the constitutional violation are relevant, as are the purpose and flagrancy of the misconduct." *Id*.

That inquiry applies even when it is undisputed that police trespassed onto the threshold of a man's bedroom door at his back yard without a warrant, *State v Unger*, 356 Or 59 (2014), or when police trespass by opening an apartment's front door, then knock on a bedroom door from

the threshold of the apartment front door without a warrant, *State v Lorenzo*, 356 Or 134, 145 (2014).

Until *Unger*, *Musser*, and *Lorenzo*, decided on August 28, 2014 and "disavowing" parts of *Hall*, *State v Hall*, 339 Or 7, 25 (2005) required: If the defendant establishes a "minimal factual nexus," between the police misconduct and the evidence, then to avoid suppression, the state may attempt to prove that the disputed evidence: (1) would have been inevitably discovered; (2) was independently obtained; or (3) was sufficiently attenuated from the illegal police conduct. *State v Medinger*, 235 Or App 88 (2010) (inevitable discovery); *State v Miller*, 300 Or 203, 226 (1985), *cert denied*, 475 US 1141 (1986); *State v Marshall*, 254 Or App 419 (2013) (inevitable discovery); *State v Bailey*, 258 Or App 18 (2013) (independently obtained); *State v Dempster*, 248 Or 404 (1967) (independently obtained); *State v Snyder*, 72 Or App 359, *rev den* 299 Or 251 (1981) (independently obtained); *State v Meier*, 259 Or App 482 (2013), *rev den* __ Or __ (2014) (independently obtained).

See ***State v Suppah***, 264 Or App 510 (8/06/14), an 8-to-5 split on whether the causal connection between an illegal stop and challenged evidence is attenuated.

4.9.3 Fourth Amendment Remedies

4.9.3.A Exclusionary Rule

"The criminal is to go free because the constable has blundered." *People v Defore*, 242 NY 13, 21-22 (1926) (Cardozo, J.).

The Oregon Supreme Court characterizes the Fourth Amendment's exclusionary rule as follows: "The federal exclusionary rule is 'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect.' United States v Calandra, 414 US 338, 348 (1974). Because of its remedial nature, courts must 'weigh the likely social benefits of excluding unlawfully seized evidence against the likely costs' to determine whether the rule applies. INS v Lopez-Mendoza, 468 US 1032, 1042 (1984) (quotation omitted). The exclusionary rule applies not only to the 'direct products' of unconstitutional invasions of Fourth Amendment rights, but also to the indirect or derivative 'fruits' of those invasions. [See Wong Sun v United States, 371 US 471 (1963)." *State v Bailey*, 356 Or 486, 495 (2014).

The Oregon Supreme Court further recognized three exceptions (there are more, see **Section 4.9.3.C**, below) to the Fourth Amendment's exclusionary rule: "There are three recognized exceptions to the Fourth Amendment exclusionary rule: (1) the inevitable discovery exception; (2) the independent source exception; and (3) the attenuation exception. *United States v Smith*, 155 F3d 1051, 1060 (9th Cir 1998)." *State v Bailey*, 356 Or 486, 496 (2014). "The doctrine of inevitable discovery allows admission of unlawfully obtained evidence if the government can 'establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means.' *Nix v Williams*, 467 US 431, 444, 448 (1984). The independent source doctrine permits the introduction of evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from activities untainted by the initial illegality. *Murray v United States*, 487 US 533, 537 (1988)." *Id*. at n 4.

Turning to the United States Supreme Court: 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).

"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 Justice Brandeis).

"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)).

4.9.3.B Section 1983 Claims

Section 1983 provides that "[e]very person," who, under color of state law causes the violation of another's federal rights shall be liable to the party injured by his conduct. 42 U.S.C. § 1983.

In section 1983 claims for police fabrication, failure to disclose exculpatory evidence, or malicious prosecution, an interesting question remains as to the Fourth and Fourteenth Amendment protections and remedies, as the Third Circuit has observed: "The boundary between Fourth Amendment and Fourteenth Amendment claims is, at its core, temporal. The Fourth Amendment forbids a state from detaining an individual unless the state actor reasonably believes that the individual has committed a crime—that is, the Fourth Amendment forbids a detention without probable cause. *See, generally, Bailey v United States*, –– US ––, 133 S Ct 1031, 1037 (2013). But this protection against unlawful seizures extends only until trial. *See Schneyder v Smith*, 653 F3d 313, 321 (3d Cir 2011) (observing that post-conviction incarceration does not implicate the Fourth Amendment). The guarantee of due process of law, by contrast, is not so limited as it protects defendants during an entire criminal proceeding through and after trial. *Pierce v Gilchrist*, 359 F3d 1279, 1285–86 (10th Cir 2004) ("The initial seizure is governed by the Fourth Amendment, but at some point after arrest, and certainly by the time of trial, constitutional analysis shifts to the Due Process Clause." (internal citation omitted)). *Halsey v Pfeiffer*, 2014 US App LEXIS 7696 (3d Cir 2014).

"Section 1983 does not contain a statute of limitations. Thus, to determine the timely filing of a § 1983 claim, courts borrow the statute of limitations from the most analogous state-law cause of action. See 42 U.S.C. § 1988(a). For § 1983 suits, that cause of action is a personal-injury suit. See *Owens v Okure*, 488 US 235, 249–50 (1989)." *Owens v Baltimore City State's Attorney's*

Office, __ F3d __ (4th Cir 9/24/14) (failure to disclose exculpatory evidence—a due process claim that clearly arises pursuant to *Brady v Maryland*).

4.9.3.C Good-Faith Exception to Suppression

One exception to the Fourth Amendment's exclusionary rule is "the good faith" exception established in *United States v Leon*, 468 US 897 (1984). Under *Leon*, evidence seized under a defective warrant will not be suppressed if an officer acts in "objectively reasonable reliance on the warrant." *Id*. at 922. The purpose of the exclusionary rule under the Fourth Amendment is deterrence of police misconduct. *Id*. at 906. Four situations *per se* fail to meet the "good faith" exception: (1) where an affiant recklessly or knowingly placed false information in the affidavit that misled the judge; (2) where a judge wholly abandons his judicial role; (3) where the affidavit is so lacking in indicia of probable cause that believing it is unreasonable; and (4) where the warrant is so facially deficient (i.e. failing to particularize the place to be searched of the things to be seized) that the officers cannot presume it to be valid. *Id*.

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 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).

"It is one thing for the criminal 'to go free because the constable has blundered.' *People v Defore*, 242 NY 13, 21, 150 NE 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).

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).

"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*, 131 S Ct 447, 452 (2010) (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).

> ***State v Gonzales***, 265 Or App 655 (10/01/14) (Washington) (Ortega, DeVore, De Muniz) In 2007, a Cornelius Police Department officer saw defendant commit a traffic infraction. Officer activated his overhead lights. Defendant kept driving for 2-3 blocks and turned into his own driveway. He stopped, told the officer his license was suspended, and gave him an expired insurance card. Officer decided to impound the vehicle per a city code and ORS 809.720 that allow for impounding a vehicle driven by a driver with a suspended license or without insurance. Officer also decided to inventory the vehicle and found cocaine inside a wallet under a seat. Defendant moved to suppress. The trial court denied the motion reasoning that what "what [officer] did was reasonable." This case is before the Court of Appeals on remand.
>
> In *Miranda v City of Cornelius*, 429 F3d 858 (9th Cir 2005), the court held that it was unreasonable under the Fourth Amendment for a Cornelius police officer to impound a

car under facts almost identical to this case. That court did not declare ORS 809.720 or the city code unconstitutional – it just concluded that impounding a defendant's car for community-caretaking purposes was unreasonable under the Fourth Amendment.

The Court of Appeals "conclude[d] that the trial court committed legal error when it determined that the good-faith exception to the exclusionary rule applied in this case. * * * at least under the narrow circumstances presented here, [the officer] may properly be charged with knowledge that the seizure of defendant's car in his driveway pursuant to ORS 809.720 or the city code provision was unconstitutional. In short, given the existence of *Miranda* – which involved the same police force, the same statute and city code provision, and nearly identical circumstances – it was not objectively reasonable for [the officer] to rely on ORS 809.720 or the city code to order defendant's car impounded when it was parked in defendant's driveway and was not impeding traffic or threatening public safety."

"The Court's exclusionary rule jurisprudence does not require a court to have declared a statute unconstitutional in order for an officer's actions to fall outside the good-faith exception." The Fourth Amendment's exclusionary rule is based on deterrence of police misconduct.

Chapter 5: Self-Incrimination

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

5.1 Origins

The Oregon Supreme Court has stated: "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). The Virginia Declaration of Rights of 1776: www.archives.gov/exhibits/charters/virginia_declaration_of_rights.html

"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 (2011) (Alito, J dissenting).

5.2 Self-Incrimination

To receive protection of the self-incrimination clause in Article I, section 12, of the Oregon Constitution, the person's statements or conduct must be: (1) testimonial; (2) compelled; and (3) potentially used against the person in a criminal prosecution. *State v Fish*, 321 Or 48, 53 (1995).

5.2.1 Fifth Amendment Right to Remain Silent

"We sometimes forget how long it has taken to establish the privilege against self-incrimination, the sources from which it came and the fervor with which it was defended. Its roots go back into ancient times. * * * Thirteenth century commentators found an analogue to the privilege [against self-incrimination] grounded in the Bible. 'To sum up the matter, the principle that no man is to be declared guilty on his own admission is a divine decree.' Maimonides, Mishneh Torah (Code of Jewish Law), Book of Judges, Laws of the Sanhedrin, c. 18, 6, III Yale Judaica Series 52—53. *See also* Lamm, *The Fifth Amendment and Its Equivalent in the Halakhan*, 5 JUDAISM 53 (Winter 1956)." *Miranda v Arizona*, 384 US 436, 458 & n 27 (1966).

"[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 the Fourteenth).

The Fifth Amendment "privilege protects a person from being compelled to testify in any

proceeding -- including civil proceedings -- when the answers may incriminate the person in a future criminal prosecution. The privilege pertains not only to inquiries that would be directly incriminating, but also 'embraces those which would furnish a link in the chain of evidence' needed to prosecute a crime." *Redwine v Starboard LLC*, 240 Or App 673, 682-83 (2011).

The *Redwine* court collated the following Fifth Amendment protections against self-incrimination:

> ●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 v United States*, 341 US 479, 486 (1951).

"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 (2011). "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 (2011) (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.").

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).

The privilege against self-incrimination is not self-executing, *Minnesota v Murphy*, 465 US 420, 425 (1984). A witness who desires its protection must claim it. *Miranda* is an exception to the general rule that the Government has the right to everyone's testimony, *Garner v United States*, 424 US 648, 658 n 11 (1976). *Salinas v Texas*, 133 S Ct 2174 (2013).

5.2.2 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 <u>not</u> 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).

5.2.3 Waiver

"The courts are in agreement that the privilege against self-incrimination is waived where the witness has entered a plea of guilty and been sentenced and the examination is directed to eliciting facts concerning the crime of which he was convicted." *State v Nelson*, 246 Or 321, 323, *cert den*, 389 US 964 (1967).

A "defendant who elects to testify on his own behalf waives the constitutional protection against self-incrimination within the scope of his testimony." ORS 136.643; *State v Strickland*, 265 Or App 460 (2014). A "defendant's submission of an affidavit at a motions hearing" is a "waiver of the right against self-incrimination." *Id.*

Under Article I, section 12, of the Oregon Constitution, a valid waiver of an accused's right against self-incrimination "must be both *knowing* and voluntary," as emphasized in *State v Marshall*, 254 Or App 419, 428 n 10 (2013) and *State v Delong*, 260 Or App 718, *review allowed*, __ Or __ (2014). In contrast, a valid consent to a warrantless search under Article I, section 9, needs only to be voluntary.

State v Strickland, 265 Or App 460 (9/10/14) (Hood River) (<u>Devore</u>, Ortega, Edmonds SJ) Defendant "moved to exclude evidence" in his current DUII trial on grounds that his prior conviction for DUII was invalid. He filed an affidavit explaining why he had pleaded guilty to the

prior DUII. The state called defendant to the stand to cross-examine him about his claims in his affidavit. Defendant asserted his Fifth Amendment right against self-incrimination. The state then moved to strike the affidavit because the state would have no chance to respond to it or to cross-examine defendant, and that defendant had waived his right against self-incrimination. The trial court denied the state's motion to strike, and granted defendant's assertion of his Fifth Amendment privilege. The trial court also excluded evidence of the previous DUII conviction. The state appealed.

The Court of Appeals reversed and remanded: The trial court erred in denying tis request to cross-examine defendant. A "defendant who elects to testify on his own behalf waives the constitutional protection against self-incrimination within the scope of his testimony. *See* ORS 136.643." Cross-examination "is a right and not a mere privilege" plus it serves "policy goals of fairness to the parties." And a "waiver of the right against self-incrimination applies to a defendant's submission of an affidavit at a motions hearing." By filing his "affidavit that collaterally attacked the validity of a prior- predicate conviction," "defendant both asserted a constitutional right to testify and waived his constitutional right against self-incrimination regarding the contents of the affidavit." The trial court's ruling was error, and it was not harmless.

5.2.4 Oregon Constitution

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

5.2.4.A Generally

"A criminal defendant has a right to remain silent under Article I, section 12, of the Oregon Constitution." *State v Wederski*, 230 Or 57, 62 (1962).

5.2.4.B *Miranda*

"'*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, *rev denied* 350 Or 530 (2011) (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); *State v Jarnagin*, 351 Or 703, 713 (2013); *State v Smith*, 310 Or 1, 7 (1990). "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. *Roble-Baker* at 640-41; *State v Shaff*, 343 Or 639, 645 (2007) (same).

"The definition of interrogation extends 'only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response." *Rhode Island v Innis*, 446 US 291, 301-02 (1980); *State v Bradbury*, 80 Or App 613, 616 n 1, *rev den* 302 Or 342 (1986) (adopting *Innis*'s definition for Article I, section 12); *State v Doyle*, 262 Or App 456, 466 (2014) (so noting).

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).

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).

Demonstrating how a person walks in court is not testimonial. "'[T]estimonial' evidence is not limited to in-court testimony under oath." Instead, "testimonial" evidence "communicates by words or conduct an individual's beliefs, knowledge, or state of mind," in contrast with "physical characteristics such as identity, appearance, and physical conditions," under *State v Tiner*, 340 Or 551, 561-62 (2006), *cert denied*, 549 US 1169 (2007) such as photographing tattoos, handwriting, standing in court, blood sample admission, field sobriety tests, and wearing a stocking mask. *State v Fivecoats*, 251 Or App 761 (2012).

A defendant must be re-advised of his *Miranda* rights if "a reasonable person could believe that his or her rights have changed since the time they were originally given." *State v Hurtado-Navarrete*, 258 Or App 503 (2013); *State v Avila-Nava*, 257 Or App 364 (2013).

> ***State v Delong***, 260 Or App 718 (01/29/14), *review allowed* (Douglas) (Nakamoto, Armstrong, Egan) (Note: The Oregon Supreme Court heard oral argument in this case on October 8, 2014). Officers stopped defendant's car for an infraction, asked him for his driver's license, and then when defendant could not produce his license, police handcuffed him and put him in the back of the patrol car. Officers got defendant's information – he was from Utah – and ran a "wants and warrants" check from dispatch. While that check was pending, officers asked him if he had anything in the vehicle they should be concerned about. He said no. Defendant then volunteered that the officers could search his vehicle. Dispatch reported that a restraining order was entered against defendant while an officer found a fanny pack in the passenger area. The passenger said it wasn't hers. Officer unzipped the pack and found baggies of meth, a pill bottle, and various drug materials. An officer read defendant his *Miranda* rights. He made incriminating statements. The trial court denied his motion to suppress, concluding, in the Court of Appeals' phrasing: "no *Miranda* warnings were required until [an officer] returned to defendant after having discovered the fanny pack and that defendant volunteered his consent to a search of the car, upon which [the officer] was entitled to rely when he opened the fanny pack."
>
> The Court of Appeals reversed: Defendant "was in custody while handcuffed in the sheriff's patrol car," and the officers "should have provided defendant with *Miranda* warnings, as the state now acknowledges." When the officer asked defendant if he had anything they should be concerned about, that was an interrogation, and it was done before defendant was informed of his *Miranda* rights.
>
> As to defendant's "spontaneous" consent to the search: Under Article I, section 12, of the Oregon Constitution, a valid waiver of an accused's right against self-incrimination "must be both *knowing* and voluntary," as emphasized in *State v Marshall*, 254 Or App 419, 428 n 10 (2013). In contrast, a valid consent to a warrantless search under Article I, section 9, needs only to be voluntary. Here, the police proceeded and obtained consent from defendant to search his vehicle without securing both a "knowing and voluntary waiver" of his Article I, section 12, rights. And nothing broke the causal chain of events "which went from illegal seizure, to illegal search, to discovery of some physical evidence, to arrest and the giving of *Miranda* warnings, and to the defendant's admissions and the discovery of additional physical evidence." The deputies apparently confronted defendant with the unlawfully discovered physical evidence and used that to obtain admissions from him.

5.2.4.C Prosecutor References to Defendant's Invocation

The "Oregon Constitution does not permit a prosecutor to draw the jury's attention to a defendant's exercise of the right to remain silent." *State v Larson*, 325 Or 15, 22 (1997). However, a "prosecutor has the right * * * to reply to argument made by opposing counsel, and, in doing so, statements may be made which otherwise would be improper." *State v Gurlitz*, 134 Or App 262, 270, *rev den* 321 Or 560 (1995); *State v Reineke*, 266 Or App 299 (2014). The prosecutor's right "is limited and confines the prosecutor's response to evidence or argument that rebuts the impression created by the defendant." *Reineke*, 266 Or App at 309. In short: "even if a defendant opens the door to evidence of the defendant's silence, a prosecutor cannot argue that the defendant is guilty because he or she invoked the right to remain silent." *Id.* (citing *United States v Gant*, 17 F3d 935, 941 (7th Cir 1994)). Further, it is "usually reversible error to admit evidence of the exercise by a defendant of the rights" in the constitution". *Id.* at slip op 12 (quoting *State v Smallwood*, 277 Or 503, 505-06, *cert den* 434 US 849 (1977)).

> ***State v Reineke***, 266 Or App 299 (10/15/14) (Washington) (Nakamoto, Armstrong, Egan) Defendant had invoked his right to remain silent when detectives interviewed him about his mother's murder. At trial, defense counsel elicited testimony on cross that the detective had not recorded his interactions with defendant at the sheriff's office but he could have done so based on available technology. Outside the jury's presence, the prosecutor argued then that defendant's cross-examination opened the door for the state to ask why the detective had not recorded defendant because the jury had been left with the impression that the detective was incompetent or willfully neglected his duties. The trial court concluded that defense counsel had opened the door, but only allowed the state to ask why he hadn't recorded the conversation. With the jury back in place, the prosecutor asked the detective why he hadn't recorded his interactions, and the detective responded that defendant "declined to talk to us." Defendant did not object to that questioning and answering. Then in closing the prosecutor used a PowerPoint that had multiple slides specifically emphasizing defendant's "refusal to speak at the police station." Defendant did not object to particular slides when they were shown but he objected to the PowerPoint presentation. He moved for a mistrial after the jury had retired to deliberate. The trial court denied the motion. The jury found defendant guilty of murder.
>
> The Court of Appeals reversed. The trial court erred when it overruled his objection to the state's PowerPoint presentation. The "prosecutor could not argue that defendant's refusal to speak to the police was evidence of his guilt – which is exactly what she did in her PowerPoint presentation." Even though defendant opened the door to evidence of the defendant's silence, "a prosecutor cannot argue that the defendant is guilty because he or she invoked the right to remain silent." Further, this was reversible error requiring a new trial: "We have no trouble concluding that the jury in this case was likely to draw a prejudicial inference from the prosecutor's references to defendant's invocation in her PowerPoint presentation. The prosecutor's PowerPoint presentation expressly urged the jury to decide that defendant's refusal to speak to the police was one of the four reasons that he was guilty." Further, the "repeated references to defendant's silence and guilt during closing argument were not subtle, isolated, or fleeting."

5.2.4.D Field Sobriety Tests

"Because a field sobriety test constitutes a search under Article I, section 9, *State v Nagel*, 320 Or 24, 31 (1994), a warrant is required, or the search must come within a recognized exception to the warrant requirement, *State v Paulson*, 313 Or 346, 351 (1992). Under an exception for exigent circumstances, the officer must have probable cause to believe that an individual is driving under the influence. *State v Stroup*, 147 Or App 118, 122 (1997)." *State v Miller*, 265 Or App 442, 445 (2014). That probable cause has a subjective and an objective element. *Id.* "The fact that there

were other possible, lawful explanations for a person's behavior, such as frustration, does not preclude the conclusion that there was probable cause." *Id*. (citations omitted).

"Field sobriety test" is defined in ORS 801.272 as "a physical or mental test * * * that enables a police officer or trier of fact to screen for or detect probable impairment from intoxicating liquor, a controlled substance, an inhalant, or any combination of intoxicating liquor, an inhalant and a controlled substance." *State v McCrary*, __ Or App __ n 1 (10/22/14).

Oregon's field sobriety tests are set forth in OAR 257-025-0020(1), online at http://arcweb.sos.state.or.us/pages/rules/oars_200/oar_257/257_025.html.

A driver implicitly consents to submit to field sobriety tests as a condition of driving or biking on Oregon public roadways, see ORS 813.135. But before field sobriety tests are administered, the driver must be informed of the consequences of refusing or failing those tests. Those consequences include using the refusal against the driver in a criminal or civil action, see ORS 813.136. The purpose of that information is to pressure suspected drunk or drugged drivers to take the field sobriety tests. *State v Trenary*, 316 Or 172, 177 (1993); *State v Adame*, 261 Or App 11, 16 (2014). The "statute is directed at drivers who refuse to take the test, not at drivers who do take the test." *Trenary* at 178; *Adame* at 16. ORS 813.126 provides a choice to drivers: perform the tests or have the refusal used as evidence. *State v Fish*, 321 Or 48, 58 (1995).

In *Fish*, the Oregon Supreme Court concluded that some of Oregon's field sobriety tests "involve verbal statements that communicate information regarding an individual's state of mind. Many of the field sobriety tests authorized by OAR 2570-25-010(1) draw upon the individual's memory, perception, and ability to communicate, i.e., his or her testimonial capacity. For example, the tests involve counting[,] answering questions relating to [] residence and date of birth[,], estimating a period of time[,] and reciting the alphabet[.] There can be no doubt that those aspects of the field sobriety tests require the individual to communicate information to the police about the individual's beliefs, knowledge, or state of mind. Accordingly, we conclude that at least those aspects of the field sobriety tests are clearly 'testimonial' under Article I, section 12, of the Oregon Constitution." *Fish* at 60; *Adame* at 18.

But the Oregon Court of Appeals has "repeatedly held" that *Fish* "did not require that all field sobriety tests be considered testimonial and therefore subject to the protection of Article I, section 12." *Adame* at 18 (citations omitted). Tests that do not require an individual to reveal his or her thoughts, beliefs, or state of mind are not testimonial. *State v Nielsen*, 147 Or App 294, 306, *rev den* 326 Or 68 (1997); *Adame* at 18. The "heel-to-toe walk test and the physical aspects of the one-leg stand and modified Romberg tests are not testimonial and, therefore, can be compelled by the state." *Id*.

"[T]esting for a resting or natural nystagmus constitutes a search" because a "natural or resting nystagmus * * * is not a physical characteristic that is plainly manifested to the public." *State v McCrary*, __ Or App __ (2014). "Nystagmus is not an observation that is made or understood as a matter of common knowledge." *Id*.

> ***State v Adame***, 261 Or App 11 (02/12/14) (Deschutes) (Wollheim, Nakamoto, Edmonds SJ) Defendant was stopped while driving. He appeared to be drunk. Officer asked defendant to perform some field sobriety tests. The horizontal gaze nystagmus test showed 6 of 6 clues indicating alcohol intoxication. Defendant then refused to perform the walk-and-turn test, citing a "bad back." Another officer arrived, asked defendant why he would not perform "the field sobriety tests" (the Court of Appeals opinion does not indicate which of "the" tests he had refused besides the walk-and-turn), and defendant said he was tired. Defendant's speech was slurred, he smelled of alcohol, his eyes were bloodshot and watery. Defendant refused "the" field sobriety tests and said "just arrest me." Officer read him the "admonishment card" stating that "these tests are non-verbal and non-testimonial. * * * The tests I will be asking you to complete include a horizontal

gaze nystagmus test, the nine-step walk and turn test, and the one-leg stand test." The officer demonstrated those tests. The officer continued with the "admonishment card" to defendant: "If you refuse to do these tests, the test refusal can be used against you in a court of law." Officer asked defendant to perform the walk-and-turn and one-leg stand tests. He again refused. Officer asked defendant to do some non-physical tests. Defendant agreed to do those. Officer asked defendant to recite the alphabet from A to Z without singing; defendant did so without errors but his speech was slurred and his breath smelled of alcohol. Officer then asked defendant to count aloud from 65 to 98; defendant failed that test. Officer arrested defendant and he was charged with DUII.

Defendant moved to suppress the alphabet and counting test results arguing that those were testimonial and he had not first been given Miranda warnings in violation of Article I, section 12. The trial court denied his motion to suppress without making written findings.

The Court of Appeals affirmed. On three separate times during the stop, defendant refused to perform some field sobriety tests. But he agreed eventually to perform "the verbal field sobriety tests" (which the Court of Appeals presumably means the alphabet and counting tests). There is sufficient evidence in the record that defendant understood he could refuse to perform "the verbal field sobriety tests that were later requested and that his refusal could not be used against him. Therefore, we conclude that defendant was not in a situation where he was compelled to provide testimonial evidence." No error.

State v Osorno, 264 Or App 742 (8/13/14) (Multnomah) (Garrett, Devore, Ortega) Defendant was arrested for suspected DUII, taken to a police station, and given field sobriety tests, which she failed. She gave a breath test that registered a .14 BAC. The officer then asked her "when she stopped drinking." Defendant replied: "Don't want to say anything incriminating." She moved to exclude any evidence that she'd invoked her right against self-incrimination at the police station. The court granted that motion. However, on redirect, the state accidentally elicited defendant's invocation by asking the officer: "Did she say when she stopped drinking?" And the officer answered: "She told me, 'Don't want to say anything incriminating.'" Defendant objected and moved for a mistrial in chambers. The trial court denied that motion but instructed the jury to disregard the statement. Defense counsel made a detailed record of its in-chambers motion outside the jury's presence. Prosecutor argued that the curative instruction was sufficient. The trial court again denied the motion. After the jury convicted defendant of numerous charges. Defendant moved for a new trial on the self-incrimination violation. The court denied that motion citing "the prosecutor's inexperience" and "strength of the evidence" in addition to the curative instruction.

On appeal, the issue is the court's denial of the motion for a mistrial, which is reversed only if the defendant was denied a fair trial. *State v Smith*, 310 Or 24 (1990). The Court of Appeals reversed and remanded: "A reference by a prosecutor or a witness to the fact that a defendant exercised a constitutional right, such as the right to remain silent, 'may prejudice the defendant's ability to have a fair trial if the jury is likely to infer that the defendant exercised the right because he or she was guilty of the charged offense.'" (Quoting *State v Veatch*, 223 Or App 444, 455 (2008)). "There is no doubt that it is usually reversible error to admit evidence of the exercise by a defendant of the rights which the constitution gives him if it is done in a context whereupon inferences prejudicial to the defendant are likely to be drawn by the jury." (Quoting *State v Smallwood*, 277 Or 504, 505-06, *cert den* 434 US 849 (1977)). Here, it is irrelevant if the prosecutor was innocent and inexperienced; "the defendant's fundamental right to a fair trial" is at issue. As Justice Stevens stated, dissenting in *Lakeside v State of Oregon*, 435 US 333, 345 (1978), "Even if jurors try faithfully to obey their instructions, the connection between silence and guilty is often too direct and too natural to be resisted."

State v McCrary, __ Or App __ (10/22/14) (Yamhill) (DeVore, Ortega, Garrett) Defendant was stopped for drunk driving and agreed to perform field sobriety tests. Before conducting the horizontal gaze nystagmus (HGN) test, the officer asked her if she had any existing medical issues and she did not report any eye-related disorders or problems. Officer tested defendant for the HGN test, and four of six indicators showed intoxication on that test. She also did poorly on the other tests. At the police station, her blood alcohol registered .12% in the Intoxilyzer. At trial, the officer testified that he'd administered hundreds of HGN tests, and that it's standard practice to test for "a resting or a natural nystagmus," which is a "nystagmus even when they haven't drank alcohol." He tested this defendant for a visible resting or natural nystagmus. At trial, on cross-examination, defense counsel challenged the officer about the lack of notation in his field notes about a resting nystagmus test. On redirect, the officer testified that he had checked defendant for resting or natural nystagmus. The state asked the officer "to check defendant at that time to see if she had a resting nystagmus." (The Court of Appeals seems to mean "at that time" is redirect at trial). Defendant objected to the state's request, stating that such a search of defendant's physical characteristic requires a warrant. The trial court overruled the objection, defendant refused to submit to the test, and defendant moved for a mistrial. The trial court stated that she does not have a right to refuse to submit to the nystagmus test – in front of the jury – but did not force her to take the test and overruled the motion for a mistrial.

The Court of Appeals reversed and remanded: The "nature of the proposed test -- observing defendant's eyes while she focused her gaze on a stimulus held approximately one foot away from her face for several seconds -- would significantly impair a privacy interest." The court concluded "that testing for a resting or natural nystagmus constitutes a search." "Nystagmus is not an observation that is made or understood as a matter of common knowledge" under *State v O'Key*, 321 Or 285, 297 (1995). "A search does not occur in readily apparent observations of an individual's physical appearance." "To constitute a search, the examination requires something more than observation of a physical characteristic that a person plainly manifests to the public." Examples of private conditions are "one's pulse or the content of one's breath, blood, and urine." Similarly, "[r]evealing the presence of nystagmus implicates potential medical facts that an individual may well wish to keep private." "The Supreme Court has observed that examples of the causes of nystagmus not induced by alcohol 'include caffeine, nicotine, eyestrain, motion sickness, epilepsy, streptococcus infections, measles, vertigo, muscular dystrophy, multiple sclerosis, influenza, hypertension, sunstroke, changes in atmospheric pressure, and arteriosclerosis. * * * Such information falls within a privacy interest protected by Article I, section 9."

The trial court erred by advising the jury that defendant had no right to refuse to cooperate in the examination. And this error was not harmless. Although her blood alcohol was .12%, defendant challenged the validity of the Intoxilyzer machine, and although defendant failed the HGN test, she challenged the officer's compliance with HGN test administration. A person can be guilty of DUII if her BAC is .08% or higher, or if she is found to have been under the influence of alcohol. The basis of the jury's verdict is uncertain thus reversal and remand is necessary.

5.2.5 Remedies

The "Oregon Constitution requires suppression of statements made without the benefit of *Miranda* warnings." *State v Vondehn*, 348 Or 362, 472 (2010); *State v Magee*, 304 Or 261 (1987).

Suppression is a remedy for obtaining and using evidence against a defendant that was obtained in violation of Article I, section 12, of the Oregon Constitution. This would be evidence obtained

during a custodial interrogation. It includes using illegally obtained evidence against a defendant at trial but also using it against a defendant in the field – at the scene – to obtain admissions or more evidence against a defendant. An illustrative case: Defendant is handcuffed in a police car, is not read his *Miranda* rights, but voluntarily offers to let officers search his car. Without informing defendant of his *Miranda* rights, officers search and find drug evidence that they confront defendant with, and defendant makes incriminating statements. *State v Delong*, 260 Or App 718 (2014). The drugs and the statements are suppressed first because "police proceeded and obtained consent without securing from defendant both a 'knowing and voluntary waiver' of rights under Article I, section 12," and second because police did not break the causal chain and used the illegally obtained drug evidence against defendant, resulting in more illegally obtained evidence (admissions).

5.2.6 Statute on Coerced Confessions

Under ORS 136.425(1), "A confession or admission of a defendant, whether in the course of judicial proceedings or otherwise, cannot be given in evidence against the defendant when it was made under the influence of fear produced by threats." That statute has existed since 1864 and was amended in 1957. "ORS 136.425(1) continues to apply to confessions induced by and made to private parties." *State v Powell*, 352 Or 210 (2012) (statute encompasses the common law and applies to promises of leniency as well as threats).

Statutory issues are considered before constitutional issues. *State v Foster*, 303 Or 518, 526 (1987); *State v Ruiz-Piza*, 262 Or App 563 (2014). But "in the absence of arguments" by either the state or defendant that Article I, section 12, and the statute "differ in any respect that bears" on a case, the Court of Appeals has "proceeded with that understanding." *Ruiz-Piza*, slip op at 10.

> ***State v Ruiz-Piza***, 262 Or App 563 (4/30/14) (Multnomah) (Egan, Armstrong, De Muniz, SJ) Defendant and a woman brought their infant to the hospital. She was not able to breathe on her own. She had a subdural hematoma in the back of her head, bruises, and elevated liver enzymes. That physical evidence was consistent with a shaking trauma. The doctor and detectives suspected child abuse.
>
> Detectives interviewed both parents and recorded the conversation at the hospital. Defendant stated that he had been taking care of his infant and denied recalling any event that could cause her profound injuries. The detective stated, among other things: I don't think you went home on Sunday and decided you were going to break your kid. * * * * * But sometimes something will happen that explains the injury that's an accident. There's no crime involved. I get to write my report that says, 'This was an accident. It wasn't meant to be but it explains the injury on the child.'" The detectives continued the interview, making statements such as:
>
> > "If you tell me that you shook her on accident when you picked her up because you just picked her up too hard when you were playing with her, that's fine. Then that – then that's what happened and there's my story. But I need to know that because if I can't figure out what happened to her, then my assumption is going to have to be child abuse. * * * * * We have to have an explanation."
>
> Defendant then recalled tossing the baby up into the air playfully. The next day, detectives approached defendant at the hospital and made statements such as: "Sunday evening something happened to her. And we need to know why for several reasons. Mainly, because the doctors want to give her the best possible care. * * * In order for them to know exactly what happened, it can help determine * * * are there boing to be other injuries that we need to look at." The detectives pressed defendant to describe what had happened so that doctors could treat the baby: "You were the only one that would know. * * * This isn't a minor injury. This isn't a boo boo. And you are the only one at

this point in time that can help her. * * * I can't know that if I don't know how the head trauma occurred."

After detectives turned off their recording, defendant confessed that he had shaken the baby because the house was disorderly. That was not recorded. 25 minutes elapsed. Detectives turned on the recording and defendant repeated the confession.

The trial court suppressed his statements as having been made under "compelling" circumstances and not voluntary. The state sought an interlocutory appeal under ORS 138.060(1)(c).

The Court of Appeals affirmed under the state statute, ORS 136.425(1), which provides that a defendant's admission "cannot be given in evidence against the defendant when it was made under the influence of fear produced by threats." The state has the burden to prove, by a preponderance of the evidence, that an admission was voluntary ("made without inducement through fear promises, direct or implied) under the totality of circumstances.

Suppression is required for two reasons. First, the detectives "made clear" that the baby's injury could be "ameliorated by a confession." That was not supported by evidence. The detectives stated that defendant was the only one who could help his baby, which was also not supported by evidence. That resulted in a confession induced through fear and was "specifically calculated to capitalize on what the trial court recognized as defendant's acute vulnerability." Second, the officers induced defendant to confess by effectively telling defendant – in what is apparently the Court of Appeals' own quote – "the only way to avoid having the police conclude that you are a child abuser is to tell us that you accidentally shook your daughter." That was an implied promise of leniency or immunity which rendered the confession involuntary.

5.3 False Pretext Communications

Article I, section 12, does not prohibit police from attempting to obtain incriminating information from a suspect when/if 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. 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." *State v Davis*, 350 Or 440 (2011).

5.4 Polygraph Testing & Compulsory Treatment Disclosures

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).

Polygraph testing is not admissible in civil or criminal trials. *State v Brown*, 297 Or 404 (1984). But on a proper objection, it is admissible in probation revocation hearings (or possibly other proceedings that the Oregon Rules of Evidence do not apply to). *State v Hammond*, 218 Or App 574 (2008).

Defendant had prior convictions for sex offenses. His sex offender treatment program for that prior conviction involved a "full disclosure polygraph test" that included his sexual history. "Although [defendant] did not assert his Fifth Amendment right against self-incrimination at the

time of the disclosures, that right is self-executing where its assertion 'is penalized so as to foreclose a free choice.' *Minnesota v Murphy*, 465 US 420 (1984)." *United States v Bahr*, __ F3d __ (9th Cir 2013).

5.5 Right to Counsel as Derivative Right

> "**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

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

5.5.1 Introduction

See Erin J. Snyder, Open Courts and Public Trial, Oregon Constitutional Law Manual (2013), www.osbar.org/secured/barbooks/viewchapter.asp?bid=85&cid=2349

"Article I, section 12, requires the police to give a defendant who is in custody or in compelling circumstances *Miranda*-like warnings before questioning." *State v Moore/Coen*, 349 Or 371, 382 (2010), *cert denied*, 563 US __ (2011); *State v Doyle*, 262 Or App 456, 465 (2014). "Once a suspect asserts the right to counsel," questioning must cease. *State v Isom*, 306 Or 587, 593 (1988); *Doyle*, 262 Or App at 465.

The right against self-incrimination in Article I, section 12, includes the "derivative right" to the assistance of counsel during custodial interrogation. *State v Scott*, 343 Or 195, 200 (2007).

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. *State v Davis*, 350 Or 440 (2011) (In *Davis*, the defendant was not under arrest and no formal charges had been brought, thus he was not an "accused" in a "criminal prosecution" under Article I, section 11).

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." *State v Davis*, 350 Or 440 (2011). Thus 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." *Id.*

5.5.2. Equivocal?

When "a suspect in custody makes an unequivocal request to talk to a lawyer, all police questioning must cease." *State v Meade*, 327 Or 335, 339 (1998); *State v Alarcon*, 259 Or App 462 (2013). If "the request is equivocal," then "police may follow up with questions intended to clarify whether the suspect meant to invoke his right to counsel." *Meade*, 327 Or at 339.

Courts "determine whether a defendant has made an unequivocal request for counsel by analyzing the request in light of the totality of the circumstances to determine whether a reasonable officer in the circumstances would have understood that the suspect was invoking his right to counsel." *State v Alarcon*, 259 Or App 462 (quoting *State v Field*, 231 Or App 115, 123 (2009).

In *Alarcon*, the Court of Appeals concluded that when a defendant asks, during a custodial interrogation, "when she could call a lawyer," an officer should reasonably understand that defendant is invoking her right to counsel, and no further questioning should occur. 259 Or App at 468 (but harmless error).

> ***State v Doyle***, 262 Or App 456 (4/23/14) (Washington) (Tookey, Duncan, Schuman SJ) Defendant moved to suppress statements he made while at a jail in custody. The two constitutional rights he asserted were (1) his right to remain silent and (2) his right to counsel, both under Article I, section 12, and the Fifth Amendment. Note that Article I, section 12, does not use the word "counsel" (Article I, section 11, does). But Oregon courts enfold an extra-textual "right to counsel" into the textual right against compelled self-incrimination– both under Article I, section 12.
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> Defendant, age 18, was suspected of sexually assaulting a 13 year old child at defendant's house. Detectives arrived, read him *Miranda* warnings, and questioned defendant on his porch, telling him they had seen, among other things 155 text messages between defendant and the child, and they court track the child's phone and collect DNA evidence. Defendant stated: "I would like to have an attorney or something here present." After some back-and-forth discussion, the detectives ended the interview, arrested defendant 10 minutes later, then drove him about 30-40 minutes to the jail without asking any questions. Detectives told defendant, "you're in jail and you previously talked about an attorney. Do you understand why we're going through all this?" Defendant said "yeah" and then admitted that he had had sexual contact with the child. He moved to suppress his statements from his porch and at the jail, on grounds that he had initiated contact with the detectives at the jail because he thought he would receive a lenient sentence. He said he had overheard the detectives talking about his case behind their patrol car.
>
> The trial court denied his motion to suppress. The Court of Appeals affirmed under the state and federal constitutions. As to Article I, section 12: First, defendant's statement on his porch that he would like to have an attorney is an unequivocal invocation of the right to counsel. Second, detectives violated "defendant's rights" (presumably Article I, section 12, right against compelled self-incrimination and possibly his Article I, section 12, right to counsel) on the porch by continuing to question him. But defendant made no incriminating statements to those illegal questions. Third, detectives did not violate "defendant's rights" when they talked about his case behind their patrol car at the jail because that was not interrogation. After the Court of Appeals asserted that it was engaging in a state constitutional law analysis, it quoted the United States Supreme Court's definition of "interrogation" to support its state analysis (and a footnote in an Oregon Court of Appeals case that had grafted the same federal idea into the state analysis); those cases are *Rhode Island v Innis*, 446 US 291, 301-02 (1980) and *State v Bradbury*, 80 Or App 613, 616 n 1, *rev den* 302 Or 342 (1986). Fourth, the detectives' failure to stop questioning defendant on his porch (after he invoked his right to counsel)

"did not induce defendant's confession at the jail." At the jail, defendant confirmed that he understood his rights before he made his incriminating statements.

As to the Fifth Amendment: defendant "knowingly, intelligently, and voluntarily waived his right to counsel under the Fifth Amendment." He made no incriminating statements on his porch. His incriminating statements made at the jail were at his initiation and after a break.

The Court of Appeals separately assessed defendant's argument that detectives implicitly promised him leniency if he confessed, which resulted in an involuntary confession. The Court of Appeals concluded that the trial court's findings (that none of defendant's statements were coerced) are supported by the evidence, and the trial court did not err by concluding that defendant's statements were voluntary.

5.5.3 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, *rev den* 349 Or 173 (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). "However, the motorist does not have an absolute right to speak with counsel, but only the right to a reasonable opportunity to do so." *State v Groner*, 260 Or App 255, 260 (2013). "Police must scrupulously honor a motorist's right to a reasonable opportunity to consult with an attorney, but they are not required to ensure the motorist exercises that right." *Id.* "Although 15 minutes is frequently cited as a typical amount of time necessary for a reasonable opportunity to obtain legal advice, that time period is meant to guarantee that a defendant will have at least 15 minutes to look for and talk with an attorney if the defendant wishes. If the defendant elects not to use 15 minutes to contact an attorney, as is the case here, there is no 'ticking clock,' and the actual duration of the opportunity is not relevant." *Id.*

> ***State v Hernandez***, 263 Or App 46 (5/21/14) (Tillamook) (Duncan, Wollheim, Schuman, SJ) Defendant failed to preserve his claim that the state's failure to provide an interpreter caused a miscommunication that denied him his right to communicate with an attorney before deciding whether to submit to a breath test.

"When that right is violated, the remedy is to suppress the results of (or refusal to take) the breath test." *State v Groner*, 260 Or App 255 (2013); *State v Spencer*, 305 Or 59, 74-75 (1988)

5.5.4 Private Communications

Cases involving a right to consult an attorney before taking a breath test at a police station are addressed separately, see **Section 5.5.3**.

Article I, section 11, provides no express reference to a defendant's right to consult privately with counsel. *State v Durbin*, 335 Or 183 (2003). But "confidentiality is inherent in the right to consult with counsel." *State v Penrod*, 133 Or App 454, 457 (1995); *State v Russum*, 265 Or App 103 (2014).

In *State v Russum*, 265 Or App 103 (8/20/14) a jail official and a detective inadvertently opened mail from the incarcerated defendant to his attorney. The Court of Appeals held that "no presumption of prejudice arises in the absence of evidence of a purposeful intrusion that conveys the content of attorney-client communication to the prosecution. If the intrusion is inadvertent, defendant must offer some evidence to show prejudice to his constitutional rights, such as the disclosure of trial strategy to the prosecution or the production of tainted evidence. If a purposeful intrusion takes and conveys privileged information, it will remain for another case[.]"

5.5.5 "Factually Unrelated Episodes"

When a person is "charged with a crime," he "is entitled to the benefit of an attorney's presence, advice, and expertise in any situation where the state may glean involuntary and incriminating evidence or statements for use in the prosecution of its case against defendant." *State v Sparklin*, 296 Or 85, 93 (1983); *State v Plew*, 255 Or App 581 (2013).

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 Gilmore, 350 Or 380, 385 (2011); *State v Sparklin*, 296 Or 85, 95 (1983); *State v Plew*, 255 Or App 581 (2013); *State v Potter*, 245 Or App 1 (2011), rev den, 351 Or 586 (2012).

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." *State v Gilmore*, 350 Or 380 (2011); *State v Randant*, 341 Or 64 (2006); *State v Sparklin*, 296 Or 85 (1983).

Chapter 6: Accusatory Instruments and Grand Juries

"(1) The Legislative Assembly shall provide by law for: (a) Selecting juries and qualifications of jurors; (b) Drawing and summoning grand jurors from the regular jury list at any time, separate from the panel of petit jurors; (c) Empaneling more than one grand jury in a county; and (d) The sitting of a grand jury during vacation as well as session of the court.

"(2) A grand jury shall consist of seven jurors chosen by lot from the whole number of jurors in attendance at the court, five of whom must concur to find an indictment.

"(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."

"(7) In civil cases three-fourths of the jury may render a verdict." – Article VII (Amended), section 5, Or Const

6.1 Origins

"Article VII (Amended), section 5, has a lengthy history" that traces to 1857, in Article VII (Original), section 18, which was repealed in 1958. *State v Reinke*, 354 Or 98, 107-08 & n 7 (2013). "The people enacted the current version of Article VII (Amended), section 5, in 1974 after the legislature referred an amendment to that section to the voters. *See* Or Laws 1973, SJR 1." *Id.*, at 106.

6.2 Purpose

The stated purpose of Article VII (Amended), section 5, in 1974 "was to give prosecutors greater latitude to charge by information." *State v Reinke*, 354 Or 98, 112 (2013). Section 5 "requires the grand jury to find and plead only the elements of the crime as defined by the legislature." The "legislature has provided that a prosecutor need not plead sentence enhancement facts in the indictment" in ORS 136.765. "Timely written notice will suffice." *Id.* at 113.

"The current version of Article VII (Amended), section 5, consists of seven subsections that, among other things, authorize the legislature to provide for the selection of jurors and grand jurors, specify the number of grand jurors who comprise the grand jury, and determine the number of jurors necessary to render a verdict in civil cases." *State v Reinke*, 354 Or 98, 105 (2013) (citing section 5, subsections 1, 2, and 7).

"In Oregon, the state may charge a defendant with a felony by an indictment issued by a grand jury, by a prosecutor's information if the defendant waives indictment, or by a prosecutor's information followed by a preliminary hearing." *State v Reinke*, 354 Or 98, 101 n 1 (2013) (2013) (Article VII (Amended), section 5).

The grand-jury indictment provision in Article VII (Amended), section 5, 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).

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), *rev den*, 350 Or 131 (2011).

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), *rev den*, 350 Or 131 (2011) (Article VII (Amended), section 5).

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 (2011) (Article VII (Amended), section 5).

6.3 Secrecy

On the secrecy of grand jury proceedings, and contempt hearings related to grand jury testimony, see **Section 10.5.3**.

"[T]here are several compelling reasons why grand jury proceedings should be kept secret, including protecting the integrity of the grand jury investigation and the safety of witnesses." "Logic dictates that the record of proceedings concerning motions to quash grand jury subpoenas should be closed." "Where the harm caused by disclosure of judicial records outweighs the benefit of disclosure to the public, public access no longer 'plays a significant positive role in the functioning of the particular process in question.' * * * To be sure, the closure of court proceedings is the exception rather than the rule, but grand jury secrecy is a long-standing and important exception that is codified in [Federal] Rule 6(e) for good reason." *United States v Index Newspapers, LLC*, __ F3d __ (9th Cir 2014).

Chapter 7: Former 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

7.1 Origins

Article I, section 12, "was borrowed from a similar provision in the Indiana Constitution of 1851" and "the Oregon Constitutional Convention adopted it without any recorded discussion." *State v Selness*, 334 Or 515 (2002) (citing Charles Henry Carey, A HISTORY OF THE OREGON CONSTITUTION 468 (1926)).

7.2 Interpretation

Article I, section 12, is interpreted under the *Priest v Pearce*, 314 Or 411, 415-16 (1992) analysis: its specific wording, case law around it, and historical circumstances that led to its creation. *State v Selness*, 334 Or 515 (2002).

"The meaning of the term "jeopardy" in Article I, section 12, does not advance the inquiry much." *Id*.

"Jeopardy" arises only in criminal proceedings, for Article I, section 12, purposes, although even if a proceeding is labeled as "civil," it may still be "criminal" in nature. *State v Selness*, 334 Or 515 (2002) (held: a forfeiture proceeding is not criminal to constitute jeopardy). In deciding whether a proceeding is "civil" or "criminal" for Article I, section 12, purposes, the Oregon Supreme Court has determined that a case under Article I, section 11 (to determine whether a right to counsel and a right to a jury trial apply) also applies to Article I, section 12. *Id.* (applying *Brown v Multnomah County District Court*, 280 Or 95 (1977)). That is: did the legislature intend to create a civil proceeding? If yes, then the four *Brown* factors are applied to determine if the proceeding is essentially criminal. (See **Section 9.5.1** on Right to Jury Trial).

7.3 Misconduct

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).

7.3 Statute

See ORS 131.515 on former jeopardy. The party seeking dismissal on former jeopardy grounds has the burden to prove each element of former jeopardy. *State v Lyons*, 161 Or App 355, 360 (1999); *State v Hamel-Spencer*, 264 Or App 600 (2014).

Chapter 8: Delays

8.1 Pre-indictment Delay

See Jonathan M. Hoffman and Maureen Leonard, *Remedies Clause and Speedy Trial*, Oregon Constitutional Law Manual (2013), www.osbar.org/secured/barbooks/viewchapter.asp?bid=85&cid=2337.

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).

But pre-indictment delay implicates due process rights. *State v Stokes*, 350 Or 44, *cert den*, 132 S Ct 343 (2011); *State v Whitlow*, 262 Or App 329 (2014); *State v Endres*, 196 Or App 197, 200-03 (2004). The defendant must show that the delay actually prejudiced him and the state culpably (inexcusably) caused that delay. *United States v Lovasco*, 431 US 783 (1977); *State v Stokes*, 350 Or 44 (2011); *State v Davis*, 345 Or 551 (2008), *cert den* 558 US 873 (2009).

> ***State v Whitlow***, 262 Or App 329 (4/24/14) (Yamhill) (Haselton, Wollheim, Schuman) Fifty-eight months after his step-granddaughter reported that defendant had sexually assaulted her, the state indicted him. The state had initially (58 months earlier) begun an investigation, but the investigator moved to Puerto Rico and the victim moved to a nearby town. The state did not try to contact the investigator or the victim. The delay was entirely attributed to the state. The state contended that it could not find the victim, although she was attending a local middle school. The state disinterred its investigation after an anonymous tipster called 911, and then the victim told detectives about more instances of abuse by defendant that she hadn't told the original investigator. The first trial ended in a mistrial. The state reprosecuted. Twenty-six months after indictment, defendant's second trial was held. Defendant moved to dismiss based on delay violating his due process rights. The trial court granted defendant's motion to dismiss the case.
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> The Court of Appeals affirmed. Under *State v Stokes*, 350 Or 44 (2011) and *United States v Lovasco*, 431 US 783 (1977), defendant must show that the delay actually prejudiced him and the state culpably caused that delay. The court balances the government's reason against the prejudice to determine whether the delay violated "justice, fair play, and decency." *Id*. at 64. The Court of Appeals concluded that "the state was unjustified and negligent in delaying the indictment" and "the prejudice to defendant outweighs the state's reason for the delay." The state contended that its delay did not violate due process because it was "investigating." But the Court of Appeals concluded that this delay was not excusable "investigative delay" because the trial court found that "no investigation was taking place" during the delay period. Further, there were no other potential witnesses for the state to be investigating. Additionally, defendant was not responsible for any of that delay. As to actual prejudice, the Court of Appeals agreed with the trial court's findings that the delay resulted in the victim herself losing memories and answering "I don't remember" 30 times at trial, and the primary investigator was not available because of the delay. There were no other witnesses, no corroborating physical evidence, and there is disparity in the original investigator's report of his interview with the victim and with her trial testimony, thus defendant "was actually prejudiced by the lack of opportunity to impeach [victim] by way of [detective's] testimony." The substantial prejudice to defendant outweighs the "negligence or inexcusable inattention" of the state.

8.2 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 (1) the length of the delay and, if it is not manifestly excessive or purposely caused by the government to hamper the defense, (2) the reasons for the delay, and (3) prejudice to the defendant. *State v Harberts*, 331 Or 72, 88 (2000); *State v Berrellez*, 266 Or App 381 (2014) (citing slightly different analysis under *State v Mende*, 304 Or 18, 21 (1987)); *State v Ivory*, 278 Or 499, 501-04 (1977) (taking Sixth Amendment factors from *Barker v Wingo*, 407 Or 514 (1972) for Article I, section 10, use); *State v Lewis*, 249 Or App 480 (2012) (so noting).

"Delay alone can violate a defendant's right to justice without delay if it is so long that it shocks the conscience or if the state purposely caused the delay to hamper the defense." *State v McDonnell*, 343 Or 557, 572 (2007); *State v Berrellez*, 266 Or App 381 (2014).

There are at least three recognized types of prejudice: "(1) the damage from lengthy pretrial incarceration; (2) anxiety and concern resulting from public accusation of a crime; and (3) impairment of the ability to defendant at trial." *State v McDonnell*, 343 Or 557, 573-74 (2007); *State v Berrellez*, 266 Or App 381 (2014).

Article I, section 10, extends to sentencing. The analysis considers: (1) length of delay; (2) reasons for delay; and (3) prejudice to defendant, under *State v Ivory*, 278 Or 499, 501-04 (1977) (taking Sixth Amendment factors from *Barker v Wingo*, 407 Or 514 (1972) for Article I, section 10 use). Length "alone can constitute a violation" of Article I, section 10, "if it shocks the conscience or if the state purposely caused the delay to hamper the defense." As for prejudice, three factors from *State v Harberts*, 331 Or 72, 93 (2000) are considered: (1) damage arising from lengthy pretrial incarceration; (2) anxiety and public suspicion resulting from public accusation of crime; and (3) the hampering of defendant's ability to defend himself. Regarding due process, the court noted that the "United States Supreme Court has not expressly decided whether constitutional speedy trial rights apply to sentencing." *State v Lewis*, 249 Or App 480 (2012).

> ***State v Berrellez***, 266 Or App 381 (10/15/14) (Jackson) (DeVore, Ortega, Edmonds) Defendant's girlfriend's daughter reported him for first-degree sexual abuse. A detective and a child advocate video-recorded their interview with the child. The detective took 4-6 pages of notes. The child "moved out of state." Defendant fled. About two years later, defendant was indicted when the child returned to the state. No one could find defendant. The detective engaged the L.A. County Sheriff's office, which checked the home, and found defendant's "wife" there, but defendant and that "wife" disappeared. The detective retired and as part of a "routine purge," he destroyed the 4-6 pages of notes he had taken. The "master case file" was unaffected, preserving all official reports and the videotaped interview of the child. Meanwhile, the child advocate who had participate in the videotaped interview had died. In 2011, defendant was arrested somewhere (the record does not disclose where or how). Before his trial in January 2012, defendant moved to dismiss for lack of a speedy trial on statutory and constitutional grounds. The trial court concluded that the eight-year delay was not unreasonable, given the state's efforts to find him and he did not suffer prejudice.
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> The Court of Appeals affirmed, reciting Oregon Supreme Court analysis set out in *Harberts*, *Mende*, and *McDonnell*. Eight years is an "excessive" delay between indictment and trial, thus the two other factors (reason and prejudice) are reviewed. Reason for the delay is defendant's flight and the state's inability to find him. The prejudice issue was the focus of this case. Defendant contended that the child advocate's

death plus the destruction of 4-6 pages of detective notes was prejudicial to him. But the Court of Appeals noted that no one presented evidence that the now-deceased child advocate had any additional unrecorded contact with the child, so although he was deprived of cross-examination, her death "did not deprive defendant of the chance to see the interview anew and elicit criticism of any failures or oversights in the interview by means of an expert's review." As for the detective's notes, the Court of Appeals was "not persuaded that defendant would have benefitted from any exculpatory evidence" in those notes.

8.3 Statutory speedy trial

Note: There are several potential remedies for any speedy trial violation.

ORS 135.747 has been repealed as of April 1, 2014, see Or Laws 2013, ch 431, section 1; *State v Straughan*, 263 Or App 225 (2014).

Effective March 13, 2014, a felony trial must be commenced within 3 years of the date of the filing of the charging instrument and a misdemeanor trial must be commenced within 2 years of the filing date, see https://olis.leg.state.or.us/liz/2014R1/Measures/Text/SB1550/Enrolled. .

ORS 135.750 provides: "If the defendant is not proceeded against as provided in ORS 135.745 and sufficient reason therefor is shown, the court may order the action to be continued and in the meantime may release the defendant from custody as provided in ORS 135.230 to 135.290, for the appearance of the defendant to answer the charge or action." (ORS 135.750 formerly was 135.747).

Delays under the Oregon speedy-trial statute, ORS 135.747, are determined 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. A mere failure to appear does not constitute consent within the statute, rather a defendant gives "consent" to a delay only when the defendant expressly agrees to a postponement that the state or the court requested. Second, the Court determines whether that delay is reasonable. If defendants fail to appear, the delays may be nonetheless reasonable even when they did not consent. *State v Glushko/Little*, 351 Or 297 (2011).

In *State v Emery*, 318 Or 460, 467 (1994), the "court concluded that the purpose of the [speedy trial] statute is not to protect defendants from prejudicial delays – as does the guarantee in Article I, section 10, of the Oregon Constitution – but, rather, is to prevent cases from 'languishing in the criminal justice system * * * without 'prosecutorial action'." (*Emery* interpreted ORS 135.747 which was repealed effective April 1, 2014, see Or Laws 2013 ch 431, § 1, HB 2962).

State v Blevins, 263 Or App 603 (6/18/14) on "crowded dockets" and ORS 1.050 (90-day period for judges to render decisions).

State v Ellis, 263 Or App 250 (5/29/14) on determining when a defendant is "charged" for speedy trial purposes, and the many variations on "charging," such as serial accusatory instruments, dismissals, and recharging.

State v Brown, 263 Or App 263 (5/29/14) on the trial court's application of an incorrect legal standard, where the correct standard required findings of fact that the court did not make, the Court of Appeals vacated defendant's conviction and remanded with instructions. The correct statutory legal standard is in *State v Glushko/Little*, 351 Or 297 (2011). The remand includes the parties taking positions on the effect of the repeal of ORS 135.747 and enactment of SB 1550 which specifies new time limits for commencing criminal charges.

State v Straughan, 263 Or App 242 (5/29/14) on a total delay of 894 days, with defendant's consent to 251 of those days, means a 643-day delay attributable to the state, which is not reasonable and the state failed to offer any justification. Remedy is remand for entry of judgment of dismissal.

State v Hall, 265 Or App 279 (9/04/14) on the "state-attributable delay" due to "docket congestion for which the trial court gave a detailed and reasonable explanation" for which the Court of Appeals concluded "that defendant was brought to trial within a reasonable amount of time."

Chapter 9: Criminal Trials

"**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

9.1 Origins

"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).

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).

Article I, section 11, lists "a panoply of trial-related rights." As compiled in *State v Mills*, 354 Or 350 (2013), those are the rights to:

1. A public trial
2. An impartial jury
3. A trial in the county where the offense was committed
4. Be heard
5. Demand the nature and cause of the accusation
6. Have a copy of the accusation
7. Meet witnesses face to face
8. Have compulsory process.

9.2 Interpretation

The parts of Article I, section 11 that were adopted with the original Constitution are interpreted under the *Priest v Pearce*, 314 Or 411 (1992) analysis. That is: text in context, historical circumstances, and case law. The "goal is to determine the meaning of the constitutional wording, informed by general principles that the framers would have understood were being advanced by the adoption of the constitution." *State v Mills*, 354 Or 350 (2013) (citing *State v Savastano*, 354 Or 64, 72 (2013)).

9.3 Venue

"Article I, section 11, of the Oregon Constitution does not require the state to prove proper venue beyond a reasonable doubt at trial. A defendant must challenge venue in a pretrial motion. *State v Mills*, 354 Or 350, 371-73 (2013).

"Article I, section 11, enumerates a defendant's right to a trial in a particular place: 'the county in which the offense shall have been committed.' It does not codify the common-law rule requiring the state to prove venue as a material allegation. The old common-law rule was one of

jurisdiction. The constitutional guarantee is a matter of personal right, which – like other constitutional rights – may be forfeited if not timely asserted." *State v Mills*, 354 Or 350 (2013).

See also ORS 131.305(1) (venue is proper in the county in which the offense is committed, with exceptions).

9.4 Compulsory Process

"The right to compulsory process under Article I, section 11, of the Oregon Constitution parallels federal Sixth Amendment jurisprudence." The "analysis of the two is the same." "The right to compulsory process encompasses both a right to discovery and a right to compel the production of evidence. A criminal defendant's constitutional entitlement to discovery is limited to information that is both (1) in the possession of the prosecution and (2) material and favorable to a defendant's guilt or punishment." *State v West*, 250 Or App 196 (2012). (Note: In *West*, the court cited generally to *Brady v Maryland*, 373 US 83, 87 (1963), which is not a Sixth Amendment case but instead is a due process case. The court wrote: "right to compel production of materials through subpoena extends only to testimony or documents that there are 'material and favorable,' or otherwise 'demonstrably relevant' and with established 'bearing' on the case.").

A trial court's failure to inform even a represented party at a civil commitment hearing of her right to subpoena witnesses, as required under ORS 426.100(1)(d), by using the word "subpoena," is plain error that is not harmless. *State v V.B.*, 264 Or App 621 (2014); *State v Z.A.B.*, 264 Or App 779 (2014).

9.5 Jury

9.5.1 Right to Jury Trial

See Alycia Sykora, *Right to Jury Trial*, Oregon Constitutional Law Manual (2013), www.osbar.org/secured/barbooks/viewchapter.asp?bid=85&cid=2334.

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 102-08. For example:

A person arrested for, and charged with, second-degree criminal trespass (a Class C misdemeanor) is entitled to a jury trial under Article I, section 11, even if the state later reduces that charge to a violation under ORS 161.566. *State v Benoit*, 353 Or 204 (2013).

A person arrested for, and charged with, third-degree theft (a Class C misdemeanor) is entitled to a jury trial under Article I, section 11, even if the state later reduces that charge to a violation under ORS 161.566. *State v Fuller*, 355 Or 295 (2013).

"[I]t is apparent that Article I, section 11, and the Sixth Amendment are hardly congruent with respect to entitlement to a jury trial on sentence enhancement facts and that the extent of their overlay, including in specific cases, is a matter of reasonable dispute." *State v Fernaays*, 263 Or App 407, 418-19 (2014) (addressing plain error and Article I, section 11).

> ***State v Davis***, 265 Or App 179 (8/27/14) (Lane) (Nakamoto, Armstrong, Egan) Defendant testified in one trial that he was not driving when a car accident occurred, killing two of his friends. The jury in that trial convicted him of manslaughter and DUII. The state then charged defendant with perjury for falsely testifying at the first trial. The state sought to instruct the jury that in the prior trial the jury found that defendant had been drunk driving. He objected, contending that it was "unconstitutional" to apply issue

preclusion against a criminal defendant. The trial court gave the state's instruction. The jury rendered a guilty verdict.

In this case, the state used issue preclusion in this criminal prosecution to establish an element of the crime that is reserved for the jury. The Court of Appeals wrote that it was unable to find "any Oregon precedent that squarely addresses the issue" and therefore "[b]ecause no Oregon case has similarly considered whether the application of issue preclusion against a defendant in the guilt phase of a criminal trial violates the defendant's right to a jury trial, we look to decisions from other courts for guidance." (No citation).

Notably, rather than consider Oregon's history, the Court of Appeals floated into New Jersey and a Third Circuit decision, followed by string cites to Tennessee, Maryland, California, and some footnoted federal appellate cases.

Then the Court of Appeals mentioned the Oregon Constitution: "Both Article I, section 11, and the Sixth Amendment guarantee a person's right to a trial by a jury in a criminal prosecution." (Citing a Court of Appeals case and ORS 136.001(1)). The Court of Appeals further stated: "Implicit in both the state and federal right to a jury trial is the right to have a jury find all the elements of the charged offense beyond a reasonable doubt." (Citing a Court of Appeals case, *Blakely v Washington*, 542 US 296 (2004), and ORS 136.030).

The Court of Appeals concluded: In this case perjury requires proof that the defendant made a false sworn statement about a material issue knowing it was false. Whether defendant's prior testimony was false was an element of the perjury offense. "Using the doctrine of issue preclusion to conclusively establish facts necessary for a conviction in a criminal prosecution impermissibly interferes with a defendant's constitutional right under Article I, section 11, to have a jury find every element of the charged offense beyond a reasonable doubt. An instruction to the jury that certain facts have been established beyond a reasonable doubt in a prior proceeding prevents the jury from finding all elements of the charged offense. Such an instruction violates the defendant's constitutional right of a jury trial because it 'seriously hobble[s] the jury in its quest for truth by removing significant facts from the deliberative process.'" (Citing to a New Jersey case).

9.5.2 Unanimity Not Required; Jury Concurrence

> "**[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

When "initially adopted, Article I, section 11, did not expressly require that juries be unanimous. Rather, [Article I, section 11] provided only that, '[i]in all criminal prosecutions, the accused shall have the right to public trial by an impartial jury * * *.' To be sure, this court assumed early on that jurors in criminal cases had to be unanimous. See *State v Ivanhoe*, 35 Or 150 (1899)." *State v Pipkin*, 354 Or 513, 526 (2013).

"In 1934, the people approved a legislatively referred amendment" that "for the first time expressly addressed jury concurrence and jury unanimity." *Pipkin*, 354 Or at 527. Although "at first blush" the text seems to just require 10 jurors to agree on "guilt or innocence," but "to return

a verdict of guilty, the jurors have to agree that the state has proved each legislatively defined element of a crime." *Id.*

A. Unanimity Not Required

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). "In criminal cases, at least 10 jurors must agree on the verdict, except for charges of murder, which require unanimous jury agreement." *State v Pipkin*, 354 Or 513, 517 n 2 (2013) (ORS 136.450 and Article I, section 11).

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 (1972).

B. Jury Instructions

A statute may define a crime but specify alternate ways that the crime can be committed. The jury is instructed that at least ten jurors have to agree on the way that crime was committed. This is a "*Boots*" instruction, from *State v Boots*, 308 Or 371 (1989), *cert denied*, 510 US 1013 (1993). See also *State v King*, 316 Or 437 (1993) and *State v Pipkin*, 354 Or 513 (2013).

"The jury concurrence requirement derives from the Oregon Constitution, statute, and case law. * * * ORS 136.450(1) requires that 'the verdict of a trial jury in a criminal action shall be by concurrence of at least 10 of 12 jurors.' * * * A jury concurrence instruction (or '*Boots* instruction') prevents juror confusion and ensures that the jurors agree upon the specific factual predicates for the conviction." *State v Frey*, 248 Or App 1 (2012).

But the Oregon Supreme Court has constructed the constitutional aspect of *Boots*: "We read *Boots* as resting primarily on its interpretation of ORS 163.095. *Boots* referred to Article I, section 11, only once. * * * It never quoted, discussed, or analyzed" Article I, section 11." *State v Pipkin*, 354 Or 513 (2013).

If the legislature intended to have two ways of proving a single element of a crime, then Article I, section 11, does not require jury concurrence on alternative means of proving a single element. *State v Pipkin*, 354 Or 513 (2013). But: "The requirement recognized in *Boots* and reaffirmed in *Pipkin* that at least 10 jurors must agree on each legislatively defined element of a crime means that 10 jurors ordinarily must agree whether a defendant committed a crime him or herself or, alternatively, whether the defendant aided and abetted another person's commission of that crime." *State v Phillips*, 354 Or 598, 612-13 (2013) (concluding that "the legislative determination that causation in ORS 163.165(1)(e) can be proved either by directly inflicting an injury or by engaging in acts extensively intertwined with inflicting injury does not violate either Article I, section 11, or the Due Process Clause").

> ***State v Ashkins***, 263 Or App 208 (5/29/14) (Marion) (Ortega, Sercombe, Hadlock) Defendant was charged with multiple counts of raping and sodomizing and unlawfully penetrating his stepdaughter in numerous places in the household. The child did not testify as to the precise dates or methods of rape, such as which objects defendant used to

rape her. Over defendant's objection, the trial court instructed the jury that to establish the crimes, 10 of 12 of them must agree beyond a reasonable doubt the elements in the indictment. Defendant wanted the jury to be required to agree on "a specific act." The jury convicted defendant.

The Court of Appeals affirmed. The trial court did not err by declining to instruct the jury that it had to agree on which fact constituted each crime where the evidence permitted the jury the find multiple, separate occurrences. Prior cases "teach that, when the record supports the possibility of more than one occurrence of the crime charged, the court must give a jury concurrence instruction if (1) the occurrences differ as to some factual element – such as the identities of the victim or the perpetrator – that is material, or as described in *Boots*, 'essential to the crime,' and (2) the instruction is necessary to avoid causing an 'impermissible danger of jury confusion." "Neither concern is implicated where the evidence suggests that the crime was committee on multiple occasions but does not provide the jurors with enough specifics to distinguish one occasion from another in a way that would allow them to draw conflicting conclusions regarding the crime committed." Here the location of the rape – whether on a table, couch, or the mother's bedroom – is not an essential fact of the crime. Nor would they cause juror confusion. Also, as to the unlawful-penetration crime, it is not essential to the crime that defendant used various objects to penetrate, such as his finger and a toy rocket. No error.

C. No Plain Error

The Court of Appeals has rejected a defendant's claim that the trial court committed plain error by instructing the jury that it could convict him on a nonunanimous agreement. *State v Ferguson*, 247 Or App 747 (2012) (citing *State v Cobb*, 224 Or App 594 (2008) *rev den*, 346 Or 364 (2009) and *State v Bowen*, 215 Or App 199 (2007), *adh'd to as modified on recons.*, 220 Or App 380, *rev den* 345 Or 415 (2008), *cert den*, 558 US 52 (2009)), *see also State v Berry*, 261 Or App 824 (2014) (declining to "revisit and overrule" *Bowen*).

9.5.3 Number of Jurors

> "**Provision may be made by law for juries consisting of less than 12 but not less than six jurors."** -- Article VII (Amended), section 9, Or Const

> "**[I]n the circuit court ten members of the jury may render a verdict of guilty or not guilty** * * *." -- Article I, section 11, Or Const

In criminal cases, if the only charges to be tried are misdemeanors, "the trial jury shall consist of six persons." ORS 136.210(2) (enacted in 1979 under authority of Article VII (Amended), section 9, of the Oregon Constitution).

"Article VII (Amended), section 9, was referred by the legislature for popular vote in 1971 and adopted by the voters in 1972." *State v Sagdal*, 258 Or App 890 (2013), *rev allowed*, 354 Or 814 (2014).

As to Article I, section 11, in 1934: "the voters' intent in adopting the 10-person jury verdict provision in Article I, section 11, was to provide for nonunanimous jury verdicts when the jury has 12 members. The amendment was not intended to mandate a minimum of person required to comprise a jury." *State v Sagdal*, 258 Or App 890 (2013), *rev allowed*, 354 Or 814 (2014).

A State can, consistently with the Sixth Amendment that applies 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). That is so, apparently even though "there can be no doubt" that the Sixth Amendment was intended to be composed of 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 a 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).

ORS 136.210(2) (stating that trial juries "shall consist of six persons" in misdemeanor charges) comports with Article I, section 11, and Article VII (Amended), section 9, of the Oregon Constitution. Article I, section 11, provides: "[I]n the circuit court ten members of the jury may render a verdict of guilty of not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise[.]." That segment was referred as a constitutional amendment and voters adopted it in 1934. The ten-person jury verdict provision in the 1934 amendment was intended to provide for nonunanimous jury verdicts, not a requisite minimum number, based in part on *State v Osbourne*, 153 Or 484 (1936) and *State v Sawyer*, 263 Or 136 (1972) as context. In sum, "the voters' intent in adopting the 10-person jury verdict provision in Article I, section 11, was to provide for nonunanimous jury verdicts when the jury has 12 members. The amendment was not intended to mandate a minimum of person required to comprise a jury." *State v Sagdal*, 258 Or App 890 (2013), *rev allowed* 354 Or 814 (2014).

Article VII (Amended), section 9, was referred by the legislature to the voters, who adopted it in 1972. That provision allows the legislature to make laws for juries of 6 to 12 people. "[T]he legislature was authorized under Article VII (Amended), section 9, to provide for juries of fewer than 12 persons for misdemeanor cases in circuit court, as it did in ORS 136.210(2)." *State v Sagdal*, 258 Or App 890 (2013), *rev allowed* 354 Or 814 (2014).

9.5.4 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

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. Per *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." *State v Wilson*, 240 Or App 708 (2011). In contrast, federal judges must have the government's approval before accepting a defendant's written waiver (in addition to the judge's approval). FRCrP 23(a); *United States v Preston*, 706 F3d 1106 (9th Cir 2013).

Article I, section 11, gives a criminal defendant in a noncapital 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. *State v Harrell*, 241 Or App 139 (2011). 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) (convictions not sentences at

issue); *State v Webster*, 239 Or App 538 (2010). Holding a bench trial with a "Stipulation" that fails to mention the right to a jury trial and that the defendant knowingly and voluntarily relinquished that constitutional right is error apparent on the fact of the record that the Court of Appeals has exercised its discretion to correct. *State v Smith*, 260 Or App 183 (2013).

Appellate courts have no discretion to ignore the error apparent on the face of the record that occurs when a jury trial waiver is not in writing. *State v Bailey*, 240 Or App 801 (2011). However, State v Barber, 343 or 525 (2007) held that Article I, section 11, requires a written jury waiver to be effective. Article I, section 11, differs from the statutory written-waiver requirement in ORS 136.773(1) and ORS 136.770(1). That means: Although it is plain error to not get a written jury trial waiver, if the basis for the error is a statute (such as ORS 136.773(1) on enhancement facts) rather than Article I, section 11, the Court of Appeals may decline to exercise its discretion to correct statutory error. See *State v Engerseth*, 255 Or App 765, 770 n 6, *rev den* 353 Or 868 (2013) and *State v Fernaays*, 263 Or App 407 (2014).

Waiver of a jury trial does not foreclose a defendant's right to demand a jury trial on remand. *State v Barajas*, 262 Or App 364 (2014). *Barajas* quoted a federal case with approval: "The right of trial by jury in cases at law, whether in a civil or criminal case, is a high and sacred constitutional right in Anglo-Saxon jurisprudence, and is expressly guarantied [sic] by the United States Constitution. A stipulation for the waiver of such right should therefore be strictly construed in favor of the preservation of the right." *Id.* at n 1 (citation omitted).

> ***State v Fernaays***, 263 Or App 407 (6/11/14) (Marion) (Haselton, Wollheim, Schuman SJ) In this case, the Court of Appeals affirmed the trial court's imposition of a departure sentence of 114 months on defendant despite the lack of a written waiver of his right to have the alleged enhancement factors tried to a jury. The claim of error was unpreserved. The statutory error was plain error but the Court of Appeals declined to exercise its discretion to remedy it. The claim of constitutional error under Article I, section 11, was not plain error because Article I, section 11's applicability to this case is reasonably in dispute.
>
> The Court of Appeals here footnoted that *State v Barber*, 343 Or 525 (2007) involved a defendant who challenged his convictions under Article I, section 11, not his sentence. Moreover, *Barber* was based on Article I, section 11, not a statute on sentence enhancement factors. And defendant here repeatedly insisted that the trial court should try the enhancement factors, rather than the jury. Further, the ends of justice would not be promoted by correcting the error here: defendant admitted that he had served 12 years for prior convictions and he committed the present crime during his post-prison supervision. Finally, the constitutional error is not "apparent."

9.5.5 "Anonymous" Juries

An "anonymous jury" in Oregon includes the prospective juror pool and an impaneled trial jury. See *State v Washington*, 355 Or 612, 630 (2014) and *State v Rogers*, 352 Or 510 (2012).

An "anonymous jury" includes cases where the trial court requires attorneys to refer to jurors only by number during voir dire and at trial and conceals juror names from the defendants and everyone in the courtroom except attorneys, who to have access to jurors' names and addresses. *Washington*, 355 Or at 630-39.

When a jury is anonymous from a defendant's perspective, "it may prevent the defendant from assisting in identifying jurors who may be biased against him or her." And when a jury perceives itself as anonymous --"particularly when a jury is aware that anonymity is not the norm – the circumstance may suggest that their identities are being protected because the defendant is dangerous." *Washington*, 355 Or at 636 (citing *State v Rogers*, 313 Or 356, 540-41 (1992), *cert denied*, 507 US 974 (1993)).

"[A]lthough trial courts possess inherent authority to empanel anonymous juries in criminal cases, that authority is limited by a defendant's right to an impartial jury, guaranteed by Article I, section 11, of the state constitution." *Washington*, 355 Or at 633 (citing *State v Sundberg*, 349 Or 608, 617 (2011)).

"[B]efore empanelling an anonymous jury, a trial court must make findings that the particular circumstances of the case provide strong grounds for the practice." That is to ensure "that the trial court carefully considers the justifications for empaneling an anonymous jury in the context of the particular case. *Washington*, 355 Or at 637. In other words, "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." *Sundberg*, 349 Or 608.

"[A]nonymous 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." *State v Sundberg*, 349 Or 608 (2011) (quoting *United States v Paccione*, 949 F2d 1183, 1192 (2nd Cir 1991), *cert denied*, 505 US 1220 (1992)). A nonexclusive list of those factors:

> "(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." *State v Sundberg*, 349 Or 608 (2011) (quoting *United States v Fernandez*, 388 F3d 1199, 1244 (9th Cir 2004), *cert denied*, 544 US 1043 (2005)).
>
> ***State v Kelly***, 263 Or 361 (6/04/14) (Clackamas) (Nakamoto, Armstrong, Egan) Defendant owns a construction company. He was charged with various racketeering and fraud crimes based on home-improvement loans. The judge impaneled an "anonymous" jury that convicted defendant. Defendant had not objected to the anonymous jury. The Court of Appeals concluded that even if the use of the anonymous jury constituted plain error, it would not exercise discretion to reverse the decision.
>
> The "anonymity" common in these cases is not completely "anonymous." Here, the jurors were assigned seat numbers, the attorneys were instructed to refer to them by number, the presiding juror signed his or her own name to the verdict form, per the judge's request, and cameras in the courtroom were not directed at the jury. The opinion does not disclose whether the attorneys had access to juror names.
>
> On appeal, defendant contended that "empanelling an anonymous jury violated his constitutional right to an impartial jury" and relied on *State v Sundberg*, 349 Or 608 (2011), which concluded that "the unexplained use of an anonymous jury" may create "too great a risk that the jury may have believed that defendant was dangerous" and thus guilty, and the error was not harmless in *Sundberg*. Defendant here, however, simply asserted "summarily" that an anonymous jury may have caused the jury to believe he was "dangerous" despite his failure to object. The Court of Appeals here, without further reasoning, considered that this was a "white-collar crime" rather than a person-crime such as murder or rape, and that appears to have mattered to the court regarding "dangerousness." Further, the court agreed with the state that "it is possible that the jury concluded that juror anonymity at trial was due to a factor unrelated to defendant, namely, the request of the news media to bring a camera into the courtroom."

9.5.6 Jury's Duties

"**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

Article I, section 16, is the result of a compromise at the Oregon Constitutional Convention after intense debate, as noted in Charles H. Carey's *The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857* (1926). *State v Johnson*, 238 Or App 672 (2010).

"Article I, section 16, of the Oregon Constitution, does not apply to civil awards of punitive damages." *Oberg v Honda Motor Co., Ltd.*, 316 Or 263, 275 (1993).

"[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)." *State v Johnson*, 238 Or App 672 (2010).

"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." *State v Johnson*, 238 Or App 672 (2010).

9.5.7 Fair Trial – Potential Juror Prejudice

A. Defendant's Silence

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).

B. Nationality or Religion

During voir dire, the prosecutor contrasted for the potential jurors a scenario that defendant had asserted he "was out of either Iran or Saudi Arabia" where an alleged rape victim was required to produce five male witnesses to prove the rape. One juror purported to correct the prosecutor, stating that the prosecutor was describing Sharia law, not the legal system of a country. The prosecutor used a peremptory challenge to remove that juror, a university student who "was of some type of Indian ethnicity," due to the student's "lack of life experience, combined with his chosen field of study" rather than "ethnicity or religious beliefs of the defendant." A jury was empaneled and sworn. Defense counsel asked for a curative instruction: that "the jury be instructed not to use defendant's race, religion, or ethnicity against him in reaching a verdict, and that the prosecutor's reference to Sharia law was merely an illustration of the difference between legal systems." The trial judge, Rick Knapp, "refused to give the proposed instruction, commenting that such an instruction was unnecessary as the jury did not know defendant's ethnicity or religion." The jury convicted defendant. The Court of Appeals reversed. The trial court abused its discretion by failing to give a proffered jury instruction. The "impartial jury" right in Article I, section 11, guarantees "indifference by jurors to matters of race and religion."

Regardless of the prosecutor's motives, his was "conduct, blatant or subtle," that may "border[] on an attempt to introduce * * * issues of racial, ethnic, or religious bias." *State v Farokhrany*, 259 Or App 132 (2013).

9.5.8 Physical Restraints on Defendant During Trial

Security devices available to restrain a person during trial include: the Stinger Company's React Band-it stun device, shackles, handcuffs, and fabric hobbles. Other devices include pepper spray, Tasers, "impact weapons," and guns. *State v Washington*, 355 Or 612, 623 (2014). Stun belts are worn on a limb, or on the lower back, under clothing. They are "neuromuscular incapacitation" devices that deliver an electric shock to the wearer when activated by a person holding the activation device nearby. The stun devices cause pain, loss of mental focus, uncontrollable muscle contractions, and cause people to fall down, freeze, make loud noises, and sometimes urinate or defecate. The React Band-it is not visible to a jury but the wearer, of course, knows he is wearing it. *Id*.

Under the common law and Article I, section 11, of the Oregon Constitution, the Oregon Supreme Court "long has recognized the right of a criminal defendant to appear free of physical restraints during a jury trial." *State v Washington*, 355 Or 612, 627 (2014) (quoting *State v Bowen*, 340 Or 487, 495 (2006), *cert denied* 549 US 1214 (2007); *State v Wall*, 252 Or App 435, 437-38 (2012), *rev den* 353 Or 280 (2013).

However, the Oregon Supreme Court simultaneously states that it is within the trial court's discretion to order a defendant to wear shackles or a stun belt if there is evidence of an immediate and serious risk of dangerous or disruptive behavior. *State v Steltz*, 259 Or App 212 (2013). Stated alternatively: "a trial court has discretion to order physical restraint of a defendant if there is sufficient evidence of a substantial risk of dangerous or disruptive behavior, including the risk of assaultive conduct toward other persons and the risk of an attempted escape from custody." *State v Washington*, 355 Or 612, 628 (2014) (citing *State v Long*, 195 Or 81 (1952)). That evidence should be put into the record during a hearing in advance, and the trial court must make a record of its findings and reasoning. *Ibid*.

9.6 Right to Counsel

"Lawyers in criminal cases are necessities, not luxuries." *United States v Cronic*, 466 US 648, 653 (1984) (Sixth Amendment).

See **Section 5.5 on Right To Counsel During Arrest**.

See ORS 151.211 *et seq* on rights to counsel.

Under Article I, section 11, a criminal defendant has the right to be represented by counsel at all critical states of a criminal proceeding. *State v Sparklin*, 296 Or 85, 94-95 (1983); *State v Erb*, 256 Or App 416, 421 (2013).

Pretrial hearings, trial, and sentencing all are critical stages of prosecution. *State v Jones*, 293 Or 312, 315 (1982); *State v Erb*, 256 Or App 416, 421 (2013).

If a trial court errs by allowing a defendant to proceed at those stages without counsel, violating Article I, section 11, that error does not require reversal if it is harmless. Error is harmless if there is little likelihood that it affected the outcome in the case. *State v Cole*, 323 Or 30, 36 (1996); *State v Erb*, 256 Or App 416, 427 (2013).

9.6.1 Pretrial

Pretrial hearings on admissibility of evidence are critical stages of a prosecution to which the Article I, section 11, right to counsel applies. *State v Erb*, 256 Or App 416, 421 (2013).

9.6.2 Trial

Trial is a critical stage of a criminal prosecution. The right to counsel attaches to it. *State v Jones*, 293 Or 312, 315 (1982); *Erb*, 256 Or App at 421.

9.6.3 Waiver

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)). 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." *State v Easter*, 241 Or App 574 (2011).

"A defendant may elect to waive his or her right to counsel and proceed pro se" as long as the waiver is "knowing and intentional" per *State v Meyrick*, 313 Or 125, 133 (1992). On a counsel's motion to withdraw, "a trial court may inquire into a defendant's position on defense counsel's motion" but "the defendant has no burden to provide information" on the motion. A defendant may waive the right to counsel by his conduct, "so long as the conduct adequately conveys the defendant's knowing and intentional choice to proceed in court without counsel." *State v Langley*, 351 Or 652 (2012).

Closing argument is a critical stage of a criminal proceedings to which Article I, section 11, and the Sixth Amendment attach. *State v Easter*, 241 Or App 574 (2011).

> ***State v Todd***, 264 Or App 370 (7/23/14) (Multnomah) (Duncan, Wollheim, Schuman SJ) Defendant was charged with a combined twelve counts of attempted prostitution and "unlawful prostitution procurement activity" under the state and city codes. She had a series of six court-appointed attorneys, all of whom had difficulty working with her, four of whom moved to withdraw, and one of whom had her evaluated for mental health issues. Her sixth attorney appeared on the day of her trial, having filed a motion to withdraw, but being prepared to go to trial. However, defendant addressed the court and said she did not want that attorney for various reasons. The Court of Appeals opinion details the trial court's colloquy. The trial court did not speak to defendant about the risks of self-representation, instead it focused on whether defendant wanted to be represented that trial date by her sixth lawyer or instead by herself. The colloquy between the trial court and defendant was entirely focused on which of those two options defendant wanted. Defendant proceeded to represent herself during pretrial motions and during her jury trial, stating several times during the proceedings that she did not understand what the prosecutor and the trial court were discussing and that she did not want to be pro se. The jury convicted her of seven of the twelve counts.
>
> The Court of Appeals reversed the judgments, concluding that her waiver of her right to counsel was not "knowing." (The Court of Appeals did not reach the issue of a

"voluntary" waiver). The Court of Appeals repeatedly emphasized the idea and phrase that a trial court must ensure that a defendant "must understand the risks of self-representation" for the waiver to be "knowingly" made. No "catechism" is required, and the "particular risks" do not need to be understood, but more than an "abstract knowledge that there may be risks and disadvantages of self-representation" must be understood. The court cited numerous prior cases for those points, for example, "a defendant's general awareness that a lawyer might be helpful is not sufficient to establish a knowing waiver of counsel." In this case, the trial court did not "discuss the risks of self-representation or determine whether defendant understood those risks." The trial court did not establish a record demonstrating that defendant "understood the risks *inherent in self-representation*." (Emphasis by court). Further, "in the absence of a sufficient warning about the dangers of self-representation or specific information about the benefits of counsel, we have consistently rejected the argument that a generalized understanding of a lawyer's services demonstrates knowledge of the risks of self-representation." In short, where a trial court requires a defendant to make a choice – to trial with the appointed counsel or go it alone – "the court must determine that the defendant understands the risks of self-representation, to ensure that the waiver of the right to counsel is an intelligent relinquishment of that right." No colloquy = no knowing waiver.

9.6.4 Choice of Counsel

"Although an indigent criminal defendant has a right to the assistance of appointed counsel, that right is not to appointed counsel of the defendant's own choosing. *United States v Gonzalez-Lopez*, 548 US 140, 151 (2006)." *State v Langley*, 351 Or 652 (2012).

9.6.5 Post-trial

Sentencing is a "critical stage" of a criminal proceeding to which defendants have a right to counsel under Article I, section 11, of the Oregon Constitution. *State v Jones*, 293 Or 312, 315 (1982); *State v Erb*, 256 Or App 416 (2013).

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, *modified on reconsideration*, 236 Or App 465 (2010).

9.7 Right to Self-Representation

9.7.1 Introduction

Under Article I, section 11, and the Sixth Amendment, a criminal defendant has a right to be represented by counsel and to represent himself. *State v Blanchard*, 236 Or App 472 (2010) (citing *State v Verna*, 9 Or App 620, 624 (1972) and *Faretta v California*, 422 US 806, 819 (1975)).

However the right to self-representation "does not allow a party to prosecute an action individually *and* through an attorney. The right to engage in so-called 'hybrid representation' has been rejected by [the Oregon Supreme Court] in the context of criminal proceedings, despite the

fact that criminal defendants have a constitutional right to self representation under Article I, section 11." *Johnson v Premo*, 355 Or 866, 872-73 (2014); *State v Stevens*, 311 Or 119, 123-25 (1991).

9.7.2 Forfeiture and Waiver

The right to self-representation is not absolute.

A. Forfeiture

A "trial court may deny that right 'where dispensing with an attorney's services would disrupt the orderly conduct of trial.'" *State v Kinney*, 264 Or App 612 (2014) (quoting *State v Verna*, 9 Or App 620, 627 (1972) and citing *State v Davis*, 110 Or App 358, 360 (1991)). A trial court may deny self-representation on an anticipated disruption of the judicial process. *State v Miller*, 254 Or App 514, 524 (2013); *State v Kinney*, 264 Or App 612 (2014). In other words, the trial court does not need to wait until a defendant has disrupted a trial to rule on defendant's motion to represent himself. *Ibid*. (no error where trial court observed defendant's behavior the day before trial and on the day of trial, and denied his motion to represent himself before the trial commenced).

B. Waiver

"When a defendant asks to represent himself, the court must determine, on the record, whether his decision is an intelligent and understanding one." *State v Miller*, 254 Or App 514 (2013) (quoting *State v Davis*, 110 Or App 358, 360 (1991)). "Further, the court must 'determine whether granting the defendant's request would disrupt the judicial process.'" *Miller*, 254 Or App 514 (2013).

"The request for self-representation and waiver of legal representation may be denied under Article I, section 11, * * * if the request is unclear or equivocal or if it would result in the disruption of the orderly conduct of the trial" per *State v Blanchard*, 236 Or App 472 (2010). "[I]t was within the discretion of the trial court to deny the midtrial request if the court concluded that the timing of the change or other consequences of the self-representation would be disruptive of the orderly conduct of the trial in a way that would be unreasonable under the circumstances." The trial court has "discretion to deny an unequivocal, knowing, and intelligent request for self-representation." *State v Fredinburg*, 257 Or App 473 (2013).

9.8 Right to Testify / Right to be Heard

Article I, section 11, provides in part: "In all criminal prosecutions, the accused shall have the right * * * to be heard by himself and counsel[.]" That right was included in the original Oregon Constitution and no debate or comment on it is reported. Claudia Burton and Andrew Grade, *A Legislative History of the Oregon Constitution of 1857 – Part I*, 37 WILLAMETTE L. REV. 469, 518-19 (2001); *cf. State v Douglas*, 292 OR 516, 527 (1982) (Lent, J, specially concurring).

"Article I, section 11, grants two distinct, not overlapping, rights: the defendant's right to make a statement and to testify, and the defendant's right to be represented by counsel." *State v Stevens*, 311 Or 119, 124 (1991).

A defendant has the Article I, section 11, right to make an unsworn statement to the jury during the penalty phase of a capital proceeding. State v Rogers, 330 Or 282, 296-300 (2000). That right is limited to sentencing proceedings. *State v Wilcher*, 262 Or App 758 (2014) (defendant does not have the right to make an unsworn statement to the jury during the guilt phase of his criminal trial).

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).

For comparison: Under the Fourteenth Amendment's Due Process Clause and the Compulsory Process Clause of the Sixth Amendment, a criminal defendant has a right to take the witness stand and testify on his own defense. *Rock v Arkansas*, 483 US 44, 49 (1987). "The opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony." *Id*. at 52-53. The Ninth Circuit has concluded that a defendant has a constitutional right to be present at his pretrial competency hearing, and to testify at one. *United States v Gillenwater*, __ F3d __ (9th Cir 2013). "[W]hen a defendant chooses to testify in a criminal case, the Fifth Amendment does not allow him to refuse to answer related questions on cross-examination. A defendant 'has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts.' *Fitzpatrick* v. *United States*, 178 U. S. 304, 315 (1900)." *Kansas v Cheever*, 571 US __ (2013) ("We hold that where a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state to commit a crime, the prosecution may offer evidence from a court-ordered psychological examination for the limited purpose of rebutting the defendant's evidence.").

Defendants decide whether to testify based on lots of factors. *State v Moore/Coen*, 349 Or 371 (2010), *cert denied*, 131 S Ct 2461 (2011). Sometimes a defendant makes pretrial admissions that the state introduces against him during trial. A defendant may decide he wants to testify to explain those pretrial admissions. If an appellate court determines that a defendant's constitutional rights were violated by the state's collection of his pretrial statements, it is "assumed" that his trial testimony was tainted by those erroneously admitted pretrial statements. That is because the defendant may have chosen to testify because the state used those statements against him during trial. *Moore/Coen*, 349 Or at 385. On remand and retrial, the state may try to introduce the defendant's first trial testimony in his second trial (even if it cannot introduce the pretrial statements). But the defendant's trial testimony from his first trial must be excluded unless his first trial testimony "did not refute, explain, or qualify the erroneously admitted pretrial statements." *Id*.

> ***State v Dalessio***, 262 Or App 577 (4/30/14) (Josephine) (De Muniz, SJ, Armstrong, Egan) Defendant made pretrial admissions to police. The trial court admitted his pretrial admissions into evidence during trial. Defendant did not object to that evidence. Defendant testified on his own behalf during trial. He was convicted. The conviction was overturned on appeal. On remand and retrial, the state conceded that defendant's pretrial admissions were obtained in violation of his constitutional rights. So the state did not offer those pretrial admissions at the second trial. But the state did offer – and the trial court admitted over his objection– defendant's testimony from his *first* trial. He did not testify at his second trial. He was convicted.
>
> The Court of Appeals vacated and remanded. Under *State v Moore/Coen*, 349 Or 371 (2010), *cert denied*, 131 S Ct 2461 (2011), it is difficult to "unravel" the factors that a defendant considers when deciding whether to testify. It may have been that defendant testified at his first trial because the erroneously admitted pretrial statements were admitted. Or not. Thus it is assumed that the defendant's trial testimony is tainted by those erroneously admitted pretrial statements, unless the trial court (on the second trial) finds that his first trial testimony did not refute, explain, or qualify those pretrial statements.
>
> ***State v Wilcher***, 262 or App 758 (5/14/14) (Multnomah) (Tookey, Sercombe, Hadlock) The trial court denied defendant's request to present his version of the facts to a jury, unsworn, during his case-in-chief in his prosecution for murder and other charges. The

Court of Appeals upheld that decision. Although under *State v Stevens*, 311 Or 119 (1991), a defendant has a right to address the jury directly during the penalty phase of a death-penalty case, a defendant does not have an Article I, section 11, right to do so during the guilt phase of a criminal trial. All testifying witnesses are subject to procedural requirements, such as taking an oath (OEC 603), answering questions on cross (ORS 136.643), and being subject to impeachment (OEC 607). Defendant may present his version of the facts by testifying under oath.

9.9 Confrontation

> "**In all criminal prosecutions, the accused shall have the right * * * to meet the witnesses face to face * * *.**" -- Article I, section 11, Or Const

9.9.1 Generally

Article I, section 11, was adopted in 1857 without amendment or debate. * * * The provision was derived from the identically worded article from Indiana's Constitution adopted in 1851." *State v Copeland*, 353 Or 816 (2013) (citations omitted). No "direct evidence exists of what the people who framed the Oregon Constitution thought about the right to confrontation. * * * The framers more or less grafted the provision onto Oregon's constitution without explaining how they understood its scope or application." *State v Supanchick*, 354 Or 737, 765 (2013).

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) (adopting the test from *Ohio v Roberts*, 448 US 56, 66 (1980)). 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). *State v Supanchick*, 245 Or App 651 (2011).

9.9.2 Hearsay

"[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." Two requirements must be met: "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))." *State v Simmons*, 241 Or App 439 (2011).

State v Graves, 264 Or App 358 (7/23/14) (Washington) (Duncan, Wollheim, Schuman SJ) This case involved an "interesting" issue of first impression under Article I, section 11, but the Court of Appeals declined to address it because it had not been preserved in the trial court. The issue is: "Does the mere act of forwarding an e-mail create an additional layer of hearsay regarding the content of that e-mail?" This is a stalking case where defendant sent e-mails to a mother, who then forwarded his emails to her daughter who was one of defendant's stalking victims.

Defendant had had a relationship with the victim, the relationship ended, and the victim found a new boyfriend. Defendant began sending threat messages to the victim stating that he would kill the new boyfriend and deliver the body to the victim, and also defendant threatened to kill himself. Defendant also sent e-mails to the victim's mother

threatening suicide, which the mother forwarded to the victim. Defendant was charged with stalking and telephonic harassment. The Court of Appeals opinion details the court's colloquy on e-mails but those do not include a specific "layered hearsay" argument that defendant advanced on appeal. That is, under State v Moore, 334 Or 328 (2002), the state has the burden to establish that the declarant is unavailable for purposes of Article I, section 11, if it seeks to admit hearsay evidence." That argument assumes that the mother made an implied statement by forwarding the e-mail to the victim (her daughter). The record may have developed differently in significant ways had defendant raised the issue in the trial court. Affirmed.

9.9.3 Unavailable Declarant

"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)." *State v Simmons*, 241 Or App 439 (2011).

9.9.4 Forfeiture by Misconduct

"If a defendant forfeits the right to meet a witness face to face, Article I, section 11, does not require that any evidence admitted under the forfeiture doctrine possess independent guarantees of reliability." *State v Supanchick*, 354 Or 737, 765-66 (2014).

"The framers of Oregon's constitution * * * would have understood that, at common law, a defendant who engaged in wrongdoing for the purpose of making a witness unavailable could not complain that the witness's prior statements were admissible without the defendant having the opportunity to meet the witness 'face to face.'" *State v Supanchick*, 354 Or 737, 764 (2014). When "a defendant has intentionally made a witness unavailable to testify, the defendant loses the right to object that that evidence should not be admitted on state constitutional grounds. The defendant's act ensures that the witness's testimony can never be subject to 'testing in the crucible of cross-examination.' [*Crawford v Washington*, 541 US 36, 61 (2004)]. In other words, where a defendant acts wrongfully to make a witness unavailable, that defendant largely controls the very feature of the evidence to which he objects. The principle of forfeiture by wrongdoing * * * ensures that a defendant cannot manipulate proceedings in that way." *Id.* at 766.

9.9.5 Historical Exceptions

A deputy sheriff's certificate of service of a restraining order, which he was administratively required to serve, does not "trigger" an Article I, section 11, confrontation right because the declaration is an official record that did not include "investigative or gratuitous facts or opinions" and does not "contain a witness statement." *State v Copeland*, 353 Or 816 (2013).

9.10 Public Trial

See Erin J. Snyder, *Open Courts and Public Trial*, Oregon Constitutional Law Manual (2013), www.osbar.org/secured/barbooks/viewchapter.asp?bid=85&cid=2349.

"The exclusion of the public from hearings under OEC 412(4) to determine the admissibility of evidence of a sex crime victim's past sexual behavior under OEC 412(2) does not violate Article I,

section 10 or 11, of the Oregon Constitution or the First or Sixth Amendment to the United States Constitution." *State v MacBale*, 353 Or 789 (2013).

See "Open Courts" in **Section 10.5** for discussion of Article I, section 10).

9.11 Laboratory Reports

Admission of a laboratory report "without requiring the state to produce at trial the criminalist who prepared the report or to demonstrate that the criminalist was unavailable to testify" violates a defendant's right to confront witnesses against him under Article I, section 11, of the Oregon Constitution. *State v Birchfield*, 342 Or 624 (2007). The state cannot require a defendant to "secure the attendance of the criminalist who prepared the laboratory report." *State v Kinslow*, 257 Or App 295 (2013).

Under Article I, section 11, the trial court may admit a crime lab report showing that meth was a substance seized. A defendant had received a certified copy of that lab report, but did not file a written objection to that report within 15 days before trial, as required under ORS 475.235(4)-(5). The state did not have the lab report's author testify based on defendant's failure to file any objection. The statutes "do not impermissibly shift the burden to a defendant to procure a criminalist but, rather, set forth a constitutionally permissible process for determining whether the defendant intends to object to the written report." *State v Kinslow*, 257 Or App 295 (2013).

9.12 Liberty Interests

9.12.1 Involuntary Administration of Psychotropic Medicine

"Among the most weighty decisions our society can make is to subject someone to a powerful medication against his or her will. The government must meet the demanding standard set by the Supreme Court in *Sell v United States*, 539 US 166 (2003), before involuntary medication may be administered in an effort to restore a defendant's competency to stand trial." *United States v Brooks*, __ F3d __ (No. 12-30264) (9th Cir 5/07/14).

Note: The right is a "liberty interest" in the Due Process Clause of the United States Constitution, not in the state constitution to date. This could be an interesting aspect of penumbral rights under Article I, section 33, of the Oregon Constitution.

On *Sell* orders, see *United States v Gillenwater*, 2014 WL 1394960 (9th Cir 4/11/14) (district court did not err in authorizing defendant's involuntary medication).

State v Lopes, 355 Or 72 (3/20/14) (Multnomah) (Walters) This is a mandamus action. Defendant was in jail awaiting trial on attempted sex abuse charge against an 8 year old that would have a sentence of less than one year in jail. The trial court found him unable to assist in his defense due to his refusal to take psychotropic medications. The trial court committed him to a hospital. The hospital sent a letter to the judge stating that defendant would not regain the ability to stand trial unless the hospital had an ability to "provide psychiatric medication interventions." Defendant was transferred back to jail. The court ordered defendant back to the hospital. The hospital wrote the court that it could not medicate defendant against his will because he was not making immediate threats of violence and did not have a grave disability directed to his own self-care.

Defendant moved to dismiss the charges against him. The trial court denied the motion. The hospital wrote to the court stating that defendant would likely not regain competency because he refused to take psychotropic medication. Apparently, after the trial court denied defendant's motion, it then held a hearing on the motion to determine: (1) whether the court

could order defendant to be involuntarily medicated and (2) whether the state had proved that an order requiring involuntary medication would comport with *Sell v United States*, 539 US 166 (2003). The trial court ultimately ordered that it had authority to order defendant medicated and that defendant should be medicated under a psychiatrist's supervision. The trial court immediately stayed that order so that defendant could seek mandamus relief.

The Oregon Supreme Court issued the peremptory writ, concluded that the trial court's order did not meet "the four *Sell* requirements," and directed the trial court to vacate "the *Sell* order." *Sell* permits a court (or a hospital) to order the involuntary administration of antipsychotic medication to render a defendant competent to stand trial if the court considers and makes findings on four factors and if state law provides a court with such authority.

Oregon has not enacted statutes giving the courts *Sell*-specific authority. But ORS 161.360 to 161.370 (incapacity and incompetence to stand trial) and ORS 426.385(3) (permitting hospitals to administer certain treatment without the consent of a person with a mental illness) and OARs provide limited authority to hospitals and courts to administer medication involuntarily. A current rule, OAR 309-114-0010(1)(b)(D), allows hospitals to administer medication without a patient's consent pursuant to a valid court order. The Supreme Court concluded that trial courts have implicit authority to issue *Sell* orders to hospitals under ORS 161.370.

The four *Sell* factors that the trial court must find before ordering involuntary medication are: (1) important state interests are at stake in defendant's prosecution; (2) medication will significantly further those important state interests because it is substantially likely that medication will restore defendant to competency and substantially unlikely that the medication will cause side effects that impair the trial's fairness; (3) medication is necessary because no less intrusive treatments would produce the same results; and (4) administration of the medication is medically appropriate because it is in the patient's best medical interest. *Sell* factors are not a balancing test. This is a "liberty interest."

The first *Sell* factor (a "serious" crime) is partly established: the allegation against the child is serious and so are the "reputational consequences" against defendant if convicted. But the trial court's order did not include factual findings regarding the state's interest in further confining defendant, who had been in custody for 18 months on a likely maximum 12-month sentence. The record is unclear as well. Thus the first *Sell* factor is not satisfied and the trial court erred in concluding that it had been. Because the first Sell factor was not established, that "requires vacation of the trial court's *Sell* order." But the Court decided to "proceed" to address the other three Sell factors in case the state seeks another *Sell* order.

The second *Sell* factor – whether involuntary medication will significantly further the state's interest – requires two factual findings: (a) will administration of medications render defendant competent and (b) will the side effects significantly interfere with his ability to assist counsel. This second factor must be established by clear and convincing evidence. The trial court also erred in its application of the second *Sell* factor because it did not evaluate evidence as "clear and convincing."

The third and fourth *Sell* factors also require factual determinations supported by clear and convincing evidence, but the trial court's order does not state if it evaluated the evidence by the "clear and convincing" standard.

State v Smith, 264 Or App 322 (7/23/14) (Marion) (Haselton, Duncan, Wollheim) This is a pretrial appeal of a trial court's dismissal of criminal charges based on ORS 161.370(9) (no substantial probability that a defendant will gain capacity to stand trial). Note that ORS 161.370 has been amended in 2011, effective June 23, 2011, as described in footnote 1 of this opinion. In this opinion, the Court of Appeals vacated and remanded the trial court's dismissal of criminal charges against him based on *State v Lopes*, 355 Or 72 (2014).

The trial court found that defendant was unfit to proceed in the theft and robbery proceedings against him. The trial court committed him to the Oregon State Hospital for evaluation and treatment under ORS 161.370. A psychologist at OSH determined that defendant is not a substantial danger to others but he suffers from a mental disease and there is no substantial probability that he will improve to participate in his legal defense, because defendant refused to take psychotropic medication and he does not meet involuntary medication criteria. Defendant moved for dismissal of the charges against him. The state sought an order directing OSH to involuntarily medicate him. A *Sell* hearing was held. The trial court concluded that it lacked authority under Oregon law to order OSH to involuntarily medicate defendant, and the court dismissed the charges. The trial court did not issue a *Sell* order, which must be supported by clear and convincing evidence, because it concluded that it lacked authority to issue a *Sell* order.

While the state appealed, the Oregon Supreme Court decided *Lopes*, which held that under ORS 161.370, trial courts have authority to issue *Sell* orders when necessary to enable hospitals to provide treatment designed to restore a defendant's competency. The Court of Appeals concluded here that "*Lopes* flatly contradicts the trial court's expressed basis for granting the motion to dismiss." Thus the trial court erred.

The Court of Appeals noted that the evidence from the trial court's hearing is over two years old and naturally defendant's circumstances may have changed. On remand, the trial court is to consider evidence of defendant's current circumstances.

9.13 Right to Be Present at Trial

A. Oregon. A criminal defendant has a statutory right to be present at trial. ORS 136.040; *State v Shutoff*, 263 Or App 615 (2014); *State v Harris*, 47 Or App 529, 531-32 (1980), *rev'd on other grounds*, 291 Or 179 (1981); *In re Jordan*, 290 Or 669, 672-73 (1981). A "criminal trial may proceed in the defendant's absence only if there is a sufficient factual basis for concluding that the defendant voluntarily is absent from a trial that the defendant knows is occurring." *Shutoff*, 263 Or App at 617.

B. United States. "A person charged with a felony has a fundamental right to be present at every stage of the trial [including] the voir dire and empanelling of the jury." *Campbell v Wood*, 18 F3d 662, 671 (9th Cir 1994) (en banc) (citing *Illinois v Allen*, 397 US 337, 338 (1970) and *Diaz v United States*, 223 US 442, 455 (1912)). "The right of presence derives from the Confrontation Clause of the Sixth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments." *Id.* (citing *United States v Gagnon*, 470 US 522, 526 (1985) (per curiam)). "Importantly, the scope of [Federal Rule of Criminal Procedure] 43 is broader than the scope of the constitutional right to be present. * * * The statute sweeps more broadly than the corresponding constitutional right because Rule 43 incorporated the more expansive common law understanding of the right as well as the constitutional standard. *See United States v. Rolle*, 204 F3d 133, 137 (4th Cir2000) (citing Fed.R.Crim.P. 43, 1944 Advisory Committee Note, Para. 1)." *United States v Reyes*, __ F3d __ (9th Cir 2014) (No. 12−50386) ("We hold that Reyes's exclusion from the side bar exchanges during jury selection did not violate his constitutional right to be present because the conferences were not instances where the defendant's 'absence might frustrate the fairness of the proceedings.').

9.14 Victims' Rights

9.14.1 Article I, section 42

Article I, sections 42 through 45 are lengthy and are not set forth in their entirety here. The full text of Article I is online at www.oregonlegislature.gov/bills_laws/Pages/OrConst.asp.x

Article I, section 42, in part:

"(1) 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 stage 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;

(b) The right, upon request, to obtain information about the conviction, sentence, imprisonment, criminal history and future release from physical custody of the criminal defendant or convicted criminal and equivalent information regarding the alleged youth offender or youth offender;

(c) The right to refuse an interview, deposition or other discovery request by the criminal defendant or other person acting on behalf of the criminal defendant provided, however, that nothing in this paragraph shall restrict any other constitutional right of the defendant to discovery against the state;

(d) The right to receive prompt restitution from the convicted criminal who caused the victim's loss or injury;

Article I, section 42, in part:

"(2) This section applies to all criminal and juvenile court delinquency proceedings * * *. Nothing in this section reduces a c criminal defendant's rights under the Constitution of the United States. Except as otherwise specifically provided, this section supersedes any conflicting section of this Constitution." * * * * *

"(3)(a) Every victim described in paragraph (c) of subsection (6) of this section shall have remedy by due course of law for violation of a right established in this section." * * * * *
-- Article I, section 42(2) and (3), Or Const (in part)

Because Article I, section 42, was enacted by voters, it is interpreted based on the voters' intent. The first focus is text and context, "but also [the courts] may consider the measure's history, should it appear useful to our analysis." *State v Algeo*, 354 Or 236 (2013) (citing *Ecumenical Ministries v Oregon State Lottery Comm'n*, 318 Or 551, 559 (1994) and *State v Gaines*, 346 Or 160, 171-72 (2009)).

"The legislature enacted ORS 147.500 to 147.550 to effectuate [the] constitutional rights" in Article I, sections 42 and 43. *State v Algeo*, 354 Or 236 (2013).

Article I, section 42(1)(c) does not impose a duty on a private investigator, hired by a defense attorney, to inform a crime victim of his/her right to refuse an interview when conducting an interview. Similarly, a police officer has no duty to inform a person of his/her right to be free from unreasonable searches and seizures when an officer requests consent to search. In contrast, a police officer does have the duty to inform a person of his/her right against self-incrimination under Article I, section 12. *Johnson v Dep't of Public Safety Stds and Training*, 253 Or App 307 (2012).

Defendant tried to obtain his rape survivor's Google search history from Google, unsuccessfully, see *State v Bray*, 352 Or 24 (2012). Defendant then subpoenaed the survivor, attempting to order her to bring her laptop or a clone to the criminal trial. She refused and the trial court refused to order her to produce it. The trial court issued a proposed order requiring the survivor to produce a clone. She filed a claim that production of a clone, even under seal, would violate her rights under Article I, sections 42 and 43, of the Oregon Constitution, which severely restrict "discovery" of crime victims. "Regardless of what the exact boundaries of 'discovery' may be under Article I, section 42, defendant's request that a clone of the hard drive be preserved under seal for purposes of appellate review, and the trial court's order allowing that request, do not qualify [as discovery]." *State v Bray*, 352 Or 809 (2012). The Court mused about what "discovery" could mean in Article I, section 42, which voters adopted in 1999. The Constitution does not define "discovery." The first reference the Court turned to was the word's "well-defined legal meaning" in Black's Law Dictionary. The Court didn't mention anything Oregon-related. Next the Court wrote that the constitutional phrase "other discovery request" is wedged between "interview" and "deposition" "— both of which would occur pretrial --" so therefore "the voters may have intended to refer only to discovery that occurs pretrial." But would "the voters" know where and when "discovery" occurs in a lawsuit? The Court cited nothing except its own knowledge of where and when discovery occurs in civil litigation. And the Court did not decide what "discovery' means.

A statute (ORS 147.515(1)) required a victim to inform the court, within a specific number of days, that he is a victim under the Oregon Constitution asserting victims' rights. The right of a crime victim to receive prompt restitution is created by Article I, section 42(3)(a)-(c) of the Oregon Constitution. Timely filing is <u>not</u> jurisdictional, as it is with filing a notice of appeal. The statutory time restriction on filing a victims' rights claim is <u>not</u> jurisdictional. The statutes provide a "procedural path for a crime victim to pursue a remedy for the violation of the victim's constitutional rights." *State v Thompson*, 257 Or App 336 (2013).

Article I, section 42, and ORS 137.106, grant courts authority to award prompt restitution from a convicted criminal more than 90 days after entry of defendant's judgment. "As in *State v Thompson*, 257 Or App 336 (2013), ORS 137.600 did not prevent the court from imposing restitution in order to provide the victim a remedy by due course of law, after it was discovered that her constitutional right to restitution was violated." *State v Wagoner*, 257 Or App 607 (2013).

Under Article I, section 42, a crime victim is entitled to "receive prompt restitution." Under ORS 137.106(1)(a) people who commit crimes resulting in economic damages must pay the "full amount" of damages, regardless of who is at fault. A crime victim argued that because the statute

requires a victim's restitution to be in "the full amount of the victim's economic damages," Article I, section 42, should be interpreted to have that same requirement. The Court held: "Article I, section 42(1)(d) does not grant petitioner a right to 'restitution' in the 'full amount' of her economic damages as that term is defined in ORS 137.106." *State v Algeo*, 354 Or 236 (2013).

9.14.2 Victim Defined

"(3) As used in this section, 'victim' means any person determined by the prosecuting attorney to have suffered direct financial, psychological or physical harm as a result of a crime and, in the case of a victim who is a minor, the legal guardian of the minor. In the event no person has been determined to be a victim of the crime, the people of Oregon, represented by the prosecuting attorney, are considered to be the victim. In no event is it intended that the criminal defendant be considered the victim." -- Art. I, section 44, Or Const (in part)

Article I, section 44(3), states that "the people of Oregon" are the victim if no other victim has been identified. The "public is a single collective 'victim' of a violation [of the felon in possession law] for purposes of merger." *State v Torres*, 249 Or App 571, *rev den*, 352 Or 378 (2012) (deciding the matter under statute only, not Article I, section 44(3).

Chapter 10: Civil Trials

10.1 Juries

"**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 actions at law, where the value in controversy shall exceed $750, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict.**" -- Article VII (Amended), section 3, Or Const

"**In civil cases three-fourths of the jury may render a verdict**." -- Article VII (Amended), section 5(7), Or Const

"**In all civil cases the right of Trial by Jury shall remain inviolate.**" -- Article I, section 17, Or Const

A. Generally

"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).

"The guarantee of trial by jury was ensured in the Magna Carta in 1215, although the historical origins of the jury system predate the Magna Carta by hundreds of years. Thomas H. Tongue, *In Defense of Juries as Exclusive Judges of the Facts*, 35 Or L R 143, 145 (1956) (citing 3 Blackstone Commentaries 349-50) * * *. See also James L. Coke, *On Jury Trial*, 1 Or L R 177 (1922) (tracing history of jury trial to ancient Athens). From the first British expeditions to America, the common law of England, including jury trial procedures, was made a part of the law of colonial communities); *State v Hansen*, 304 Or 169, 172, 743 P2d 157 (1987) ('The "common law of England" was adopted prior to statehood or official territorial status by Oregon's provisional government. * * * The common law, in the sense of an evolving body of law, continues in force insofar as it is not in conflict with legislation or constitutional provisions.')." *Lakin v Senco Products, Inc.*, 329 Or 62 (1999).

"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).

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 words "In all civil cases the right of Trial by Jury shall remain inviolate" mean "in all civil cases the right of Trial by Jury shall remain inviolate." *Lakin v Senco Products, Inc.*, 329 Or 62 (1999).

B. 1857 and 1910 – Remittitur Eliminated

Article I, section 17, of the Oregon Constitution was copied from Indiana's Constitution and accepted by Oregon voters in 1857. At that time, judges had some power to add or subtract from jury verdicts (remittitur and additur). The Oregon Supreme Court has noted that judicial power to lower jury verdicts was not absolute: "Oregon trial courts never have had the power to reduce a jury's verdict or to enter judgment for a lesser amount of damages over the objection of the prevailing party, who always could reject a judicial remittitur and demand a new jury trial. See *Adcock v Oregon Railroad Co*., 45 Or 173, 181, 77 P 78 (1904) (in an action for personal injuries, the court may order a remission of part of the damages awarded by the jury, but only as a condition of overruling a motion for a new trial)." *Lakin v Senco Products, Inc.*, 329 Or 62 (1999).

In 1910, Oregon voters amended the constitution to eliminate that power from judges. "[S]ince the adoption of Art. VII, § 3, of the Constitution it has been uniformly held that the circuit courts of this state have been stripped of the power which they had theretofore exercised of setting aside a verdict for excessive damages. See *Hust v Moore-McCormack Lines, Inc*., 180 Or 409, 417 (1946)." *Van Lom v Schneiderman*, 187 Or 89, 92 (1949); *Carey v Lincoln Loan Co.*, 342 Or 530, 537 (2007). The Oregon Supreme Court has summarized this very significant shift in power away from the state and to the people (both jurors and litigants):

> "Before the people adopted Article VII (Amended), section 3, in 1910, an Oregon trial court had the power to set aside a jury's verdict when it considered the verdict to be excessive. See, e.g., *Lindsay v Grande Ronde Lumber Co.*, 48 Or 430, 438-39, (1906) (duty of trial court to set aside excessive jury verdict); *Nelson v Oregon Railway Etc. Co.*, 13 Or 141, 142-43 (1886) (same). * * * In *Van Lom*, the court emphasized the importance of a litigant's state constitutional guarantee to a jury trial and concluded that the purpose of Article VII (Amended), section 3, was "to eliminate, as an incident of jury trial in this state, the common law power of a trial court to re-examine the evidence and set aside a verdict because it was excessive or in any other respect opposed to the weight of the evidence." *Id*. at 99. Consequently, the court held that, under the Oregon Constitution, a reviewing court may examine the record only "to determine whether it can affirmatively say there is no evidence to support the verdict." *Id*. at 95; see also *State v Brown*, 306 Or 599, 604, (1988) (fact decided by jury may not be reexamined unless reviewing court can say affirmatively that there is no evidence to support jury's decision); ORCP 64 B(5) (trial court may grant new trial if evidence is insufficient to justify verdict or is against the law); *Hill v Garner*, 277 Or 641, 643 (1977) (court may not grant judgment notwithstanding verdict if there is any evidence to support verdict)." *Parrott v Carr Chevrolet, Inc.*, 331 Or 537, 552 (2001).

Note: The legislature has continued to attempt to patch over that 1910 amendment, not by repealing the aspect of Article VII (Amended), section 3, that removed remittitur power from judges, but instead by attempting to cap juries' factual decisions (damages) by statute. See ORS 18.650 (1987) renumbered as ORS 31.710 (legislatively capping noneconomic damages at $500,000 regardless of the severity of the injury or any facts of any case). (Moreover, the legislature mandates: "The jury shall not be advised of the limitation" on damages. ORS

31.710(4)). See also ORS 30.260 to 30.300 for limitations to tort claims against the state and public bodies.

10.2 Specific Claims

See Alycia Sykora, *Right to Jury Trial*, Oregon Constitutional Law Manual (2013), www.osbar.org/secured/barbooks/viewchapter.asp?bid=85&cid=2334.

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) (but see *M.K.F. v Miramontes*, 352 Or 401 (2012) (nature of relief decides this issue).

"Article I, section 17, guarantees a right to a jury trial for all civil claims or requests for relief, absent a showing that the nature of the particular claim or request at issue is such that it would have been tried to a court without a jury at common law. *M.K.F. v Miramontes*, 352 Or 401, 425 (2012)." *State v N.R.L.*, 354 Or 222 (2013).

In cases where both an injunction and money damages are sought, the "right to jury trial must depend on the nature of the relief requested and not on whether, historically, a court of equity would have granted the relief had the legal issue been joined with a separate equitable claim." *M.K.F. v Miramontes*, 352 Or 401 (2012) (claims for money damages, even as part of a stalking protective order, have a jury).

Article I, section 17, does not require a jury trial for restitution determinations in adult criminal prosecutions under ORS 137.106. *State v Hart*, 299 Or 128 (1985).

Article I, section 17, does not require a jury trial for restitution determinations in juvenile delinquency cases under ORS 419C.450. Restitution under that statute does serve a compensatory purpose. Restitution also is a blend of civil and criminal law, but the purpose of restitution under ORS 419C.450 is primarily "a tool to achieve penal and rehabilitative ends." That statute is not civil in nature, therefore Article I, section 17, did not grant a right to a jury trial in this case. *State v N.R.L.*, 354 Or 222 (2013).

10.3 Caps on Noneconomic Damages

10.3.1 Personal Injury

"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. * * * In any such case, the trial of all issues of fact must be by jury. The determination of damages in a personal injury case is a question of fact. *Chase v Alexander*, 255 Or 136, 138, 465 P2d 226 (1970) * * *. The damages available in a personal injury action include compensation for noneconomic damages resulting from the injury. * * * The legislature may not interfere with the full effect of a jury's assessment of noneconomic damages, at least as to civil cases in which the right to jury trial was customary in 1857, or in cases of like nature. * * * It follows, therefore, that, in this context, ORS 18.560(1) violates Article I, section 17." *Lakin v Senco Products, Inc.*, 329 Or 62 (1999).

10.3.2 Medical Malpractice

Article I, section 17, prohibits the legislature from limiting the jury's determination of noneconomic damages in medical malpractice cases for injuries, including those that occur to a person *during his birth*. Such medical malpractice cases are not "prenatal" torts, they are medical malpractice torts. Applying Oregon's statutory cap on noneconomic damages violates Article I,

section 17, in medical malpractice cases. A "cause of action for medical malpractice preexisted the adoption of the Oregon Constitution. *See, e.g., Mead v Legacy Health System*, 352 Or 267, 276 n 7 (2012); *see also* William Blackstone, 3 *Commentaries on the Laws of England* 122 (1768)." *Klutschkowski v PeaceHealth*, 354 Or 150 (2013).

10.3.3 Prenatal Injuries

The Oregon Supreme Court has stated: "[W]e assume * * * that, in 1857, a child would not have had a cause of action for physical injuries to the mother during the course of her pregnancy that resulted from a breach of the general standard of due care and that had only a consequential effect on what was, at the time of the injury, a fetus." *Klutschkowski v PeaceHealth*, 354 Or 150, 176 (2013). Note that injuries occurring during birth are not "prenatal" torst.

10.3.4 Loss of Consortium in Products Liability

Loss of consortium related to a spouse's injury was recognized in 1857, therefore Article I, section 17, prohibits the application of ORS 31.710(1) (the cap) to a loss of consortium claim in a products liability claim. *Rains v Stayton Builders Mart, Inc.*, 264 Or App 636, 666 (2014).

> ***Rains v Stayton Builders Mart, Inc.***, 264 Or App 636, 666 (2014). A worker fell 16 feet to the ground and became a T12 paraplegic. He and his wife brought claims against several defendants. The jury returned a verdict against two defendants, applied the comparative fault statute, ORS 31.600(2), and designated one defendant 30 percent at fault, the other defendant 45 percent at fault, and the injured man 25 percent at fault. The jury awarded the injured man $5,237,700 in economic damages and $3,125,000 in noneconomic damages, and the man's wife $1,012,500 in noneconomic damages. After reducing the judgment to account for the injured man's comparative fault, the trial court entered a limited judgment for plaintiffs in the sum of $7,031,400.
>
> The trial court denied a defendant's motion to reduce each plaintiff's noneconomic damages under ORS 31.710(1). ORS 31.710(1) caps noneconomic damages at $500,000 in most civil actions "arising out of bodily injury[.]" The trial court denied the defendant's motion to apply the statutory cap, agreeing with plaintiffs that application of the cap in this case would violate Article I, section 17, of the Oregon Constitution.
>
> The defendant appealed, contending that ORS 31.710(1), as applied to the man's strict products liability claim and the wife's loss of consortium claim, does not violate Article I, section 17.
>
> The Court of Appeals concluded "that the trial court correctly determined that the cap, as applied to [the wife's] loss of consortium claim, would violate Article I, section 17, of the Oregon Constitution, and affirm the judgment on that issue." The Court of Appeals explained that "[t]here is little dispute that a common-law claim for loss of consortium predates 1857. Keeton, *Prosser and Keeton on the Law of Torts* § 125 at 931 (explaining that, by 1619, a husband could recover loss of consortium damages from a tortfeasor who had injured his wife)." Although *Sheard v Oregon Electric Ry. Co.*, 137 Or 341 (1931) held that at common law, a married woman could not sustain an action for the loss of consortium of her husband, even though a husband could sustain the same claim, and "a wife's loss of consortium claim arising out of injury to her husband is not a claim that was recognized in 1857," it does not follow that the "application of ORS 31.710 would not violate Article I, section 17" to the wife's claim. The Court of Appeals concluded "that, even though a woman's married status "operated as a suspension * * * on the legal existence of the wife," *Sheard*, 137 Or at 345, a married woman's loss of consortium claim is in the 'class of cases' recognized at common law."

10.3.5 Wrongful Death

In *Greist v Phillips*, 322 Or 281 (1995), the Oregon Supreme Court determined that the legislature's $500,000 statutory cap on noneconomic damages in wrongful death actions does not violate the right to trial by jury under the Oregon Constitution. In short: "*Greist* was a wrongful death case, the parameters of which are subject to legislative adjustment from time to time." *Hughes v PeaceHealth*, 344 Or 142 (2008). The following paragraphs are quotes from *Greist*.

"In Oregon, * * * the right of action for wrongful death is statutory. '[A]t common law no remedy by way of a civil action for wrongful death existed.' *Richard v. Slate,* 239 Or. 164, 167, 396 P.2d 900 (1964). In *Goheen v. General Motors Corp.*, 263 Or. 145, 153-54, 502 P.2d 223 (1972), this court traced the history and development of wrongful death actions in Oregon and stated: 'The original Oregon Wrongful Death Act was included in the original Deady Code in 1862. * * * [It] did not specifically limit awards of damages to any named dependents. Neither did it specifically limit damages to pecuniary loss, although total recovery was limited to $5,000. This limitation on the amount of recovery was increased from time to time, and was finally removed [by Oregon Laws 1967, chapter 554, section 1].' (Footnotes omitted.) There was no wrongful death statute in Oregon before the 1862 Deady Code. *Ibid.* Therefore, at the time Article I, section 17, was adopted, no right existed for a trial by jury for a wrongful death action. Because wrongful death actions are 'purely statutory,' they 'exist only in the form and with the limitations chosen by the legislature.' *Hughes v. White*, 289 Or. 13, 18, 609 P.2d 365 (1980)."

"Even [if] a wrongful death action is 'of like nature' to a personal injury action, [the statutory cap is not unconstitutional under Article I, section 17]. When Article I, section 17, and the constitution were adopted, a jury's determination of the amount of damages to be awarded in tort actions was not protected from judicial alteration."

"Before the adoption of Article VII (Amended), section 3, in 1910, Oregon trial courts were empowered to exercise their discretion and set aside jury verdicts and grant a new trials for excessive damages found by a jury, or to order a remittitur of the excess as a condition to denying a motion for a new trial. *See, e.g.*, General Laws of Oregon, ch. 2, § 232(5), p. 197 (Deady 1845-1864) (court could set aside jury's verdict because of '[e]xcessive damages * * * given under the influence of passion or prejudice'); *Adcock v Oregon Railroad Co.*, 45 Or 173, 181, 77 P 78 (1904) ('Where the damages assessed are excessive, in the opinion of the trial court, or not justified by the evidence, the error may in many cases be obviated by remitting the excess.'); *Sorenson v Oregon Power Co.*, 47 Or 24, 33, 82 P 10 (1905) (approving trial court's exercise of remittitur). *See also* Hall S. Lusk, *Forty-Five Years of Article VII, Section 3, Constitution of Oregon*, 35 Or L Rev 1, 4 (1955) (stating that, before adoption of Article VII (Amended), section 3, trial courts were empowered to set aside verdicts that they believed to be excessive)."

"Article VII (Amended), section 3, and subsequent decisions by this court, did away with that practice. In order to inhibit such practice and to uphold verdicts, the Constitution was amended so as to preclude a court from re-examining any fact that had been tried by a jury, when the verdict returned was based on any legal evidence. *Buchanan v. Lewis A. Hicks Co.*, 66 Or 503, 510, 133 P780, 134 P 1191 (1913)."

"*Until* the adoption of Article VII (Amended), section 3, in 1910, trial courts were empowered to reduce jury awards of damages when the courts believed that those awards were excessive. That fact, in itself, disposes of plaintiff's argument that there existed at common law, at the time Article I, section 17, was adopted in 1857, a right to have a judge enter judgment on a jury's award of damages without judicial alteration in a personal injury action." (Emphasis in *Greist*).

"The right of action for wrongful death was created by the legislature in 1862, and it was created with a limitation on the amount recoverable. When the voters adopted Article VII (Amended), section 3, in 1910, the maximum amount recoverable in a statutory wrongful death action was

$7,500. Lord's Oregon Laws, ch. VI, § 380, p. 326 (1910). Although voters told the courts not to 're-examine' facts "tried by a jury," Art. VII (Amended), § 3, there is no indication in wording, case law, or history that the voters meant to undo the extant dollar limit on wrongful death actions. The removal, in 1967, of any limitation on the amount recoverable in a wrongful death action did not place the issue of dollar limits beyond the legislature's power to act, nor clothe the legislature's creation with constitutional guarantees not present at its inception.

"In summary, after examining the wording of Article VII (Amended), section 3, the case law surrounding it, and the historical circumstances that led to its creation, we have found no suggestion that Article VII (Amended), section 3, restricts the legislature's authority to set a maximum recovery in statutory wrongful death actions. Its authority in that regard is not diminished by the fact that the maximum recovery is set in a general statute that applies to wrongful death actions, rather than in the wrongful death statute itself."

10.4 Verdicts

10.4.1 "Three-Fourths of the Jury"

A trial court must individually poll jurors upon a party's request. The results of that poll need to show up on the record (a collective "show of hands" from the jury box will not enable review of claims of error).

The Oregon Constitution provides that in civil cases, "three-fourths of the jury may render a verdict." Article VII (Amended), section 5(7). "When there is a twelve-person jury, that means that the same nine or more jurors must agree, in full, on every interdependent element of a particular claim against a particular defendant." *Congdon v Berg and Farmers Insurance*, 256 Or App 73 (2013) (quoting *Sandford v Chev Div General Motors*, 292 Or 590, 613 (1982)).

ORCP 59 G(3) "requires an individual poll of each juror in a manner that demonstrates whether each juror agreed with the entire verdict." That procedural rule is "an absolute privilege" to each party. The purpose of a jury poll "is to determine if three-fourths of the jurors 'agree on all issues determined by the verdict,' * * * whether it be general or special." "Once the verdict is read, the poll, on request, can be conducted in two ways: (1) the jurors can be polled individually on each issue decided, or (2) the jurors can be asked to respond affirmatively or negatively to the question, 'Is the verdict just read your individual verdict?', with an instruction that those who say 'yes' must agree with the entire verdict." "*Sandford* required the trial court to determine whether the same nine jurors agreed with each part of the verdict upon a request for a jury poll." The verdict is invalid. *Congdon v Berg and Farmers Insurance*, 256 Or App 73 (2013).

Failure to object to a group poll, however, may eliminate a party's ability to obtain reversal on appeal. *State v Mannix*, 263 Or App 162 (2014) (after jury's guilty verdict, defendant wanted to poll the jury, but rather than individually poll, the court asked the presiding juror if the vote was unanimous, and the jury was dismissed, without any objection by defendant, which resulted in an unpreserved claim of error).

10.4.2 "The Same Nine Jurors"

If jury instructions and a verdict form require "at least the same nine jurors" to agree on "each answer," with the "answer" involving two subparts economic and noneconomic damages, but after a jury poll under ORCP 59 G(3), the *same* nine did not agree on both economic and noneconomic damages, then the jury instructions and form "required at least the same nine jurors to agree on the amounts of both types of damages." The jury instructions become "the law of the case" and if only eight jurors agreed on both types of damages, "the verdict violated Article VII (Amended), section 5(7), of the Oregon Constitution." *Kennedy v Wheeler*, 258 Or App 343 (2013).

10.5 Open Courts

> "**No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every 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

See Erin J. Snyder, *Open Courts and Public Trial*, Oregon Constitutional Law Manual (2013), www.osbar.org/secured/barbooks/viewchapter.asp?bid=85&cid=2349.

10.5.1 Origins

Oregon's "open courts clause" is based on – but not identical to - Indiana's open courts clause in its constitution of 1851. *State v MacBale*, 353 Or 789 (2013). The Oregon Supreme Court has decided that the Oregon framers wanted courts to administer justice "in a manner that permits public scrutiny of the court's work in determining legal controversies," based on a dictionary definition of the words "secret" and "openly" in Article I, section 10, and citing a law review article, David Schuman, *Oregon's Remedy Guarantee: Article I, section 10 of the Oregon Constitution*, 65 OR L REV 35, 38 (1986). *Doe v Corp of the Presiding Bishop*, 352 Or 77 (2012).

10.5.2 Interpretation

The Oregon Supreme Court interprets Article I, section 10, "by examining the text of the provision, the historical circumstances leading to the creation and adoption of the provision, and the applicable case law concerning the provision." *Doe v Church of Latter Day Saints*, 352 Or 77, 87 (2012) (quoting a case that cited *Priest v Pearce*, 314 Or 411, 415-16 (1992).

"Article I, section 10, does not compel the trial court to release the public trial exhibits that are subject to a protective order or entitle the public to have access to trial exhibits at the close of trial." *Doe v Corp of the Presiding Bishop*, 352 Or 77 (2012). The "command for openness in Article I, section 10, is subject to qualification for some aspects of court proceedings, that, by well-established tradition, were and are conducted out of public view." *Id.*

Nothing in Article I, section 10, prohibits a trial court from releasing files to the public. Under ORCP 36 C, issuing and vacating a protective order are within the trial court's discretion. *Doe v Corp of the Presiding Bishop*, 352 Or 77 (2012).

"The principle of open justice entitles the public to attend and to view the other aspects of the administration of justice in a court – such as a proceeding to suppress inadmissible evidence – to ensure that the court and the parties comply with the law, and appear to do so, in an accountable manner." A "court does not comply with Article I, section 10, by confining the public's attendance in court to only the presentation of admissible evidence." *Doe v Corp of the Presiding Bishop*, 352 Or 77 (2012).

Article I, section 10, "does not entitle the public to inspect every trial exhibit at the end of a trial." Article I, section10, does not create "a right in every observer, at the end of a court proceeding, to obtain the release of the evidence admitted or not admitted during the proceeding." "Article I, section 10, creates no absolute public right of access to trial exhibits at the close of trial." *Doe v Corp of the Presiding Bishop*, 352 Or 77 (2012).

Article I, section 10, is limited to *adjudications* and does not include all pretrial hearings. An OEC 412 hearing is not an adjudication. Although *Oregonian Publishing Co v O'Leary*, 303 Or 297 (1987) appears to require the OEC 412 hearing to be open to the public, the Oregon Supreme Court has shrugged off that case, reasoning: "*O'Leary* was decided before this court adopted its

current paradigm for interpreting original constitutional provisions. Thus, the court did not scrutinize the words of Article I, section 10, or specifically consider what the framers intended by the phrase 'no court shall be secret.'" *State v MacBale*, 353 Or 789, 802 (2013). Further distancing itself from its precedent in *O'Leary*, the Court added that grand jury proceedings have been secret. And the Court quoted constitutional framer/judge Matthew Deady's observation in an 1887 case: "[A]lthough the constitution requires justice to be 'administered openly and without purchase,' no one doubts that, * * * in a certain class of cases, the general public, in the interest of public morals and decency, may be excluded from the courtroom." *Id*. at 804. In sum: "a hearing to determine the admissibility of evidence under OEC 412 does not constitute an administration of justice for purposes of Article I, section 10, and that the legislature may provide that such a hearing be closed to the public." *Id*. at 809. Therefore, "the exclusion of the public from hearings under OEC 412(4) to determine the admissibility of evidence of a sex crime victim's past sexual behavior under OEC 412(2) does not violate Article I, section 10 or 11, of the Oregon Constitution or the First or Sixth Amendment to the United States Constitution."

10.5.3 First Amendment

The First Amendment guarantees of freedom of speech and freedom of the press provide a right to access criminal trials. *Richmond Newspapers, Inc. v Virginia*, 448 US 555, 576-77 (1980). The First Amendment protects the right of public access, even though it is not explicitly enumerated, because part of the First Amendment's purpose is to enable citizens to contribute to our republican system of self-governance. *Globe Newspaper Co. v Superior Court*, 457 US 596, 604 (1982); *Courthouse News Service v Planet*, __ F3d __ (9th Cir 4/07/14) ("The news media's right of access to judicial proceedings is essential not only to its own free expression, but also to the public's.").

The public has a First Amendment right of access to voir dire of jurors in criminal trials, *Press–Enterprise Co v Superior Court*, 464 US 501, 511 (1984), and to certain preliminary criminal hearings, *El Vocero de P.R. v Puerto Rico*, 508 US 147, 149–50 (1993) (per curiam) (preliminary criminal hearings), *Press–Enterprise Co. v Superior Court*, 478 US 1, 10 (1986) (preliminary criminal hearings).

Every federal court of appeals that has considered whether there is a right of public access to civil trials has concluded that there is such a right, see *Delaware Coalition for Open Gov't, Inc. v Strine*, 733 F3d 510 (3d Cir 2013), *cert denied* __ US __ (2014) (compiling cases; concluding that the public has a right of access under the First Amendment to Delaware's state-sponsored arbitration program). A proceeding qualifies for the First Amendment right of public access when "there has been a tradition of accessibility" to that kind of proceeding, and when "access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise Co*, 478 US at 10.

> ***United States v Index Newspapers LLC and Duran***, __ F3d __ (9th Cir 9/05/14) In Seattle in May 2012, violent protesters damaged the federal courthouse, cars, and other buildings. Newspapers reported it. Defendant Duran and another protester were subpoenaed to appear before the grand jury. They refused to testify. They were held in contempt. The contempt hearing was closed to the public. Portions of their grand jury testimony, where they had refused to answer questions, were recited into the record. They were found guilty of contempt and jailed until they consented to testify, for up to 18 months or until the grand jury "expired." Two weeks later, the court held a status conference on the confinement. The first part of that status conference was closed to the public. The second part was open to the public, in which Duran's attorney stated that Duran had been held in solitary confinement for the duration of his jail time. He refused to testify at the grand jury proceeding, so the court continued to hold him in contempt. The government asked for a status hearing in six months, but Duran's attorney stated that

Duran would refuse to testify. The court told Duran's attorney he could contact the court for a hearing. Five months later, Duran's attorney did so, requesting that Duran and his protester colleague be released. The court released them. During their confinement, *The Stranger*, a newspaper, had filed motions to unseal the non-grand jury portions of the transcripts of the court's proceedings. The trial court wrote that "the record *The Stranger* sought was "a mix of secret grand jury material, grand jury material that may have lost its secrecy, legal argument, banal information, and more." It ruled that the court had no obligation "to sift through these grand jury proceedings to determine what is secret and what is not." The trial court ruled: "The public has a right to the transcripts of the open portions of the hearings, but no more."

The Stranger filed a mandamus petition in the Ninth Circuit to unseal the portions of Duran's and K.O.'s contempt files that do not contain matters shielded by Federal Rule of Criminal Procedure 6(e).

The Ninth Circuit panel affirmed in part and reversed in part:

"America has a long history of distrust for secret proceedings. *See In re Oliver*, 333 US 257, 268–69 (1948) ("[D]istrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the *lettre de cachet*." (footnotes omitted)). Pursuant to the First Amendment, there is a presumed public right of access to court proceedings. *See Oregonian Publ'g Co. v U.S. Dist. Court*, 920 F2d 1462, 1465 (9th Cir 1990). Secret proceedings are the exception rather than the rule in our courts. *See id.* Nevertheless, one very well established exception is grand jury proceedings. *Press-Enterprise Co. v Superior Court*, 478 US 1, 8–9 (1986) (*Press-Enterprise II*)."

"The Supreme Court has instructed that the following two questions should be asked to determine whether the First Amendment right of access applies to a particular proceeding: (1) "whether the place and process have historically been open to the press and general public," and (2) "whether public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise II*, 478 US at 8.

This test is commonly referred to as the "experience and logic test." *See, e.g., id.* at 9. The same test applies to the disclosure of "*documents* generated as part of a judicial proceeding." *Times Mirror*, 873 F.2d at 1213 n.4. If we conclude that there is a First Amendment right of access to any of the documents encompassed by *The Stranger*'s request, we must "then determine whether any such right is overcome by a compelling governmental interest." *In re Copley Press, Inc.*, 518 F3d 1022, 1026 (9th Cir 2008). We also "consider whether the common law gives the public a right of access separate from the First Amendment." *Id.* The public's common law right of access is not absolute and it does not extend to records that have "traditionally been kept secret for important policy reasons." *Times Mirror*, 873 F.2d at 1219. In particular, our court has held that the common law right to public records and documents does not extend to grand jury transcripts or to sealed search warrant materials during a pre-indictment investigation. *United States v. Bus. of Custer Battlefield Museum & Store*, 658 F3d 1188, 1192 (9th Cir 2011).

"Applying the experience and logic test to each category of documents sought by *The Stranger*, we conclude there is no First Amendment public right of access to: (1) filings and transcripts relating to motions to quash grand jury subpoenas; (2) the closed portions of contempt proceedings containing discussion of matters occurring before the grand jury; or (3) motions to hold a grand jury witness in contempt. We do not consider whether there is a separate common law right of access to these documents because any such presumption in favor of access is outweighed by the compelling government interest in maintaining grand jury secrecy. In contrast, the public does have presumptive First

Amendment rights of access to: (1) orders holding contemnors in contempt and requiring their confinement; (2) transcripts and filings concerning contemnors' continued confinement; (3) filings related to motions to unseal contempt files; and (4) filings in appeals from orders relating to the sealing or unsealing of judicial records. These rights of access are categorical and do not depend on the circumstances of any particular case." *United States v Index Newspapers LLC and Duran*, __ F3d __ (9th Cir 2014) ("Our holding is specifically limited to the public's right of access while the grand jury investigation is ongoing.").

10.6 Waiver

Oregon case law is limited on waiver of the state constitutional right to a jury trial in civil cases.

"The right of trial by jury in cases at law, whether in a civil or criminal case, is a high and sacred constitutional right in Anglo-Saxon jurisprudence, and is expressly guarantied [sic] by the United States Constitution. A stipulation for the waiver of such right should therefore be strictly construed in favor of the preservation of the right." *State v Barajas*, 262 Or App 364, 367 n 1 (2014) (dicta in a criminal case citing *Burnham v. North Chicago St. Ry. Co.*, 88 F 627, 629 (7th Cir 1898)).

In federal cases, the Seventh Amendment right to a civil jury trial may be waived "knowingly and voluntarily based on the facts of the case." *Palmer v Valdez*, 560 F3d 968-69 (9th Cir 2009). Having a bench trial without objection may suffice as a jury waiver in a civil case. *White v McGinnis*, 903 699, 703 (9th Cir 1990) (en banc).

10.7 Venue

"Modern venue rules are predominantly statutory, but they derive from early common-law principles." *Kohring v Ballard*, 355 Or 297 (2014). Oregon's first venue statute followed that tradition. *Id.* at 307 (citing General Laws of Oregon p 147-48 (Deady 1845-1864)).

ORS 14.080 provides that venue is proper wherever a defendant engages in "regular, sustained business activity." *Kohring v Ballard*, 355 Or 297 (2014). Defendants have a "right" to insist on proper statutory venue. *Id.* (citing *Rose v Etling*, 255 Or 395, 399 (1970) (mandamus if the proper vehicle to challenge an erroneous trial court denial of a motion to change venue).

Personal jurisdiction requirements are different than statutory venue requirements. *Id.* at 313. The current federal definition of corporate residence for venue purposes does equate venue and personal jurisdiction. *Id.* Oregon does not. "Jurisdiction refers to the authority of the court to hale a defendant into court, while venue concerns the particular location where it is appropriate for the court to exercise that authority." *Id.* (citation omitted).

Chapter 11: Punishment

"**No person arrested, or confined in jail, shall be treated with unnecessary rigor.**" -- Article I, section 13, Or Const

"**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

"**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

11.1 Cruel and Unusual Punishment; Proportionality

"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).

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).

"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*." *State v Simonson*, 243 Or App 535 (2011).

A 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*. "Characteristics of either the defendant or the victim, or both, may be considered." *State v Wilson*, 243 Or App 464 (2011).

On probation revocation and vertical proportionality, see *State v Barajas*, 254 Or App 106 (2012).

> ***State v Parker***, 259 Or App 547 (11/27/13) (Marion) (Wollheim, Schuman, Duncan) Defendant pleaded guilty to 10 counts of illegally downloading child pornography, which consisted of 1,460 images and videos, 286 of which were original, indicating 286 "unique child victims' undergoing "violent rape, sodomy, or molestation" among other acts of violence on the children. He was sentenced to 119 months in prison. He has two prior DUIIs but no apparent other criminal convictions. He contended that his sentence is too lengthy, arguing that it exceeded the maximum allowable by law per ORS 138.050 and it was disproportional under Article I, section 16. The trial court disagreed.
>
> The Court of Appeals affirmed: the sentences are not disproportionate. First, "it is not appropriate to consider defendant's aggregate or cumulative sentence of 119 months to determine if his aggregate or cumulative sentence of 119 months is disproportionate to his 10 offenses." Second, his individual sentences do not "shock the moral sense" of reasonable people when compared to the offenses, based on the three *Rodriguez/Buck* factors: (1) comparison of the severity of the penalty to the gravity of the crime; (2) comparison of other related crimes' penalties; and (3) defendant's criminal history. Significantly: "Defendant's acts are inextricably and irreversibly tied to the sexual abuse of vulnerable children." And the statute he was convicted of violating (ORS 163.684) is specifically aimed at "the economic incentives for causing that harm" to children. Defendant also has two prior DUIIs, and the trial court was not prohibited from considering those former offenses in determining the sentence for this conviction for encouraging child sex abuse.
>
> ***State v Rivera***, 261 Or App 657 (3/26/14) (Marion) (Wollheim, Nakamoto, Schuman) In 2007, a jury found defendant guilty of first-degree rape. He raped his wife under the theory that it was his marital "right" to engage in sexual relations with her. Under Measure 11 (now ORS 137.700 to 137.707), that conviction results in a mandatory minimum of 100 months in prison. The trial court stated that it had no discretion but would never give defendant a 100-month sentence. Defendant was sentenced before *Rodriguez/Buck*. Defendant appealed and sought a remand requiring the trial court to reconsider the proportionality of Measure 11 under *Rodriguez/Buck*. The state opposes a remand.
>
> The Court of Appeals remanded to the trial court to resentence defendant under *Rodriguez/Buck*, footnoting that its "opinion should not be read to imply that a Measure 11 sentence would or would not be a violation of Article I, section 16, or be read as an endorsement of the factors that the court identified in 2007." (It is not clear what those "2007" factors are – presumably factors that the trial court considered.)

11.2 Eighth Amendment

"**Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted**." -- Eighth Amendment, US Const

11.2.1 Application to the States

Punishment: The cruel and unusual punishment prohibition in the Eighth Amendment applies to the States through the due process clause of the Fourteenth Amendment. *Robinson v California*, 370 US 660 (1962); *McDonald v City of Chicago*, 130 S Ct 1316, 3034 n 12 (2010).

Bail: The prohibition against excessive bail in the Eighth Amendment applies to the States. *Schilb v Kuebel*, 404 US 357 (1971); *McDonald v City of Chicago*, 130 S Ct 1316, 3034 n 12 (2010).

Fines: 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*, 130 S Ct at 3035 n 13 (citing *Browning-Ferris Indust. v Kelco Disposal, Inc.*, 492 US 257, 276 n 22 (1989)).

11.2.2 "Cruel and Unusual" Includes Proportionality

"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).

"[T]he Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller v Alabama* and *Jackson v Hobbs*, 132 S Ct 2455 (2012).

Capital punishment of offenders under age 16 violates the Eighth Amendment. *Thompson v Oklahoma*, 487 US 815 (1988) (plurality).

The Eighth Amendment bars capital punishment for all juveniles under age 18. *Roper v Simmons*, 543 US 551 (2005).

Life without parole violates the Eighth Amendment when imposed on juvenile nonhomicide offenders. *Graham v Florida*, 130 S Ct 2011 (2010).

The Eighth Amendment prohibits imposing the death penalty for nonhomicide crimes. *Kennedy v Louisiana*, 554 US 407 (2008).

The Eighth Amendment prohibits imposing the death penalty on mentally retarded defendants. *Atkins v Virginia*, 536 US 304 (2002).

11.2.3 Excessive Fines

A. *Criminal in personam*

State v Goodenow, 251 Or App 139 (2012)

B. *Civil in rem*

In *United States v Cyr*, __ F3d __ (9th Cir 8/21/14), the Ninth Circuit applied the Eighth Amendment analysis and concluded that a $132,245 civil forfeiture did not violate the Excessive Fines Clause:

> "If the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional." *United States v Bajakajian*, 524 US 321, 337 (1998). The defendant carries "the burden of establishing that the forfeiture is grossly disproportional by a preponderance of the evidence." 18 U.S.C. § 983(g)(3). While we are not restricted to "any rigid set of factors," *United States v Mackby*, 339 F3d 1013, 1016 (9th Cir 2003), we have typically "considered four factors in weighing the gravity of the defendant's offense: (1) the nature and extent of the crime, (2) whether the violation was related to other illegal activities, (3) the other penalties that may be imposed for the violation, and (4) the extent of the harm caused." *United States v $100,348.00 in U.S. Currency*, 354 F3d 1110, 1122 (9th Cir 2004).
>
> *See United States v Ferro*, 681 F3d 1105 (9th Cir 2012).

11.3 Unnecessary Rigor

"Article I, section 13, guarantees that '[n]o person arrested, or confined in jail, shall be treated with unnecessary rigor.' To establish that a particular practice offends Article I, section 13, an inmate must show that the practice 'would be recognized as an abuse to the extent that it cannot be justified by necessity.' *Sterling v Cupp*, 290 Or 611, 620, (1981). Practices such as nonemergency bodily searches conducted by opposite-sex guards, *id.* at 632, and 'ongoing and periodical assaults,' *Schafer v Maass*, 122 Or App 518, 522 (1993), have been held to be unconstitutional under that standard." *Smith v Department of Corrections*, 219 Or App 192 (2008) *rev den* , 345 Or 690, *cert den*, 557 US 923 (2009) (ban on porn in jail is not unnecessarily rigorous treatment of an inmate).

Article I, section 13, of the Oregon Constitution is concerned with conditions within a prison. *Sterling v Cupp*, 290 Or 611, 619-22 (1981). "In *Sterling*, the Supreme Court held that a corrections officer's nonemergency, over-the-clothes patdown of an inmate of the opposite sex that involves 'touching of sexually intimate body areas' constitutes 'unnecessary rigor.' 290 Or at 632." *Voth v Officer Solice*, 263 Or App 184 n 1 (2014) (court did not address Article I, section 13, claim because it was unpreserved). A sentence of death is not a condition of "unnecessary rigor." *State v Guzek*, 310 Or 299 (1990). Similarly, Article I, section 13, is not violated by pretrial detention anxiety suffered by an aggravated murder defendant. *State v Moen*, 309 Or 45, 97 (1990).

"Damages for deprivations of Oregon constitutional rights can be sustained only if a plaintiff can make a claim under an extant common-law, equitable, or statutory theory that provides nominal damages as a remedy and cannot be based solely on a provision under the Oregon constitution." *Millard v Oregon Dep't of Corrections*, __ F Supp 2d __ (D Or June 3, 2014) (quoting *Barcik v Kubiaczyk*, 321 Or 174, 190-91 (1995)). The "appropriate remedy for constitutional violations by public bodies, officers, employees and agents is the Oregon Tort Claims Act, [ORS] 30.260 – 30.300." *Ibid.* (quoting *Juran v Independence Or Cent School District*, 898 F supp 728, 730 (D Or 1995)). When a plaintiff fails to plead his claim that prison officials violated his Article I, section 13, rights under the Oregon Tort Claims Act, he "thus may not bring such a claim in federal court unless the State of Oregon waives sovereign immunity under the Eleventh Amendment of the U.S. Constitution." *Ibid.*

Cf. Thomas A. Balmer and Katherine Thomas, *In the Balance: Thoughts on Balancing and Alternative Approaches in State Constitutional Interpretation*, 76 ALBANY L REV 2027, 2042 (2013) (addressing the Court's analysis of Article I, section 13, in *Sterling v Cupp*).

11.4 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

State v Lane, 260 Or App 549 (01/02/14) (Marion) (Egan, Armstrong, Nakamoto) (Review allowed, oral argument in the Oregon Supreme Court 9/18/14) The trial court imposed four prison terms as a sanction for defendant's single violation of a probationary term. The trial court ordered those terms to run consecutively. A rule, OAR 213-012-0040(2)(a), provides that sanctions shall be concurrent for a single probation violation. But Article I, section 44(1)(b) provides that no law may limit a court's authority to impose consecutive sentencing terms for crimes against different victims. In this case, defendant had four felony child sex abuse convictions involving four different victims.

The Court of Appeals wrote: "The issue in this case is whether OAR 213-012-0440(2)(a) foreclosed the trial court from imposing consecutive terms for the single probation violation, or whether Article I, section 44(1)(b), instead operated to invalidate that regulatory limitation on the court's authority."

The Court of Appeals concluded: "our consideration of Article I, section 44(b)(1)'s text and context leads us to conclude that the provision does not apply to the imposition of sanctions for the violation of multiple probationary terms where those terms were originally imposed as part of a felony sentencing. Because defendant committed only one probation violation, the trial court was required, under OAR 213-012-0040(2)(a), to impose the incarceration terms concurrently and erred in doing otherwise."

Per the Oregon Supreme Court's Media Release: "On review, the issue is: If a defendant is serving multiple probationary sentences imposed on felony convictions that are based on crimes committed against different victims, and the court revokes those probationary sentences based on a finding of a single violation of probation, does Article I, section 44(1)(b), of the Oregon Constitution authorize the court to impose consecutive sentences, despite OAR 213-012-0040(2)(a), which provides that if more than one term of probationary supervision is revoked for a single supervision violation, the sentencing judge shall impose the incarceration sanctions concurrently?"

11.5 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).

11.6 *Ex Post Facto*

The record of the Oregon Constitutional Convention on the ex post facto clause "does not indicate the convention's intent in adopting the provision." *State v Cookman*, 324 Or 19, 28 (1996)

"However, it appears that Article I, section 21, was derived from the Indiana Constitution of 1851, specifically, Article I, section 24, of that Constitution. W. C. Palmer, *The Sources of the Oregon Constitution*, 5 OR L REV 200, 202 (1926). Article I, section 24, of the 1851 Indiana Constitution is itself substantially similar to Article I, section 18, of the 1816 Indiana Constitution." *Ibid*. The *Cookman* court then concluded that it was entitled to rely on an 1822 Indiana case because the decision "was available to the framers of the Oregon Constitution when they decided to adopt the Indiana ex post facto provision in our state constitution." *Id*. at 31 (also citing Blackstone's *Commentaries* and THE FEDERALIST). That method has been called reliance on "The Whopper" and a "fallacy of elitism." See Jack L. Landau, *A Judge's Perspective on the Use and Misuse of History in State Constitutional Interpretation*, 38 VAL U L REV 451, 479-81 (2004) ("Sometimes the courts employ the fiction that sources from other jurisdictions were, at least in a temporal sense, 'available' to the framers.")

The "framers of the Oregon Constitution intended for Article I, section 21, to proscribe four categories of penal laws: those that punish acts that were legal before enactment; those that aggravate a crime to a level greater than it was before enactment; those that impose greater or additional punishment than that annexed to the crime before enactment; and those that deprive a defendant of a defense that was available before enactment." *State v MacNab*, 334 Or 469, 475 (2002).

In 2009, the Oregon legislature changed the "look back" period for DUII diversion eligibility, to 15 years (it had been 10 years). The "purpose of the Oregon Vehicle Code is primarily remedial, not punitive." The "primary purpose" of the diversion lookback period is "not punitive." The "practical effect" also is not punitive, because "ex post facto protections are implicated only when the change in the law inflicts punishment 'not annexed to the crime at the time of commission," per *McNab*. Diversion is a procedure to avoid prosecution and punishment. Eligibility for diversion is not punishment. Changes in the criteria for diversion eligibility do not "increase punishment" for DUII under Article I, section 21, of the Oregon Constitution. *State v Carroll*, 253 Or App 265 (2012), *rev den* 353 Or 428 (2013).

11.7 Forfeitures

Oregon's Constitution contains a lengthy section called the "Oregon Property Protection Act of 2000." That section is in Article XV, section 10:
http://bluebook.state.or.us/state/constitution/constitution15.htm.

It was enacted as part of an initiative petition in 2000. Its purpose is listed in section 2:

> "Statement of principles: The People, in the exercise of the power reserved to them under the Constitution of the State of Oregon, declare that:
>
> "(a) A basic tenet of a democratic society is that a person is presumed innocent and should not be punished until proven guilty;
>
> "(b) The property of a person generally should not be forfeited in a forfeiture proceeding by government unless and until that person is convicted of a crime involving the property;
>
> "(c) The value of the property forfeited should be proportional to the specific conduct for which the owner of the property has been convicted; and
>
> "(d) Proceeds from forfeited property should be used for treatment of drug abuse unless otherwise specified by law for another purpose."

11.8 Punitive Damages

Punitive damages are limited by substantive due process under the Fourteenth Amendment. Note generally that due process under the Fourteenth Amendment has both substantive and procedural due process components. Procedural due process prevents mistaken or unjust deprivation and at a minimum requires fair notice and an opportunity to be heard. Substantive due process prohibits certain actions regardless of procedural fairness. *Zinermon v Burch*, 494 US 113, 125-26 (1990); *Carey v Piphus*, 435 US 247, 259 (1978); *County of Sacramento v Lewis*, 523 US 833, 845 (1998); *Mathews v Eldridge*, 424 US 319, 333 (1976).

11.8.1 Substantive Due Process

"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 under "substantive" due process. *Schwarz v Philip Morris, Inc.*, 348 Or 442, 458-59 (2010) (substantive due process places limits on punitive damages award). 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.

11.8.2 Oregon's Application

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).

As to the second *Gore* guidepost (the ratio between the punitive and compensatory damages awards), the Oregon Supreme Court has stated 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.'" "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." *Hamlin v Hampton Lumber Mills, Inc.*, 349 Or 526 (2011) (Court reinstated the jury's award for a thumb injury with a ratio of 22:1 (punitives to compensatories)).

200:1 ratio: In *Lithia Medford LM, Inc. v Yovan*, 254 Or App 307 (2012), the jury awarded $0 in economic damages, $100K in punitives, and $500 in noneconomic damages. That is a 200:1 ratio of compensatory to punitive damages. The *Lithia* court noted: "It is bedrock law that, in Oregon, calculating punitive damages is the function of the jury." The facts must be viewed in a way that favors the jury's award of $100K in punitives, under *Parrott v Carr Chevrolet, Inc.* 331

Or 537 (2001) (in *Parrott*, the Oregon Supreme Court affirmed a one million dollar punitive damages award with an $11,496 compensatory damages award, which is an 86:1 ratio). The 200:1 ratio in *Lithia* was deemed not "grossly excessive" based on similar claims. That 200:1 ratio "alone does not make the punitive damages award 'grossly excessive," because the US Supreme Court affirmed a 526:1 ratio in 1993, in *TXO Production Corp v Alliance Resources Corp*, 509 US 443 (1993). *Lithia Medford LM, Inc. v Yovan*, 254 Or App 307 (2012) (reversed and remanded for reinstatement of jury award).

600,000:1 ratio: In *Evergreen West Business Center, LLC v Emmert*, 254 Or App 361 (2012), *rev'd*, 354 Or 790 (2014), the jury returned a verdict for plaintiff of one dollar in compensatory damages and $600K in punitives. (That is a 600,000:1 ratio). The trial court reduced the award to four dollars, under *Goddard v Farmers Ins Co*, 344 Or 232 (2008) which suggests a 4:1 ratio is proper. The "familiar guideposts" of due process are: (1) reprehensibility; (2) disparity between harm to plaintiff and the punitives awarded; and (3) the difference between punitive damages and the civil penalties in comparable cases, as stated in *State Farm Mutual Ins Co v Campbell*, 538 US 408, 418 (2003). Defendant had a net worth of about 160 million dollars. He saw potentially large profits in breaching his fiduciary duties and made a calculated decision to do so. In addition, the jury heard about defendant's behavior in other business dealings. The jury's decision did not go beyond the state's interests. *See Arizona v Asarco, LLC*, 733 F3d 882 (9th Cir 2013) (reducing punitive damages from a 300,000:1 to a 125,000:1 ratio where compensatories were just one dollar). *Evergreen West Business Center, LLC v Emmert*, 254 Or App 361 (2012), *rev'd* 354 Or 790 (2014).

Chapter 12: 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

12.1 Origins

See David Schuman, *Oregon's Remedy Guarantee: Article I, section 10 of the Oregon Constitution*, 65 OR L REV 35 (1986).

See Jonathan M. Hoffman and Maureen Leonard, *Remedies Clause and Speedy Trial*, Oregon Constitutional Law Manual (2013), www.osbar.org/secured/barbooks/viewchapter.asp?bid=85&cid=2337.

12.2 Interpretation

"[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).

"*Smothers*, however, requires that the 'injury' that a modern remedy must restore is 'a wrong or harm for which a cause of action existed when the drafters wrote the Oregon Constitution in 1857.' 332 Or at 124. * * * [P]laintiff's injury in this case—as pleaded and determined by a jury—is not the sort for which a cause of action existed at that time. *Smothers* does not give us liberty to pick and choose which causes of action that existed in 1857 we now regard as 'outmoded.' It requires us to take the law as we find it as of that time." *Howell v Boyle*, 353 Or 359, 388 (2013).

"[N]ot every constitutional provision can be reduced to a neat formula that avoids the necessity of applying careful judgment to the facts and circumstances of each case." *Howell*, 353 Or at 388. In *Howell*, a plaintiff suffered injuries in a pedestrian-versus-police car collision with police officer Boyle. A jury found that plaintiff and Boyle were equally at fault and that plaintiff's damages totaled approximately $1 million. The trial court reduced the award by half, in accordance with the jury's findings of 50% comparative fault. Defendants then moved to reduce the award further, to the $200,000 limit of the Oregon Tort Claims Act then in existence. The trial court denied the motion, concluding that applying the statutory limitation would violate the remedy clause of Article I, section 10, of the Oregon Constitution. The Oregon Supreme Court concluded that an award of $200,000 under this case did not violate Article I, section 10, of the Oregon Constitution. That is because "the constitution requires that any remedy that remains after the imposition of a modern limitation on it be 'substantial.' In this case, the $200,000 judgment that plaintiff received satisfies that constitutional requirement." *Id.* at 362.

Article I, section 10, applies to natural persons only, not to corporations. *Liberty Northwest Ins. Corp. v Oregon Ins. Guarantee Assoc.*, 206 Or App 102 (2006).

12.3 Caps

To comply with the Remedy Clause, the remedy remaining after a cap must be "substantial." In *Howell v Boyle*, 353 Or 359 (2013), "[b]ut for" the damage cap in ORS 31.270, a plaintiff would have recovered $507K. The damages cap allowed for only $200K. The Court considered that remaining sum to be substantial. "The damage limitation thus does not leave plaintiff 'wholly without a remedy,'" the Court decided. The remedy just has to be "substantial." *Greist v Phillips*, 322 Or 281 (1995) interpreted the Remedy Clause as guaranteeing that plaintiffs "not be left 'wholly without remedy'" rather than with "a whole remedy." "The fact is that not every constitutional provision can be reduced to a neat formula that avoids the necessity of applying careful judgment to the facts and circumstances of each case." *Howell v Boyle*, 353 Or 359 (2013).

12.4 Contributory Negligence

Smothers v Gresham Transfer, Inc., 332 Or 83 (2001) requires a court to consider whether the common law in Oregon in 1857 would have recognized a plaintiff's claim.

In *Schutz v La Costita III, Inc.***,** 256 Or App 573 (2013), the court considered a claim against a bar for injuries sustained after drunk driving. "Even if there had been a cause of action against alcohol purveyors for injuries sustained as a result of negligently served alcohol in first-party cases such as this one, the action would have been foreclosed by the well-settled doctrine of contributory negligence, if not also by assumption of the risk." The "extensive and detailed dicta" in *Howell v Boyle*, 353 Or 359 (2013), concluded that contributory negligence was a "complete bar" to mid-19th century negligence claims. Although that aspect of *Howell* was "pure dicta," the Court of Appeals felt it would be "imprudent to ignore it." *Schutz v La Costita III, Inc.***,** 256 Or App 573 (2013).

12.5 Workers' Compensation

The remedy clause of Article I, section 10, entitles plaintiff to bring a civil negligence claim in circuit court, despite ORS 656.018 (the workers' comp exclusive-remedy statute). *Smothers v Gresham Transfer, Inc.*, 332 Or 83 (2001). Workers' claims for negligence against employers and negligence per se were recognized in *Smothers*. *Alcutt v Adams Family Food Services, Inc.*, 258 Or App 767 (2013).

12.6 Wrongful Death

The Oregon "legislature is entitled to amend the amount of damages available in a statutory wrongful death action without running afoul of Article I, section 10, as long as the plaintiff is not left without a substantial remedy." "The remedy for wrongful death is substantial, not only because 100 percent of economic damages plus up to $500,000 in noneconomic damages is a substantial amount, but also because the statutory wrongful death action in Oregon has had a low limit on recovery for 113 years of its 133-year history. * * *[T]he wrongful death claim came into existence with a limitation, and the highest previous limitation (1961-1967) was $25,000. In relation to that history, the present remedy is substantial." *Greist v Phillips*, 322 Or 281 (1995).

Chapter 13: Error

"**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

13.1 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). 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)).

The "test for affirmance despite error" is: "Is there little likelihood that the particular error affected the verdict?" *State v Davis*, 336 Or 19 (2003) (held: the trial court should not have admitted the physician's diagnosis of child sex abuse under the circumstances of this case; error was not harmless); *State v Gibson*, 338 Or 560, 576, *cert denied*, 546 US 1044 (2005). Whether the erroneous exclusion of evidence is "harmless" depends on the content and character of evidence, as well as the context in which it was offered. Erroneous exclusion of evidence that is "merely cumulative" of admitted evidence and not "qualitatively different" than admitted evidence generally is harmless. *State v Davis*, 336 Or 19, 32-34 (2003).

In assessing whether the admission of *hearsay* testimony was error and whether an erroneous admission was harmless, courts "describe and review all pertinent portions of the record, not just those portions most favorable to [the state]." *State v Eckert*, 220 Or App 274, 276 *rev den*, 345 Or 175 (2008); *State v Villenueva-Villenueva*, 262 Or App 530 (2014) (no mention of statute or constitution).

Harmless error analysis 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).

13.2 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).

"A federal constitutional error does not require reversal 'if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.' *State v. Cook*, 340 Or 530, 544, 135 P3d 260 (2006)." *State v Cuevas*, 263 Or App 94 (2014).

13.3 Statutory harmless error

13.3.1 Criminal

"Harmless error" standards are 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."

13.3.2 Civil

ORS 19.415(2) provides: "No judgment shall be reversed or modified except for error substantially affecting the rights of a party." Under that legislative directive, appellate courts "will reverse a trial court's decision only if the purported error substantially affected the aggrieved party's rights. '[E]videntiary errors substantially affect a party's rights and 13 require reversal when the error has some likelihood of affecting the jury's verdict.'" *Dew v Bay Area Health District*, 248 Or App 244, 258 (2012); *Bazzaz v Howe*, 262 Or App 519 (2014).

"In determining whether error is harmless," the court "examines whether it is likely that a trial court's error affected the outcome of the case below." *Baker v English*, 324 Or 585, 590 (1997); *Ramirez v Northwest Renal Clinic*, 262 Or App 317 (2014). Courts evaluate the error based on the lower-court proceedings, rather than make "a prediction about potential proceedings in the future." *Ramirez*.

13.4 Preservation and Error

Usually appellate courts will not address the merits of an assignment of trial-court error unless the point was raised (preserved) in the trial court.

ORAP 5.45(1) provides: "[n]o matter claimed as error will be considered on appeal unless the claimed error was preserved in the lower court * * *." *See Ailes v Portland Meadows, Inc.*, 312 Or 376, 380, 823 P2d 956 (1991) (noting that, generally, an issue must have been preserved in the trial court for the appellate court to address it on appeal). The Court of Appeals states that it has a "duty to determine, *sua sponte*, whether the arguments that an appellant raises on appeal are adequately preserved for our review." *State v Cossette*, 256 Or App 675, 680 (2013); *Field v Coursey*, 264 Or App 724 (2014) (so stating).

That preservation requirement "gives a trial court the chance to consider and rule on a contention, thereby possibly avoiding an error altogether or correcting one already made, which in turn may obviate the need for an appeal." *Peeples v Lampert*, 345 Or 209, 219 (2008). That rule "also ensures fairness to opposing parties, by requiring that the positions of the parties are presented clearly to the initial tribunal." *State v Walker*, 350 Or 540, 548 (2011); *State v Rose*, 264 or App 95, 100-01 (2014).

An exception to that preservation rule is "plain error" or "an error of law apparent on the record" under ORAP 5.45(1). "Plain error" must be apparent on the face of the record. *State v Brown*, 310 Or 347, 355 (1990).

"An error is plain if it is a legal error that is obvious or not reasonably in dispute and the court need not go outside the record or select among competing inferences to discern it. *State v Brown*, 310 Or 347, 355, 800 P2d 259 (1990). If we conclude that an asserted error is plain, we must determine whether to exercise our discretion to address the error. *Ailes v Portland Meadows, Inc.*, 312 Or 376, 382, 823 P2d 956 (1991)." *State v Birchard*, 251 Or App 223 (2012). Factors to determine if discretion should be exercised include "the competing interests of the parties; the nature of the case; the gravity of the error; the ends of justice * * *; how the error came to the court's attention; and whether the policies behind the general rule requiring preservation of error have been served in the case another way, i.e., whether the trial court was * * * presented with both sides of the issue and given an opportunity to correct any error. *Ailes*, 312 Or at 382 n 6.

Appellate courts assess plain error "by reference to the law as of the time the appeal is decided" rather than the law at the time of the disputed trial court ruling. *State v Jury*, 185 Or App 132, 136 (2002), *rev den* 335 Or 504 (2003); *State v Tilden*, 252 Or App 581 (2012).

An error, preserved or not, is "grave" if the evidence is insufficient to convict. The "entry of a criminal conviction without sufficient proof * * * is of constitutional magnitude." *State v Reynolds*, 250 Or App 516, 522 (2012); *State v Tilden*, 252 Or App 581 (2012) (same). A defendant "obviously has a significant interest in not being convicted of a crime that the state did not prove, while the state has no conceivable interest in upholding [an] erroneous conviction." *Tilden*, 252 Or App 581 (2012).

A trial court may impose fees and costs on a defendant if it finds that the defendant "is or may be able to pay" the fees and costs. ORS 161.665(4); ORS 151.505(3). It is plain error for a trial court to order a criminal defendant to pay court-appointed attorney fees without finding that the defendant has the ability to pay those fees. *State v Coverstone*, 260 Or App 714, 716 (2014); *State v Delgado-Juarez*, 263 Or App 706, 707 (2014); *State v Ramirez-Hernandez*, 264 Or App 346 (7/23/14); *State v Below*, 264 Or App 384 (7/23/14).

A trial court's failure to inform even a represented party at a civil commitment hearing of her right to subpoena witnesses, as required under ORS 426.100(1)(d), by using the word "subpoena," is plain error that is not harmless. *State v V.B.*, 264 Or App 621 (8/13/14); *State v Z.A.B.*, 264 Or App 779 (8/13/14).

"[I]t is plain error for a trial court to not strike explicit vouching testimony *sua sponte*. *See State v Milbradt*, 305 Or 621, 630, 756 P2d 620 5 (1988) ('We suggest in the future that if counsel attempts to elicit [testimony commenting on the credibility of a witness,] the trial judge, *sua sponte*, should summarily cut off the inquiry before a jury is contaminated by it.'); *State v Higgins*, 258 Or App 8 177, 178 (2013), *rev den*, 354 Or 700 (2014) (plain error to not strike mother's testimony that she 'knew for sure' that her daughter was not lying when the daughter said that the defendant had raped her); *B. A. v Webb*, 253 Or App 1, 12 (2012), *rev den*, 353 Or 428 (2013) (plain error for trial court to fail to strike testimony that the witness had 'no doubt' what the complainant told her was the "absolute truth" because that testimony constituted 'explicit vouching for [the complainant's] credibility' and a 'blatant and pervasive violation of the *Middleton/Milbradt* proscription'); *Hollywood*, 250 Or App at 678-79; *Lowell*, 249 Or 16 App at 366-70; *see also Kellar*, 315 Or at 278-79 (court plainly erred in failing to strike testimony by physician of child witness that '[t]here was no evidence of leading or coaching or fantasizing' and that the child 'was obviously telling you about what happened to her body'"); *State v McQuisten*, 97 Or App 517, 519-20, 776 P2d 1304 20 (1989) (concluding that trial court 'had a duty, *sua sponte*, not to allow testimony' from police officer that 'it is pretty hard for [a sexual assault victim] to fabricate those feelings' and that the complainant was showing 'very true emotions and signs' of sexual abuse, because 'the jury could reasonably have drawn the inference that the officer believed the story of the complaining witness, bolstering her credibility in its estimation')." *State v Wilson*, __ Or App __ (10/22/14) (not plain error for the trial court to fail to strike, *sua sponte*, testimony that a rape victim's demeanor was "not fake").

13.5 Invited Error

"The doctrine of invited error 'usually is invoked when a party has invited the trial court to rule in a particular way, under circumstances that suggest that the party will be bound by the ruling or at least will not later seek a reversal on the basis of it.'" *State v Kinney*, 264 Or App 612 (2014) (quoting *State v Ferguson*, 201 Or App 261, 269, *rev den* 340 Or 34 (2005) and *Anderson v Oregon Railroad Co.*, 45 Or 211, 217 (1904)).

Therefore, when a party on appeal actively brought on what he now calls "error," the appellate courts usually will not entertain the claim of error. *Ibid*. So, for example, if a party "had affirmatively misstated

the law, and the trial courts had relied on those misstatements to take the action that they did," the appellate courts likely will decline to exercise their discretion to consider the allege errors. *Ibid.* (citing several cases).

If the Court of Appeals determines that it is "not required to consider" errors, it may then "decline to review them" if the defendant invited the errors. *State v Kinney*, 264 Or App 612 (8/13/14).

13.6 Effect of Pleas on Remand

A defendant who prevails on appeal may withdraw his or her guilty plea. ORS 153.335(3); *State v Kinney*, 264 Or App 612 (2014).

Chapter 14: 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

> "**We declare that all men, when they form a social compact are equal in right** * * *."
> -- Article I, section 1, Or Const

See Erin C. Lagesen, *Equal Privileges and Immunities*, Oregon Constitutional Law Manual (2013), www.osbar.org/secured/barbooks/viewchapter.asp?bid=85&cid=2336.

14.1 Introduction

Article I, section 20, prohibits two types of unequal treatment: "first, to any citizen, and second, to any class of citizens." *State v Clark*, 291 Or 231, 237, *cert denied* 454 US 1084 (1981). Article I, section 20, "applies to government actions generally, including prosecutors making charging decisions." *State v Savastano*, 354 Or 64 (2013).

14.2 Classes of Citizens

Article I, section 20, "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, *cert denied* 454 US 1084 (1981). Class-based claims under Article I, section 20, are similar to Equal Protection claims: a person claims that he or she is unlawfully denied a privilege or immunity based on the person's membership in some societally-recognized class such as race, religion, or gender. *Id.*

14.3 Individuals

To make an individual–based claim under Article I, section 20, "a defendant must initially show that the government 'in fact denied defendant individually * * * [an] equal privilege * * * with other citizens of the state similarly situated.'" *State v Savastano*, 354 Or 64 (2013) (quoting *State v Clark*, 291 Or 231, 237, *cert denied* 454 US 1084 (1981)). "An agency or official's decision will comply with Article I, section 20, 'as long as no discriminatory practice or illegitimate motive is shown and the use of discretion has a defensible explanation' in the individual case." *Savastano* (quoting *Clark*). "An executive official's decision will be 'defensible' when there is a rational explanation for the differential treatment that is reasonably related to the official's task or to the person's individual situation." *Savastano*.

"Article I, section 20, does not require consistent adherence to a set of standards or a coherent, systematic policy" but does "require government to treat similarly situated people the same. A government decision-maker will be in compliance with Article I, section 20, as long as there is a rational explanation for the differential treatment that is reasonably related to his or her official task or to the person's individual situation." *Savastano* overruled *State v Freeland*, 295 Or 367 (1983) and reaffirmed *State v Clark*, 291 Or 231, *cert denied* 454 US 1084 (1981).

"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." *State v Davis*, 237 Or App 351, 361 (2010), *aff'd by an equally divided court*, 353 Or 166 (2013). In *Davis*, "defendant's license plates were run as part of the deputy's normal activity of investigating for stolen vehicles. In the course of that activity, *any* driver who happened to be

coming out of the parking lot at that moment would have been subject to the same scrutiny. There was nothing arbitrary or whimsical about the deputy's decision to run defendant's license plates; rather, that decision was 'random'- in the deputy's words- only in the sense that, because of the juxtaposition of time and place, the plates that were run were defendant's, and not some other citizen's. So understood, we cannot conclude that defendant was denied any privilege or immunity on the same terms as other citizens-the benchmark of Article I, section 20. *See Clark*, 291 Or. at 246 ('We do not believe equal protection goes so far as to require previously stated standards as long as no discriminatory practice or illegitimate motive is shown and the use of discretion has a defensible explanation.'). *Davis*, 237 Or App at 261.

14.4 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 2010).

Chapter 15: 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

15.1 Introduction

See Denise G. Fjordbeck, Stephanie Striffler, Patrick M. Ebbett, and Jona J. Maukonen, *Takings*, Oregon Constitutional Law Manual (2013), www.osbar.org/secured/barbooks/viewchapter.asp?bid=85&cid=2347.

"A 'taking' of property is a shorthand description for an exercise of the government's power of eminent domain, which is the power of the sovereign to take property for 'public use' without the property owner's consent. *Coast Range Conifers v Board of Forestry*, 339 Or 136, 142-43, 117 P3d 990 (2005)." *Dunn v City of Milwaukie*, 355 Or 339, 346 (2014); *Hall v Dep't of Transportation*, 355 Or 503, 510 (2014).

Under the federal Constitution: "The [federal] Takings Clause is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' *Armstrong* v *United States*, 364 US 40, 49 (1960)." *Arkansas Game and Fish Comm'n v United States*, 133 S Ct 511 (2012).

"A public body that takes private property for public use must pay the property owner 'just compensation.' Or Const, Art I, § 18." *City of Harrisburg v Leigh*, 254 Or App 558 (2013).

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). "Article I, section 18, is not the source of the state's eminent domain power." *Dunn v City of Milwaukie*, 355 Or 339 (2014).

15.2 Condemnation

15.2.1 Eminent Domain

"Typically, government exercises its eminent domain power by initiating a condemnation proceeding and, through that proceeding, compensating a property owner before appropriating property for a public purpose." *Hall v Dep't of Transportation*, 355 Or 503, 510 (2014); *Dunn v City of Milwaukie*, 355 Or 339, 346 (2014); *Cereghino v State Highway Comm'n*, 230 Or 439, 443-44 (1962). Governmental units exercise that authority through condemnation proceedings in ORS chapter 35. *City of Bend v Juniper Utility Company*, 242 Or App 9 (2011). The state's condemnation authority arises under Article I, section 18, of the Oregon Constitution. *Cf. State v Alderwoods (Oregon), Inc.*, 265 Or App 572, 584 n 1 (2014) (Sercombe, J., concurring) (per curiam).

State v Alderwoods (Oregon), Inc., 265 Or App 572 (Washington) (9/17/14) (per curiam) (aff'd by an equally divided court) The state filed a complaint in eminent domain, seeking to acquire a temporary construction easement on defendant's property in Tigard plus all rights of

access between defendant's property and Highway 99W. The property had two driveways to the highway. The state closed the driveways and put in curbed sidewalks, and required defendant to obtain a permit for any further driveways. Before trial, the state filed a motion in limine to exclude evidence of any loss of value of defendant's property caused by the driveway closures. The state's position was that defendant had no private property interest in the driveways, so there was no Article I, section 18, "taking" for those driveways. The trial court granted the motion.

Defendant and the state then stipulated that defendant was entitled to an award of $11,792 as just compensation for the temporary construction easement over defendant's land.

The Court of Appeals affirmed by an equally divided court in three lengthy separate opinions: two concurrences and one dissent. Judge Armstrong, concurring for himself, Ortega, Duncan, DeVore, and Garrett, wrote: "it is well established in Oregon that governmental regulation or modification of a road for purposes that denies a landowner access to the road does not give rise to a compensable taking of the owners' access right." Defendant "was not entitled to recover damages measured by a loss of access that it does not have."

Judge Sercombe, concurring, wrote: "We start with a proposition to which all agree: As a matter of eminent domain law, there is no right to compensation for a loss or restriction of access to an abutting street if access to the property is not completely eliminated by the project for which other property is being condemned." Judge Sercombe further wrote: The "only property interest in street access held by an abutter at common law is a general, unfixed, right to access the street. That is, a general right of access to the street exists either directly from the frontage of the property along the street or indirectly from a private or public approach that borders the property. Unless a government takes that entire interest – both the direct and indirect access – no compensation is owed under Article I, section 18." He concluded: "No compensation is owed to defendant under Article I, section 18, for the loss of the use of its driveways because defendant has no particular 'private property' right to use those driveways to travel to and from the highway and, because defendant retains access through [another side way], the state's action does not take defendant's general right of access to the highway. The dissent does not disagree with that constitutional analysis. It concludes, however, that defendant has a statutory property right to use the driveways."

Dissenting, Judge Wollheim, Haselton, Nakamoto, Egan, Tookey, and Schuman would have remanded to allow defendant to prove the amount of damages as a result of the state's condemning defendant's property. "A taking can also occur through governmental regulation that has the effect of rendering one's property valueless * * *also known as a 'regulatory taking.'" "Contrary to Judge Sercombe's concurrence, it is well settled that, at common law, a landowner whose property abuts a public highway has a right of direct access to the highway to the property. That right of access is treated at common law as a property right analogous to an easement and cannot be extinguished through condemnation without compensation." The dissent noted that on appeal, the state describes its action as just "the elimination of curb cuts" but the state did not purport merely to regulate defendant's highway access by "the elimination of curb cuts." In this action, "the state sought also to acquire defendant's abutter's right of access through eminent domain." The state's view is that "an acquisition of access to a public highway is simply a way by which the state regulates public highways, and results in a compensable taking only if it results in a total loss of economic value and viable use of the property. Respectfully, the state's argument confuses the state's power of eminent domain, through which the state acquires a property owner's interest, with the state's regulatory power, through which the state regulates highways for the public safety. In the regulatory context, it is well established that no compensation is due when the government undertakes to regulate an abutting property owner's access, unless the owner's loss of use of the property is virtually total." But here "the state *condemns* the right of access" and that analysis is different. "Condemnation results in a taking of the easement for access."

15.2.2 Just What is "Just Compensation"?

"Standards of just compensation vary by locality, but generally demand market value as seen by an unpressured seller. For example, the federal standard for just compensation is 'what a willing buyer would pay in cash to a willing seller at the time of the taking.'" Alec Harris, Redemption and Return on Investment: Using Eminent Domain in the Underwater Mortgage Fight, 8 HARVARD LAW & POLICY REVIEW 437, 453 (2014) (quoting *United States v 564.54 Acres of Land*, 441 US 506, 511 (1979) citing *United States v Miller*, 317 US 369, 374 (1943)).

Governmental units exercise eminent domain authority through condemnation proceedings in ORS chapter 35 and must provide "just compensation" to the property owner based on the fair market value of the property being "taken." *City of Bend v Juniper Utility Company*, 242 Or App 9 (2011). The "[a]ppropriateness of a particular valuation method or combination of methods is not determined by fixed principles of law, but is a factual determination that depends on the record developed in each case." *Id.* at 20–21.

In a "total taking" for public use, the owner receives "the fair cash market value of the land" which includes "any improvements thereon." *City of Harrisburg v Leigh*, 254 Or App 558 (2013). The property is valued on the date the condemnation action is filed or the date the condemnor entered and appropriates the property, whichever is first. *Id.*

Valuation of "property is measured as of the date the condemnation action is commenced or the date the condemnor enters on and appropriates the property, whichever first occurs." *State v Lundberg*, 312 Or 568, 574 n 6, *cert denied*, 506 US 975 (1992); *City of Harrisburg v Leigh*, 254 Or App 558 (2013). Note: *Lundberg* was decided under the federal constitution, and the Court assumed the analysis would be the same under the Oregon Constitution. The *Leigh* court, conversely, applied the state constitution without noting that *Lundberg* was decided under the federal constitution.

Where "there is a total taking of the land for public use, the owner is to be compensated by receiving the fair cash market value of the land, which includes the land itself and any improvements thereon which are a part of the realty." *Highway Comm'n v Holt*, 209 Or 697, 699 (1957).

"Just compensation is full remuneration for loss or damage sustained by an owner of condemned property. It is the fair market value of the condemned property or the fair market value of that of which the condemnee has been deprived by reason of the acquisition of the condemnee's property. *State Highway Comm v Hooper*, 259 Or 555, 560 (1971). In the case of a partial taking of property, the measure of damages is the fair market value of the property acquired plus any depreciation in the fair market value of the remaining property caused by the taking. *Id.* Fair market value is defined as the amount of money the property would bring if it were offered for sale by one who desired, but was not obliged, to sell and was purchased by one who was willing, but not obliged, to buy. *Highway Comm. v Superbilt Mfg. Co.*, 204 Or 393, 412 (1955) (citing *Pape v Linn County*, 135 Or 430, 437 (1931)). Just compensation requires that valuation of property be based on its highest and best use. Highest and best use is that which, at the time of appraisal, is the most profitable likely use of a property. It may also be defined as that available use and program of future utilization which produces the highest present land value." *Lundberg*, 312 Or at 574.

Note: In *Lundberg*, at footnote 4, the Oregon Supreme Court wrote: "Defendants also relied on Article I, section 18, of the Oregon Constitution, which provides that '[p]rivate property shall not be taken for public use * * * without just compensation.' Defendants, however, do not suggest any different analysis under the Oregon Constitution than under the United States Constitution. Therefore, we assume for purposes of this case, without deciding, that the analysis would be the same under the Oregon Constitution."

"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)).

Dedications. 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).

15.3 Inverse Condemnation

A "condemnation" action is commenced by the state or its instrumentality to acquire private interests in land for public use. *See, e.g., State v Alderwoods (Oregon), Inc*., 265 Or App 572 (2014) (Armstrong, J., concurring) (per curiam).

In *Emmert v Clackamas County*, No. 3:13-cv-01317-HU (6/24/14), the District Court summarized inverse condemnation in Oregon and federal courts:

> "'Inverse condemnation is simply a popular term for a takings claim in which the government has taken property without formal condemnation proceedings.' *W. Linn Corporate Park, LLC v. City of W. Linn*, 428 Fed App'x 700, 701 n2 (9th Cir 2011). The criteria for an unconstitutional taking are not necessarily identical under the provisions of the state and federal constitutions, however. *Ferguson v. City of Mill City*, 120 Or App 210, 213 (1993). Indeed, [t]he Oregon Supreme Court has observed that the 'basic thrust' of the two constitutional provisions 'is generally the same' but has cautioned that the 'criteria' used to determine if a 'taking for public use' has occurred within the meaning of the Oregon Constitution 'are not necessarily identical to those pronounced from time to time by the United States Supreme Court under the fifth amendment.' *Schoonover v. Klamath County*, 105 Or App 611, 614 (1991) (citing *Suess Builders v. City of Beaverton*, 294 Or. 254, 259 n.5 (1982)).
>
> "An example that illustrates the importance of the distinction is *David Hill Development, LLC v City of Forest Grove*, 688 F Supp 2d 1193 (D Or 2010), where Judge Acosta undertook separate state and federal takings analyses and ultimately granted summary judgment on the plaintiff's state law inverse condemnation claim and denied summary judgment on the plaintiff's federal inverse condemnation claim. *Id.* at 1197 & 1209-11. Later in his opinion, Judge Acosta also noted that state law takings claims are subject to a six-year statute of limitations under ORS 12.080(4), while federal takings claims brought under § 1983 are governed by Oregon's two-year statute of limitations for personal injury claims. *Id.* at 1223.
>
> "In the Ninth Circuit, '[t]aking claims must be brought under § 1983.' *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F3d 651, 655 (9th Cir 2003); *Golden Gate Hotel Ass'n v. City & County of San Francisco*, 18 F3d 1482, 1486 (9th Cir 1994) * * *. 'To state a claim under § 1983, a plaintiff must allege two essential elements—that a right secured by the Constitution or laws of the United States was violated; and that the alleged violation was committed by a person acting under the color of state law.' *Taylor v. Fields*, No. C 14-0411 PJH, 2014 WL 644557, at *4 (N.D. Cal. Feb. 19, 2014) (citing *West v. Atkins*, 487 U.S. 42, 48 (1988))." *Emmert v Clackamas County*, slip op at 11-13, see https://www.docketalarm.com/cases/Oregon_District_Court/3--13-cv-01317/Emmert_v._Clackamas_County/26/.

"Typically, government exercises its eminent domain power by initiating a condemnation proceeding and, through that proceeding, compensating a property owner before appropriating property for a public purpose." *Hall v Dep't of Transportation*, 355 Or 503, 510 (2014).*Dunn v*

City of Milwaukie, 355 Or 339 (2014); *Cereghino v State Highway Comm'n*, 230 Or 439, 443-44 (1962). When "the government takes property interests through its actions without first initiating condemnation proceedings," "the property owner can bring an inverse condemnation action to obtain the just compensation that Article I, section 18, guarantees." *Hall*, 355 Or at 510; *Dunn*, 355 Or at 346-47 (citing *Cereghino v State Highway Comm'n*, 230 Or 439, 444 (1962)).

In Oregon state courts, inverse condemnation claims have a six-year statute of limitations. *The Foster Group, Inc. v City of Elgin, Oregon*, 264 Or App 424, 441 (7/30/14). But federal takings claims brought under § 1983 are governed by Oregon's two-year statute of limitations for personal injury claims. *David Hill Development, LLC v. City of Forest Grove,* 688 F. Supp. 2d 1193, 1223 (D Or 2010); Emmert v Clackamas County,

15.3.1 Oregon Constitution

15.3.1.A "Different Standards to Different Categories"

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." *Mossberg v University of Oregon*, 240 Or App 490 (2011). "Inverse condemnation is the popular description of a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." *Thornburg v Port of Portland*, 233 Or 178, 180 n 1 (1962); *West Linn Corporate Park v City of West Linn*, 349 Or 58, 64, 240 P3d 29 (2010). *Hall v State of Oregon*, 355 Or 503, 506 n 1 (2014).

The Oregon Supreme Court "has distinguished among de facto takings [inverse condemnation] depending on the nature of the governmental action that gave rise to the claim,and it has applied different standards to different categories of governmental actions." *Hall*, 355 Or at 511.

In other words, the Court's standards have been all over the map. Any case predating *Hall* should be interpreted through *Hall*. In *Hall*, the Court tried to organize its cases into three categories:

> (1) physical occupation that causes a substantial interference with use and enjoyment, such as nuisance and trespass;
>
> (2) regulations that restrict possession, enjoyment, or use that result in no economically viable use or substantial beneficial use; and
>
> (3) zoning or planning for eventual public use that reduces the property's value only if the owner "is precluded from all economically feasible private uses pending eventual taking for public use or the governmental intrusion inflicts virtually irreversible damage . *Hall*, 355 Or at 511-12 & 522.

(1) "Deprivation of All Economically Viable Use." "[T]here are at least two different ways in which governmental action may result in a 'taking' by inverse condemnation under Article I, section 18, of the Oregon Constitution. The first arises when a present governmental action creates an expectation that the private land in question eventually will be taken for a public use. *See Fifth Avenue Corp. v Washington Co.*, 282 Or 591, 613 (1978) (illustrating concept). In such circumstances, a property owner must prove that the owner is precluded from "all economically feasible private uses [of the property] pending eventual taking for public use" or that "the designation [of the property for eventual public use] results in such governmental intrusion as to inflict virtually irreversible damage." *Fifth Avenue Corp*, 282 Or at 613-14.

"The second category of 'takings' by inverse condemnation occurs when the government acts to 'intervene[ ] to straighten out situations in which the citizenry is in conflict over land use or where

one person's use of his land is injurious to others.' *Fifth Avenue Corp*., 282 Or at 613. To establish a 'taking' in the latter context, the test is essentially the same as under the former: The property owner must show that the application of the government's particular choice deprives the owner of all economically viable use of the property. *Fifth Avenue Corp*., 282 Or at 609, 613. If the owner has 'some substantial beneficial use' of the property remaining, then the owner fails to meet the test. *Dodd v Hood River County*, 317 Or 172, 184-86 (1993)." *Boise Cascade Corp v Board of Forestry*, 325 Or 185, 197-98 (1997) (emphasis added).

(2) "Substantial Interference." "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." *Vokoun v City of Lake Oswego*, 335 Or 19, 26 (2002). The plaintiff is required to show "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." *Id.* at 27. In *Hall*, the Oregon Supreme Court categorized *Vokoun* as a physical occupation case that substantially interfered with the owner's use and enjoyment. *Hall*, 355 Or at 511. Hall also put these cases into the physical occupation category that requires only proof of substantial interference: *Thornburg v Port of Portland*, 233 Or 178 (1963) (nuisance), *Morrison v Clackamas County*, 141 Or 564 (1933) (trespass), *Kurtz v Southern Pacific Co*, 80 Or 213 (1916) (encroachments), and *Mosier v Oregon Navigation Co*, 39 Or 256 (1901) (encroachments).

(3) "No Economically Viable Use or Substantial Beneficial Use." *Hall* organized its prior cases into a category of "government zoning or planning actions involving the designation of private property for eventual public use" that "result[s] in a reduction in the property's value." *Hall*, 355 Or at 511. In those cases, "the owner is entitled to compensation if, and only if: '(1) he [or she] is precluded from all economically feasible private uses pending eventual taking for public use; or (2) the designation results in such governmental intrusion as to inflict virtually irreversible damage." *Id.* at 511-12, 522. *Hall* listed *Fifth Avenue Corp v Washington County*, 282 Or 591 (1978) and *Suess Builders Co v City of Beaverton*, 294 Or 254 (1982) as "applying that standard." *Hall* quoted *Fifth Avenue* to state the "generally accepted rule" that "mere plotting or planning in anticipation of a public improvement does not constitute a taking or damaging of property affected." *Hall*, 355 Or at 518. There are two exceptions to that general rule, per *Hall*: **(a)** actions that "preclude an owner form all economically feasible private uses pending an eventual taking by eminent domain," such as "condemnation blight," as in *Coast Range Conifers*, 339 Or at 147 n 12 and *Suess Builders*, 294 Or at 257-58; and (b) "precondemnation government action results in a physical occupation of private property or invasion of private property rights that substantially interferes with an owner's rights of exclusive possession and use," as discussed in *Fifth Avenue*, 282 Or at 613-14 & n 17 and *Lincoln Loan*. *Hall*, 355 Or at 519-22.

> ***Hall v State of Oregon***, 355 Or 503 (5/30/14) (Brewer) (Linn) Plaintiffs brought an inverse condemnation action related to ODOT's precondemnation designation of their property for eventual public use. A jury awarded plaintiffs over $3 million in damages. ODOT appealed. The Court of Appeals reversed, holding that no taking had occurred.
>
> The Oregon Supreme Court affirmed the Court of Appeals' decision. Under *Fifth Avenue*, ODOT's actions do not meet the standards to prove an inverse condemnation taking unless plaintiffs prove that ODOT's actions "deprived them of all economically viable use of their property or invaded their property rights so as to substantially interfere with its use and enjoyment." *Id.* at 522-23. Plaintiffs did not meet that standard: they sold and received income from billboards on the property. "Because plaintiff's property retained some economically viable use, plaintiffs could not establish a cognizable de facto taking by condemnation blight." *Id.* at 523 (citing *Coast Range Conifers*, 339 Or at 147 n 12 and *Suess Builders*, 294 Or at 260). Plaintiffs also failed to present any evidence that ODOT's actions were a nuisance that substantially interfered with their use and enjoyment of their property thus reducing its value. They did not allege physical occupation or invasion as in *Thornburg* and *Lincoln Loan*. Finally, plaintiffs allege that ODOT had a malicious purpose but that is irrelevant. "Governmental entities can be liable for intentional torts

that do not amount to a taking of property." *Id*. at 524 nn 2 & 8 (citing *Gearin v Marion County*, 110 Or 390 (1924)).

15.3.1.B Takings Elements

There "is no unitary test for takings claims, and the test varies with the nature of the claim." *Dunn v City of Milwaukie*, 355 Or 339 (2014). Tests the Oregon Supreme Court has identified in *Dunn* and *Hall v State of Oregon*, 355 Or 503 (2014) include these cases:

- Physical invasion of property: *Dunn v City of Milwaukie*, 355 Or 339 (2014)
- Other physical occupations:
  - *Cereghino v State Highway Comm'n*, 230 Or 439, 446 (1962)
  - *Kurtz v Southern Pacific Co.*, 80 Or 213 (1916)
  - *Mosier v. Oregon Navigation Co.*, 39 Or 256 (1901)
- Regulation or planning: *Dodd v Hood River County*, 317 Or 172, 182 (1993).
- Nuisance: *Thornburg v Port of Portland*, 233 Or 178, 180 (1963).

Intent – Not Negligence – Required. "[N]egligence alone will not support a claim for inverse condemnation and that intent to take is an element of such a claim." The "government's conduct must be 'tantamount to a public appropriation' of property" in nature and degree (citing *Coast Range Conifers*). "The power of eminent domain is affirmative in nature. It is a power exercised for a particular purpose - the public's benefit – and intentionally. The idea that the sovereign's power of eminent domain could be exercised through error, accident, or inadvertence, is at odds with the nature of the power itself. Inadvertent and unintended acts give rise to liability, if at all, as ordinary torts, not takings." *Dunn v City of Milwaukie*, 355 Or 339 (2014) (no citation).

Damages. Damages for takings and under ORS 197.796 are determined as of the date of the injury. *Brown v City of Medford*, 251 Or App 42 (2012).

Doctrine of Unconstitutional Conditions. The doctrine of unconstitutional conditions "provides that 'the government may not require a person to give up a constitutional right – [such as] the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property.'" (Citing *Lingle v Chevron USA*, 544 US 528, 547 (2005)). It "is the imposition of that unconstitutional condition – and not the later physical invasion of the property – that violates a property owner's rights." *Brown v City of Medford*, 251 Or App 42 (2012).

15.3.1.C Exactions

Two cases establish a two-part test for assessing the constitutionality of a government exaction of a dedication of private property: First, the exaction must substantially advance the same government interest that would furnish a valid ground for denial of the development permit – also known as the 'essential nexus' prong of the test, *Nollan v California Coastal Comm'n*, 483 US 825, 836-37 (1987). Second, the nature and extent of the exaction must be 'roughly proportional' to the effect of the proposed development, *Dolan v City of Tigard*, 512 US 374, 385 (1994). *Brown v City of Medford*, 251 Or App 42 (2012).

15.3.1.D Temporary Takings

To assert an inverse condemnation 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).

To "distinguish between a 'taking, on the one hand, and simple administrative inconvenience or delay, on the other, it is necessary to require that a complaining party allege some degree of permanence in its loss. We hold that, in order 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." *Id.* at 200.

Dunn v City of Milwaukie, 355 Or 339 (5/08/14) (Clackamas) (Linder) While a city's cleaned its sewer lines, sewage backed up into plaintiff's home, oozing from toilets and sinks, and settling 3-4 inches deep in her house. She cleaned it herself. Six or seven months later, as her home smelled like a sewer, her wood floor buckled from the sewage, and she hired experts. Ten months after the sewer ooze, she filed formal complaint. Twenty months after the sewer ooze, she sued the city alleging over $65,000 in damages. The city moved for a directed verdict because she had not proven that the city had acted "intentionally" which is required for an Article I, section 18, takings claim. The trial court denied the motion, presumably under plaintiff's argument that she had only to show that sewer ooze had been a "natural and ordinary consequence" of the city's sewer-line cleaning. Jury awarded about $58,000.

The Court of Appeals affirmed under *Volkoun v City of Lake Oswego*, 335 Or 19 (2002), reasoning that intent was a necessary element but the jury could infer the city's intent if ooze was a natural and ordinary consequence of sewer-line cleaning.

The Oregon Supreme Court reversed based on the "intent" element, and noting that this opinion is limited to a physical occupations claim. "[N]egligence alone will not support a claim for inverse condemnation and that intent to take is an element of such a claim." The "government's conduct must be 'tantamount to a public appropriation' of property" in nature and degree (citing *Coast Range Conifers*). "The power of eminent domain is affirmative in nature. It is a power exercised for a particular purpose - the public's benefit – and intentionally. The idea that the sovereign's power of eminent domain could be exercised through error, accident, or inadvertence, is at odds with the nature of the power itself. Inadvertent and unintended acts give rise to liability, if at all, as ordinary torts, not takings." (No citation). Unlike other courts, Oregon does not expand its "takings" law to reach governmental negligence.

The Court tried to explain the "natural and ordinary consequences" element of a takings claim based on physical occupation as "import[ing] a stronger relationship between the government's act and the result that follows. * * * it conveys that, in the ordinary course of events, a certain act will naturally have **a** certain consequence." (Emphasis added). The Court criticized the Court of Appeals for "phrasing that test as one that looked to '**a**' natural and ordinary consequence, rather than '**the**' natural and ordinary consequence, of the government's action." (Emphasis added). The Court footnoted words such as "certainty or inevitability" but "not, necessarily – regularity or frequency" and "particular circumstances are substantially certain to occur on a seasonal or other intermittent basis * * * such a result can be found to be certain and inevitable."

After all of that, the Court "clarified" the "natural and ordinary consequences test" this way: "A factfinder is entitled to impute the requisite intent to take property if the invasion to the property owner's interests was the necessary, substantially certain, or inevitable consequence of the government's intentional acts. * * * A plaintiff still must show that the government intentionally undertook its actions and the inevitable result of those actions, in the ordinary course of events, was the invasion of the plaintiff's property that is the basis for the plaintiff's inverse condemnation claim. Thus if a plaintiff's best evidence is that the invasion was a less than certain consequence – such as a conceivable, possible, or plausible outcome, or one that otherwise might or might not occur – that is not enough for a factfinder to infer that the invasion was intentional."

In this case, sewage backups into people's houses due to city sewer-line cleaning is "rare and uncommon" so it was not "the necessary, certain, predictable, or inevitable result of the city's intentional manner of hydrocleaning the adjacent sewer, the evidence was insufficient to support plaintiff's inverse condemnation claim."

15.3.2 Fifth Amendment

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).

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. Planning Agency*, 535 US 302, 331-32 (2002); *Coast Range Conifers v Board of Forestry*, 339 Or 136, 151-54 (2005); *Bruner v Josephine County*, 240 Or App 276 (2011) (the "entire property interest" must be assessed to determine if a regulatory taking occurred).

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); *Bruner v Josephine County*, 240 Or App 276 (2011).

"As a general rule, zoning laws do not constitute a taking, even though they affect real property interests: "'[T]his Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests. Zoning laws are, of course, the classic example, which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property.' *Penn Cent. Transp. Co. v. City of New York*, 438 US 104, 125 (1978) (citations omitted)* * * *see also Lingle v Chevron U.S.A. Inc.*, 544 US 528, 538 (2005) (holding that, in considering a regulatory taking case, 'we must remain cognizant that 'government regulation—by definition— involves the adjustment of rights for the public good." *Laurel Park Community, LLC v City of Tumwater*, 698 F3d 1180 (9th Cir 2012).

Even if no property was taken, the "unconstitutional conditions doctrine" in the Fifth Amendment context means: "Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation. As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury." *Koontz v St. Johns River Water Mgmt Dist*, 133 S Ct 2586 (2013).

Chapter 16: 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

16.1 History

See Jeffery J. Matthews, *Right to Bear Arms*, www.osbar.org/secured/barbooks/viewchapter.asp?bid=85&cid=2339.

Article I, section 27, "was patterned upon and is identical to Art. I, §§ 32 and 33, Constitution of Indiana." *State v Robinson*, 217 Or 612, 619 (1959); *State v Christian*, 354 Or 22 (2013).

Article I, section 27, is not absolute: Lawbreakers can be disarmed. In England and colonial America, firearms regulations were directed at public safety concerns. Today Oregon laws restricting arms must promote public safety. *State v Hirsch/Friend*, 338 Or 622 (2005). Also, a person with a "mental illness" can be disarmed: "Finding that an individual 'is a person with mental illness' is a condition precedent to the issuance of an order prohibiting the purchase or possession of a firearm, ORS 426.130(1)(a)(D). *State v Thierman*, 161 Or App 175, 176 (1999)." *State v W.B.*, __ Or App 777 (8/13/14).

16.2 Tenets

"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 (2011) (citing *State v Hirsch/Friend*, 338 Or 622 (2005)). Article I, section 27, prevents the legislature from infringing on the people's individual right to bear arms for purposes limited to self-defense. *State v Kessler*, 289 or 359 (1980) (billy club); *State v Christian*, 354 Or 22 (2013).

The legislature may prohibit carrying concealed weapons and felons possessing arms when it determines such acts to be threats to public safety. *State v Christian*, 354 Or 22 (2013). The "legislature has wide latitude to enact specific regulations restricting the possession and use of weapons to promote public safety * * * as long as the enactment does not unduly frustrate the individual right to bear arms for the purpose of self-defense." *Id*. A law prohibiting

"[O]verbreadth challenges are not cognizable in Article I, section 27, challenges." Unlike "protected speech and assembly, recognizing overbreadth challenges in Article I, section 27, cases is not necessary because the enforcement of an overbroad restriction on the right to bear arms does not tend to similarly deter or 'chill' conduct that that provision protects." *State v Christian*, 354 Or 22, 39 (2013). Instead of facial overbreadth, Article I, section 27, challenges are "conventional facial" challenges. *Id*. at 40. Such facial challenges are "limited to whether the ordinance is capable of constitutional application in any circumstance." *Id*.

16.3 Second Amendment

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." -- Second Amendment, US Const

The Second Amendment applies to the States and to local regulation of firearms. *McDonald v City of Chicago*, 130 S Ct 3020, 3026 (2010).

The Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *District of Columbia v Heller*, 554 US 570, 592, 635 (2008). A law that "totally bans handgun possession in the home" violates the Second Amendment. *Id.* at 627, 635.

But the Second Amendment "does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns." And the "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons'" limits the Second Amendment right." *Heller*, 554 US at 625-27; *see also United States v Henry*, 668 F3d 637 (9th Cir 2012) ("we hold that the Second Amendment does not apply to machine guns.").

The majority of federal circuits have discerned a two-step Second Amendment analysis from *Heller*. *United States v Chovan*, 735 F3d 1127, 1136-37 (9th Cir 2013); *Jackson v City & County of San Francisco*, __ F3d __ (3/25/14). First, courts ask whether the challenged law burdens conduct that the Second Amendment protects. Second, courts determine the "appropriate level of scrutiny." *Chovan*, 735 F3d at 1136. This inquiry "bears strong analogies" to the US Supreme Court's free-speech cases. *Jackson*, slip op at 10 (citing *Ezell v City of Chicago*, 651 F3d 684, 702-03 (7th Cir 2011).

Some circuits conclude that the government may regulate the carrying of concealed weapons outside of the home. Revocation "of a firearms license on the basis of providing false information * * * on the firearms license application form is not a violation of the Second Amendment in this case." *Hightower v City of Boston*, 693 F3d 61 (1st Cir 2012).

The Ninth Circuit has held that a law requiring handguns to be stored in a locked container when not carried on the person burdens Second Amendment rights, but does not violate the Second Amendment under intermediate-level scrutiny, because it burdens only the manner of exercising Second Amendment rights, similarly to a content-neutral speech restriction that regulates the time, place, or manner of speech. *Jackson v City & County of San Francisco*, __ F3d __ (3/25/14) (facial and as-applied challenge). A law prohibiting sales of hollow-point bullets does not violate the Second Amendment under intermediate-level scrutiny; even though the text of the Second Amendment does not mention ammunition, the right to possess firearms implies a corresponding right to obtain the bullets necessary to use them. *Id.* Hollow-point bullets are designed to tear larger wounds inside a body so as to hit a major organ or artery, and the city carried its burden of showing that the law is a reasonable fit to achieve its goal of reducing the lethality of ammunition.

Professor Akhil Amar posits that in Article I, section 8, of the US Constitution and the Second Amendment, "*army* means enlisted soldiers, and *militia* means citizen conscripts." Akhil Reed Amar, THE BILL OF RIGHTS 54 (1998) (emphasis in original). In 1789, army meant a "mercenary force" that was "feared" because it was a standing army "filled with hired guns" who had "sold themselves into virtual bondage to the government" and "were typically considered the dregs of society." *Id.* at 53. In contrast, the militia was "a randomly conscripted cross-section" of "all citizens capable of bearing arms" who land, families, homes, and served alongside their friends, classmates, parishioners (their community) and thus were less likely to become "servile brutes." *Ibid.* and 55.

Professor Leonard Levy writes that the Second Amendment protects individual rights, not only collective states' rights to maintain militias. A "substantial scholarly literature maintains that those militias exist, at least in part, as a shield against tyranny by the national government. That notion is bizarre, even loony, in character; the Constitution does not authorize the state militias to make was against the national government. However, a right to insurrection theoretically exists to correct intolerable and systematic abuses. Americans embrace the doctrine of that a right of revolution is a natural right; some state constitutions even endorse the right. The Constitution nevertheless brands as treason overt acts or the levying of war against the United States." Leonard W. Levy, ORIGINS OF THE BILL OF RIGHTS 134 (1999).

Chapter 17: 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

17.1 Oregon

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).

"The Oregon Constitution, Art. IV, sec. 24, protects the state from 'suit' unless the legislature provides a cause of action. The Oregon Tort Claims Act was passed in 1967 to partially abolish tort immunity for all public bodies. However, any person who claims damages from a public body under the Oregon Tort Claims Act must comply with certain requirements, including giving written notice of the tort 'within 180 days after the alleged loss or injury.' As explained by the Oregon Supreme Court: 'When the Oregon Tort Claims Act was first adopted, it enacted a partial waiver of sovereign immunity. At the same time, the sovereign, acting through the legislature, exacted certain conditions as a part of that partial waiver of sovereign immunity. One condition was a dollar limitation on the amount that an injured party may recover from the sovereign. Another condition was timely notice. Under the Oregon Tort Claims Act, it was insufficient for the sovereign that a summons and complaint might show up on the sovereign's doorstep any time within the period of the statute of limitations. The sovereign required additional and earlier notice.' *Krieger v. Just*, 319 Or 328, 333, 876 P2d 754, 756-57 (1994) (citations omitted). *Wharton v Jewell*, Case No. 3:14-cv-00314-ST (D Or 7/07/14).

Stated similarly: "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 Oregon Tort Claims Act, 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 time limits in ORS 30.260 to 30.300. 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 den* 324 Or 394 (1996). *Doe v Lake Oswego School District*, 242 Or App 605 (2011).

17.2 Eleventh Amendment

"**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

In 1793, in *Chisolm v Georgia*, 2 Dall. 419, the US Supreme Court took jurisdiction in a case brought by a South Carolina citizen against the State of Georgia. The Court reasoned that Article III, section 1, clause 1 (extending federal judicial power to controversies "between a State and Citizens of another State") limited Georgia's sovereign immunity. *Chisolm* created a "shock of surprise" and prompted the immediate adoption of the Eleventh Amendment. Though the Eleventh Amendment's 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.").

"Despite the narrowness of its terms, since *Hans v Louisiana*, 134 US 1 (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*, 501 US 775, 779 (1991) (citations omitted).

Chapter 18: Impairment of Contracts

"**No . . . law impairing the obligation of contracts shall ever be passed** . . ." -- Article I, section 21, Or Const

"**No State shall . . . pass any . . . Law impairing the Obligation of Contracts.**" Article I, section 10, clause 1, US Const

18.1 U.S. Constitution

The Contracts Clause prevents a state from arbitrarily "reduc[ing] its financial obligations whenever it want[s] to spend the money" elsewhere, but nevertheless permits the state to modify its contractual obligations subject to certain limitations. *United States Trust Co. of New York v New Jersey*, 431 US 1, 26 (1977). 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." *Id. at* 20.

18.2 Oregon Constitution

See C. Robert Steringer, *Contract Clause*, Oregon Constitutional Law Manual (2013), www.osbar.org/secured/barbooks/viewchapter.asp?bid=85&cid=2340.

"Unlike many of the provisions in Article I, of the Oregon Constitution, the provision in section 21 against impairing the obligation of contracts has its ultimate source not in the early state and colonial constitutions but in the Constitution of the United States, Article I, section 10, clause 1, and the Northwest Ordinance of 1787." *Eckles v State of Oregon*, 306 Or 380, 389 (1988) (citations omitted). Although the "federal provision was probably intended to apply only to private contracts," specifically "state debtor relief laws, which many of the framers believed were impairing the credit of the new nation," in 1810 and 1819, the United States Supreme Court applied the federal provision against states. *Id*. at 390. "Given this interpretation, Article I, section 21, was very likely intended to apply to both state and private contacts." *Ibid*.

To determine if a claim of contractual impairment or breach arises under Article I, section 21: (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." *Hughes v State of Oregon*, 314 Or 14 (1992).

Statutory obligations can become contractual when the statute announces "clearly and unmistakably" that the obligation is immune from statutory change. *Campbell v Aldrich*, 159 Or 208, *appeal dismissed*, 305 US 559 (1938); *FOPPO v State of Oregon*, 144 Or App 535 (1996) (where legislation does not show a legislative commitment not to repeal or amend the statute in the future, a statutory contract probably does not exist).

The "state is not obligated by Article I, section 21, to perform its contracts according to the terms of those contracts, at least where * * * the contractual interests of the parties with whom the state has contracted are financial or property interests. In such cases, Article I, section 21, protects contractual interests by obliging the state to compensate for its breach of those contracts. In this respect, Article I, section 21, is consistent with Article I, section 18." *Eckles v State of Oregon*, 306 Or 380, 401 (1988).

Chapter 19: Voting and Elections

19.1 Oregon Constitution

Article II of the Oregon Constitution describes elections, electors, recalls, and campaigning: http://bluebook.state.or.us/state/constitution/constitution02.htm.

Article I, section 8, of the Oregon Constitution protects free expression, which the Oregon Supreme Court has concluded implicates political contributions and expenditures. http://bluebook.state.or.us/state/constitution/constitution01.htm.

Under Article II:

- "All elections shall be free and equal." (Section 1).
- Persons eligible to vote:

  -Must be U.S. citizens
  -Must be at least 18 years old
  -Must have resided in Oregon at least 6 months before the election (with an exception)
  -Must have registered at least 20 days before the election. (Section 2).

- If the vote involves "levying special taxes or issuing public bonds," law may require votes to be taxpayers.
-A mentally handicapped person has voting rights unless adjudged incompetent to vote. (Section 3).
-Anyone convicted of a crime may forfeit his right to vote, unless law provides otherwise. (Section 3).

19.2 Oregon Statutes

Statutes and regulations abound as well, see http://sos.oregon.gov/elections/Pages/laws-rules.aspx.

19.3 Federal Laws

On federal voting rights laws, see the United States Department of Justice links at www.justice.gov/crt/about/vot/intro/intro.php

Chapter 20: Finance, Tax, and Improvements

Several Articles in the Oregon Constitution involve finance, bonds, and taxation.

See Harry M. Auerbach, *Limitation on Taxes*, Oregon Constitutional Law Manual (2013), www.osbar.org/secured/barbooks/viewchapter.asp?bid=85&cid=2346.

See Harvey W. Rogers and Edward H. Trompke, *Public Finance*, Oregon Constitutional Law Manual (2013), www.osbar.org/secured/barbooks/viewchapter.asp?bid=85&cid=2345.

20.1 Finance

Article IX contains numerous provisions identifying state financing, mostly through bonds and taxation. That very lengthy Article is available here:
http://bluebook.state.or.us/state/constitution/constitution09.htm

Article IX, section 1a, provides: "No poll or head tax shall be levied or collected in Oregon." *Cf. Bogdanski v City of Portland*, TC 5186 (01/28/14) (tax court lacked subject matter jurisdiction).

20.2 Uniform Taxation

Article I, section 32, provides: "No tax or duty shall be imposed without the consent of the people or their representatives in the Legislative Assembly; and all taxation shall be uniform on the same class of subjects within the territorial limits of the authority levying the tax."

Class of One: The "taxing authorities may not single out one taxpayer for discriminatory, or selective, enforcement of a tax law that should apply equally to all similarly situated taxpayers. *Penn Phillips Lands v Tax Comm'n*, 247 Or 380, 385-86 (1967); *City of Eugene v Comcast of Oregon II, Inc.*, 263 Or App 116 (2014). "Oregon courts have employed the same analysis under Article I, section 32, and the Equal Protection Clause" of the United States Constitution. *City of Eugene v Comcast of Oregon II, Inc.*, 263 Or App 116 (2014) (citing *Kane v Tri-Co. Metro Transp District*, 65 Or App 55, 59 (1983), *rev den* 296 Or 411 (1984)). To prove a violation of Article I, section 32, the taxpayer must "demonstrate an intentional and systematic pattern of discrimination." *Pacificorp Power Marketing v Dep't of Revenue*, 340 Or 204, 219 (2006). "Intentional" means "an intention, or the equivalent of fraudulent purpose, to disregard the fundamental principal of uniformity." *Freightliner Corp v Dep't of Revenue*, 275 Or 13, 20 (1976) (citing a US Supreme Court case); *City of Eugene v Comcast of Oregon II, Inc.*, 263 Or App 116 (2014).

> ***City of Eugene v Comcast of Oregon II, Inc.***, 263 Or App 116 (5/21/14) (Lane) (Schuman SJ, Duncan, Wollheim) This case is about a city's attempt to collect fees from Comcast's revenue earned from cable modem services. A taxing authority – the City of Eugene -- imposed a 7% of gross revenue license fee on Comcast's revenue for internet service in Eugene (among other fees). The city enforced that fee against some but not all internet service providers. As to the constitutional issue under Article I, section 32, two internet service providers provided services through their own facilities and thus the city did not enforce a license fee. The city stated that it had made a clerical error and corrected that error. Comcast argued that the city didn't make just a mistake and anyway, it does not have a burden to prove bad faith.
>
> The trial court concluded that the city's effort to enforce the license fee violated Article I, section 32, of the Oregon Constitution and the Equal Protection Clause of the United States Constitution. The city appealed.
>
> The Court of Appeals reversed on those constitutional issues. The Court of Appeals set the legal parameters: Did Comcast produce any evidence that the city's taxing decision amounted to an intentional and systematic pattern of discrimination or something akin to fraudulent purpose.

Comcast has that burden under *Pacificorp Power Marketing v Dep't of Revenue*, 340 Or 204, 219 (2006) and *Freightliner Corp v Dep't of Revenue*, 275 Or 13, 20 (1976). Comcast did not.

20.3 Income Tax

Article IV, section 32, of the Oregon Constitution provides: "Notwithstanding any other provision of this Constitution, the Legislative Assembly, in any law imposing a tax or taxes on, in respect to or measured by income, may define the income on, in respect to or by which such tax or taxes are imposed or measured, by reference to any provision of the laws of the United States as the same may be or become effective at any time or from time to time, and may prescribe exceptions or modifications to any such provisions. At each regular session the Legislative Assembly shall, and at any special session may, provide for a review of the Oregon laws imposing a tax upon or measured by income, but no such laws shall be amended or repealed except by a legislative Act."

State courts have jurisdiction and the federal courts do not have original jurisdiction over personal income tax cases.

> ***Glasgow v Dep't of Revenue,*** 356 Or 511 (2014) (Walters) An Oregonian who did not pay personal income tax for several years alleged that federal courts have original jurisdiction to determine that she must pay state tax on wages. She moved to change venue from the tax court to the United States Supreme Court. The Tax Court and the Oregon Supreme Court concluded that she must pay wages, the federal courts do not have original jurisdiction, and her claim is frivolous:
>
> "The first paragraph of Article III, section 2, specifically enumerates the cases over which federal courts have jurisdiction. Under that paragraph, federal courts have jurisdiction over controversies between states, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state and foreign states. The second paragraph of Article III, section 2, does not extend federal court jurisdiction beyond those enumerated cases. *United States v Texas*, 143 US 621, 643-44, 12 S Ct 488, 36 L Ed 285 (1892). This [personal income tax] case is not a case described in the first paragraph of Article III, section 2, and is therefore not subject to the original jurisdiction of the United States Supreme Court." *Id.* at 514-15.

20.4 Property Tax

"Property taxation is certainly an area that has been traditionally occupied by the states. Indeed, the provisions of Article I, section 9, clause 4 of the federal constitution prohibit, as a practical matter, the imposition of a property tax by the federal government." *City of Seattle v Oregon Dep't of Revenue*, __ OTC __, slip op 8 (2011).

"In Oregon, property taxes are assessed for, among other things, real property, including any improvements on that real property. The taxes—referred to as 'ad valorem' taxes—are based on the value of the property and improvements." *Village at Main Street Phase II v. Dep't of Revenue*, 356 Or 164, 166 (2014).

"The statutes that provide for the assessment and taxation of property in Oregon are consolidated in ORS chapter 308. As a general matter, Oregon property is assessed in one of two ways—it is either centrally assessed by the department or locally assessed by a county assessor. ORS 308.517(5) (all property not assessed by the department assessed by county assessor of county in which property situated)." *Comcast Corp v Dep't of Revenue*, 356 Or 282, 293 (2014).

In 1997, "voters approved Ballot Measure 50, which amended the Oregon Constitution, creating a new provision, Article XI, section 11. Among many other things, Measure 50 and its implementing statutes

reduced the assessed value of property to 10 percent below 1995 values. Or Const, Art XI, § 11(1)(a). For future years, the value of property for tax purposes cannot exceed three percent more than what it was in the preceding year. Or Const, Art XI, § 11(1)(b); ORS 308.146(2). The combined effect of [a case] and Measure 50 was to curb the assessor's ability to adjust any error in valuation of any assessment components that a taxpayer elected not to challenge." *Village at Main Street Phase II v. Dep't of Revenue*, 356 Or 164, 169 (2014) (citing *Flavorland Foods v Washington County Assessor*, 334 Or 562, 565 (2002) (summarizing effects of Measure 50)).

20.5 Banks, Corporations, and Municipal Relations

Article XI of the Oregon Constitution, online here, http://bluebook.state.or.us/state/constitution/constitution11.htm, sets out "corporations and internal improvements."

Article XI, section 9, of the Oregon Constitution provides in part: "No county, city, town or other municipal corporation, by vote of its citizens, or otherwise, shall become a stockholder in any joint company, corporation or association, whatever, or raise money for, or loan its credit to, or in aid of, any such company, corporation or association." That provision's intent is "to prevent the investment of public funds in private enterprises." *Johnson v School District No. 1*, 128 Or 9, 12 (1928); *Carruthers v Port of Astoria*, 249 Or 329, 331 (1968). But that section protects only "tax revenues." *DeFazio v Washington Public Power Supply System*, 296 Or 550, 579 (1984); *Int'l Longshore and Warehouse Union v Port of Portland*, __ F Supp 2d __ (D Or 2014) Case No. 3:12-cv-01494-SI (4/03/14) (held: Port of Portland's programs did not violate Art. XI, § 9, in any way that plaintiff alleges, among other things the "Port is simply obligated to demonstrate that revenues other than taxes were used to finance the private project").

Chapter 21: Other Provisions

The Oregon Constitution contains numerous holdover provisions from territorial days. For example, a person is ineligible for "any office of trust, or profit," if he gives, accepts, or carries another person to fight a duel, under Article II, section 9, http://bluebook.state.or.us/state/constitution/constitution02.htm .

The Oregon Constitution also contains newer statutesque provisions, particularly under the Finance Article. Examples include farm loans to veterans (Article XI-A), credits for higher education building projects (Article XI-F(1)), pollution control (Article XI-H), water and power projects (Article XI-D and XI-I(1)), multifamily housing for elderly and disabled (Article XI-I(2), OHSU (Article XI-L), seismic rehabilitation (Article XI-M and –N), pensions (Article XI-O), and lotteries (Article XV, section 4), among others. Those are litigated less frequently than Article I generally.

Chapter 22: Penumbral Rights

22.1 Textual Rights

"**This enumeration of rights, and privileges shall not be construed to impair or deny others retained by the people.**" -- Article I, section 33, Or Const

"**The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people**." -- Amendment IX, U.S. Constitution

Article I, section 33, of the Oregon Constitution, like the Ninth Amendment, is an underdeveloped area of constitutional law.

22.2 Origins

Article I, section 33, seems to have been copied from Iowa's Constitution and engrafted into Oregon's Constitution without debate or amendment. Claudia Burton and Andrew Grade, *A Legislative History of the Oregon Constitution of 1875 – Part I*, 37 WILLAMETTE L REV 469, 553-54 (2001). Iowa's constitutional history demonstrates that its framers relied on an Organic Act for Wisconsin Territory (from which Iowa had been carved out). *The Debates of the Constitutional Convention of the State of Iowa*, online at www.statelibraryofiowa.org/services/collections/law-library/iaconst.

The Oregon Supreme Court has only peripherally interpreted Article I, section 33. Justice Linde, in dissent, has commented on Article I, section 33:

> "[I]f a procedure is 'so rooted in the traditional conscience of our people as to be ranked as fundamental,' the people of Oregon do not need the fourteenth amendment to protect it. I take article I, section 33 of the Oregon Constitution to preserve such 'unenumerated' rights as were of constitutional magnitude in 1859, that is to say, rights specifically against government and 'so rooted as to be fundamental.'" *State v Burrow*, 293 Or 691, 713 (1982) (Linde, J., dissenting).

22.3 Ninth Amendment

Professor Leonard Levy posits: "The Ninth Amendment is the repository for natural rights, including the right to pursue happiness and the right to equality of treatment before the law." Leonard W. Levy, ORIGINS OF THE BILL OF RIGHTS 254 (1999). Some natural rights are within the Ninth Amendment, Professor Levy suggests, such as the right "to hunt and fish, the right to travel, and very likely the right to intimate association or privacy in matters concerning family and sex, at least within the bounds of marriage. Such rights were fundamental to the pursuit of happiness. But no evidence exists to prove that the Framers intended the Ninth Amendment to protect any particular natural rights. The text expressly protects unenumerated rights, but we can only guess what the framers had in mind. On the basis of tantalizing hints and a general philosophy of natural rights, which then prevailed, conclusions emerge that bear slight relation to the racial, sexual, or political realities of that generation." *Ibid.*

On *positive* rights in the Ninth Amendment, Professor Levy observes: In addition to natural rights, some positive rights may be included – those resulting from the social compact that creates government. Those within the Ninth Amendment – that were not included in the first eight – may be the "right to vote and hold office, the right to free elections, the right not to be taxed except by consent through representatives of one's choice, the right to be free from monopolies, the right to be free from standing armies in times of

peace, the right to refuse military service on grounds of religious conscience, the right to bail, the right of an accused person to be presumed innocent, and the person's right to have the prosecution shoulder the responsibility of proving guilt beyond a reasonable doubt – all these were among existing positive rights protected by various state law, state constitutions, and the common law." *Id*. at 254-55.

22.4 Rights Between the Lines

22.4.1 Standard of Proof in Criminal Cases

Justice Unis, citing Justice Linde's dissent in *Burrow* quoted above, has considered Article I, section 33, on the level of proof in criminal cases:

"the right not to be convicted of a crime except on proof beyond a reasonable doubt is a right protected by Article I, section 33, of the Oregon Constitution. In order to be an Article I, section 33, right, three elements must exist. First, the right must be one that no other Oregon constitutional provision affirmatively addresses. Second, the right must be shown to have been recognized at least in general terms to exist at the time Oregon became a state. Third, the right must be one that the people of Oregon's founding generation would have considered of constitutional magnitude between government and people, 'that is to say, rights specifically against government and so rooted as to be fundamental.' *State v Burrow*, 293 Or 691, 713 (1982) (Linde, J., dissenting). Those three elements exist with respect to the right not to be convicted of a crime except on proof beyond a reasonable doubt." *State v Williams*, 313 Or 19, 48 (1992).

22.4.2 Birth Mothers' Privacy

The Oregon Supreme Court has mentioned Article I, section 33, in several cases. In no case has it found privacy or other rights within the section:

"[N]either Article I, section 1, nor Article I, section 33, lend any support to the idea that the framers of the Oregon Constitution intended to confer on birth mothers a constitutional right to conceal their identities from their children. Those provisions, taken separately or together, have never been construed as providing a general privacy right under the Oregon Constitution." *Does v State of Oregon*, 164 Or App 543 (1999), *rev den*, 330 Or 138 (2000).

22.4.3 Convicted Sexual Predators' Privacy

There is "no federal privacy right" implicated in disseminating information to the public that a person is a convicted sexual predator. "Petitioner also argues, without explanation, that the [prison and parole] board's order violates his right to privacy under the state constitution. He does not provide any basis for saying that the right, if it exists, is any broader than the federal right that we recognized in *Does*, and we decline to address his state constitutional argument." *VLY v Board of Parole*, 188 Or App 617 n 20 (2003).

22.4.4 Right to Travel

Oregon courts have stated that the federal 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), *cert denied* 541 US 1044 (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.

"[W]e have found no case law supporting [the] proposition" that stalking protective orders violate "a constitutional right to travel. * * * Further, defendant has made no 'penumbral' argument under Article I, section 33, to the trial court or to the Court of Appeals. Consequently we reject defendant's arguments". *Delgado v Souders*, 334 Or 122 (2002).

Chapter 23: Amendments and Revisions

> "If state constitutions differ from the federal Constitution and from each other as well, the obvious question is why. Perhaps the most salient difference between state constitutionalism and national constitutionalism, as well as the one with the broadest implications, is the frequency of state constitutional change through constitutional amendment and constitutional revision." G. Alan Tarr, UNDERSTANDING STATE CONSTITUTIONS 29 (1998).

Article XVII of the Oregon Constitution consists of two sections setting out methods to amend and revise the Oregon Constitution. Article XVII is online at www.oregonlegislature.gov/bills_laws/Pages/OrConst.aspx.

On "revisions" versus "amendments," see *Martinez v Kulongoski*, 220 Or App 142, *rev den*, 345 Or 415 (2008).

On amendments, particularly Article VII, see *Carey v Lincoln Loan Co*., 342 Or 530 (2007).

On the "separate vote" requirement: Article XVII, section 1, provides in part: "When two or more amendments shall be submitted * * * to the voters of this state at the same election, they shall be so submitted that each amendment shall be voted on separately." See *Armatta v Kitzhaber*, 327 Or 250 (1998), *Lehman v Bradbury*, 333 Or 231 (2002), and *League of Oregon Cities v State*, 334 Or 645 (2002).