THE OREGON CONSTITUTIONAL LAW NEWSLETTER

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In this Issue . . .

Opinions expressed in this newsletter are each author's alone.
Alycia Sykora, Editor

Save the Date: Professor Pam Karlan Visits on November 22, 2013

Erin Snyder

The Constitutional Law Section's annual CLE will be held on November 22, 2013, at the Embassy Suites in Portland. The day will begin with nationally renowned Supreme Court scholar Stanford Professor Pamela S. Karlan, who will to give a 90-minute summary of recent U.S. Supreme Court case law. Her presentation will be followed by an in-depth look at national trends in state and federal constitutional issues. In the afternoon, Oregon Supreme Court Justice Jack Landau, Oregon Court of Appeals Judge David Schuman, and Alycia Sykora will give their annual review of Oregon state constitutional cases. The day will conclude with a series of "tutorials" by local experts on litigating current state constitutional issues. The CLE coincides with the publication of the first Oregon State Bar Book on Oregon Constitutional law.
(Note: The Bar Book is online at www.osbar.org/secured/barbooks/viewbook.asp?bid=85. See page 12 of this Newsletter for more information. – Ed.)

Erin Snyder is Associate Director of Career & Professional Development Center at Lewis & Clark Law School. She serves as C0-Chair of the Constitutional Law Section's CLE Committee.

The Pending Case of State v. Babson: Freedom of Assembly

Les Swanson

(Note: The Oregon Supreme Court heard oral argument in *State v. Babson* on June 13, 2013. – Ed.)

The Oregon Court of Appeals' decision in *State v. Babson*, 249 Or. App. 278 (2012), *review allowed*, 353 Or 103 (2012), is a model of elegance, clarity, historical research and carefully reasoned analysis. It ends, however, in a whimper because of constraints either self-imposed or set by the Oregon Supreme Court's methodology for addressing free expression and freedom of assembly issues under Article 1, sections 8 and 26.

In *Babson*, a significant freedom of assembly issue devolves into a remand to the trial court so that testimony can be obtained from two legislators about their intent or what they know about the intent of others involved in a Legislative Administrative Committee (LAC). LAC has authority over space and facilities within the state capitol, and after defendants conducted for some time a day-and-night vigil on the capitol steps to protest the deployment of Oregon National Guard troops to Iraq and Afghanistan, the LAC promulgated rules prohibiting overnight use of the capitol steps. The protestors were arrested by police, convicted of second-degree criminal trespass, treated as a violation, and were each fined $500. They appealed.

Judge Schuman, writing for the Court of Appeals, first determined that the LAC had authority to promulgate the rules, then determined that the Debate Clause of the Oregon Constitution, Article IV, section 9, that provides legislators immunity from being "questioned in any other place" concerning "words uttered in debate in either house" did not apply under the circumstances, to the two legislators, thus the remand for taking their testimony.

Turning to the freedom of assembly issue (Article 1, section 26), the court relied on *Lahmann v. Grand Aerie of Fraternal Order of Eagles*, 202 Or. App. 123 (2005) and summarized *Lahmann*'s holding:

> [t]he section's wording suggests that "assembling together" refers to assemble for deliberation about issues affecting the welfare of the public (the "common good" of the inhabitants), and the balance of the section protects the ability of the inhabitants to give practical effect to their deliberations by ensuring that they may voice their determinations to others who might respond politically.

Lahmann held that Article 1, section 26, did not apply to Oregon Eagles who excluded women from their membership despite the Oregon public accommodations law. The court denied protection to the Eagles' claimed right of freedom to assemble as an organization excluding women. Evidence was lacking that they spent time deliberating on matters affecting the welfare of the public.

In contrast with *Lahmann*, in *Babson*, there was no dispute that the protestors were involved in public policy and/or political deliberation. Why was the court in *Babson* unable to decide whether the protestors were protected by Article 1, section 26? The court concluded that because the expression and assembly clauses are closely associated – the right of assembly protects aggregate expression and creates an audience for that expression - the two provisions are subject to the analytical framework for Article 1, section 8 cases, including the framework's limitations on overbreadth challenges under *State v. Illig-Renn*, 341 Or. 228 (2006).

The framework (methodology) works like this: (1) a law may regulate expression or assembly (subject to overbreadth challenge); (2) a law may focus on a harm that is regulable and not constitutionally protected, but may expressly specify that a protected activity is a means of achieving that harm (subject to overbreadth challenge); (3) a law might not mention any protected activity, but in being enforced could

have the effect of regulating a protected activity (not subject to overbreadth challenge). This third category of laws are subject only to "as applied" challenges, that is, challenges to the law as applied, but not to challenges for overbreadth of the law standing alone without application.

In *Babson*, the court decided that the LAC "overnight" rule was in the third category. The law only restricts the hours of use for the capitol steps. It doesn't single out expression or assembly – it apparently applies to any person on those steps for any reason. One can argue that such a restriction certainly encompasses those who would assemble on the steps for expressive or assembly purposes. But the point of the third category is that such activities are not being singled out nor even mentioned, so if the law is directed toward such activities it would have to be proven in an "as applied" situation.

What if a law restricted standing or sitting for more than five minutes on all public building grounds during nighttime hours? The law does not mention expressive or assembly activity, but the denial of all standing or sitting activities would sweep in expression and assembly rights to such a great extent that an overbreadth challenge should be allowed. That is permitted under the three-part frame-work, because even though such a law is in category three (under which facial constitutional challenges are not permitted) the Oregon Supreme Court in *Illig-Renn* acknowledged an exception to category-three cases:

> The foregoing [analysis] does not mean that we will ignore a clear case of facial unconstitutionality or overbreadth merely because the statute manages to avoid any direct reference to speech or expression. *Id*. at 67.

The *Illig-Renn* court cited *State v. Moyle*, 299 Or. 691 (1985) and concluded: "*in general* we will not consider a facial challenge to a statute on overbreadth grounds if the statute's application to protected speech is not traceable to the statute's express terms." *Id*. at 67 (emphasis added).

It is likely that the Oregon Supreme Court would use its exceptions and allow a facial challenge to the hypothetical law banning standing or sitting during nighttime hours on all public building grounds. Are these exceptions applicable to the defendants' facial challenge of the LAC rule in *Babson*? Yes, for the following reasons. If the court restricts the defendants to an "as applied" challenge, the case is then remanded to the trial court, where the defendants will be allowed to question the two legislators (the co-chairs of the LAC) about the intent or objective behind the enactment of the no nighttime use of the capitol steps rule. Real world experience informs us that the legislators are not likely to testify that their motive in passing the rule was to get these and other unwanted assemblies of persons off of the capitol steps.

The objective(s) of the LAC rule is not just an issue of content-neutrality; it is most importantly an issue of speech and assembly neutrality. If the rule was passed for the objective of stopping the protestors' message against the two wars it would clearly violate content-neutrality. But if the objective of the rule is to cut off all speech and assembly on the capitol steps during nighttime hours because legislators find it annoying, disturbing, irritating, degrading, or the like, to have the capitol steps used for speech and assembly reasons, the rule is not speech and assembly neutral, and therefore is unconstitutional. Content-neutral and assembly-neutral are two different concepts, and transgression of either one should be fatal to the LAC rule.

The *Babson* record reflects that "the LAC met to discuss the overnight rule immediately after the protest began *** one legislator on the committee pointedly referred to 'the situation out on the steps, if I may say so, if you all understand what I'm talking about'***." *Babson*, 249 Or App at 290. The first arrest of a demonstrator occurred within hours after the first LAC meeting to consider the overnight rule. That charge was then dismissed, the LAC amended the rule to eliminate the administrator's discretion to allow some groups to remain on the steps overnight, and then the arrests in this case were made. *Id*. at 290. That

evidence is strong that the LAC did not like having to put up with overnight demonstrators, at least some overnight demonstrators, and wanted a rule to keep them off the capitol steps.

What happens if the Oregon Supreme Court affirms the remand to the trial court and the testimony is taken of the two legislators? Whatever the legislators say in their testimony, the dispute may already be decided. Burgess, the LAC administrator, testified in the trial court that there were concerns about lit candles, a heating device, an intoxicated and angry observer, homeless individuals, and at least one unregistered sex offender. And Burgess testified "that he was motivated by public safety concerns and not defendants' protest message." *Id*. at 291.

The *Babson* court noted: "Although we might weigh the evidence and come to a different finding (or not) that is not our role on appeal; we must affirm the trial court's finding regarding the enforcers' intent if it is supported by any competent evidence in the record. Or. Const., Art. VII (Amended), section 3, and, as described above, such evidence exists." *Id*. at 291.

That is what I meant in stating that the Court of Appeals' decision in *Babson* -- a heroic and admirable effort of legal craftsmanship and analysis -- ends in a whimper. The implication seems to be that, on remand, the two legislators can be questioned concerning the intent-motivation-objective for enacting the LAC rule, but whatever their testimony, there remains in the trial court record competent testimony from administrator Burgess that the LAC rule is content-neutral and is based on concerns of public safety and capitol security. If the case is appealed again, after the two legislators testify, no matter what they say, the competent evidence Burgess presented will most likely require the Court of Appeals to affirm the trial court, so long as the trial judge continues to find Burgess' testimony credible and rules against the defendants.

Because that will involve a finding of fact, the Court of Appeals will be constitutionally restrained from interfering with that finding of fact on appeal. Article VII (Amended), section 3, of the Oregon Constitution requires that "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." That constitutional provision includes a judge sitting as the trier of fact.

The end result of the Oregon Supreme Court's methodology for analyzing constitutional overbreadth issues in Article 1, sections 8 and 26 cases, where the law does not refer to expression or assembly (category three of the three-category methodology), is that the trial court will often make the final decision on important constitutional issues. That is because in "as applied" cases, the judge, or a jury, makes factual findings regarding witnesses' testimony on the intent-motivation-objective of the lawmakers. And human experience teaches us that lawmakers, or an administrator for lawmakers, take pride in doing their work properly and will likely testify that a law affecting freedom of assembly was actually aimed at public safety and capitol security, or the like.

The enactment of the LAC rule should be reviewed facially, and not "as applied." The Oregon Supreme Court's precedents in Article 1, section 8 and 26, cases provide ample justification for a "facial" review. First, a little history. The Court of Appeals had written in *State v. Illig-Renn*: "If speech-neutral statutes may not be challenged facially under Article I, section 8, and that rule extends into the area of free assembly so as to override the logic of *Ausmus* and *Illig-Renn III*, it is up to the Supreme Court to say so."

Justice Gillette, writing for the Supreme Court in *Illig-Renn*, emphatically rebuked the Court of Appeals: "We respond to that invitation by stating outright that we already have "said so." 341 Or. at 66. But, immediately after that brusque statement, Justice Gillette wrote: "In *Robertson*, this court repeatedly signaled that a statute is subject to a facial challenge only if it expressly *or obviously* proscribes expression. *** Marginal and *unforeseen applications* to speech and expression are left for judicial

exclusion through application of the constitutional rule to the specific facts of a given case." (Emphasis added). Still later in the opinion, Justice Gillette wrote: "The foregoing does not mean *that we will ignore a clear case of facial unconstitutionality or overbreadth merely because the statute manages to avoid any direct reference to speech or expression*." (Emphasis added). And a few lines later: "But, *in general*, we will not consider a facial challenge to a statute on overbreadth grounds if the statute's application to protected speech is not traceable to the statute's express terms." *Id*. at 67.

What are we to conclude about facial challenges to category three cases? I submit that if it is so hard for the court to say that it will not consider facial challenges to the third category in the court's methodology, and so easy to state exceptions, like "only if ***obviously", and to imply that the court will accept a facial challenge if the applications to speech or assembly are foreseen, and "don't worry" lawmakers cannot avoid a facial challenge by merely managing to avoid any direct reference to speech or expression, and to write "in general" we will not consider a facial challenge, there is a strong message that the court will use facial review in third category cases under some circumstances.

Something like the controversial doctrine of "double effect" in ethics is likely afoot in these third-category situations. The collateral damage (the secondary effect) of banning all overnight protests is the elimination of speech and assembly on the capitol steps during nighttime hours. But if the legislators testify that the main objective (the primary effect) is public safety and capitol security, then the destructive collateral consequences to speech and assembly (the secondary effect) may be overlooked. A court has to carefully examine all of the surrounding circumstances and facts, beyond the testimony of participants about the legislators' "state of mind", to determine whether a prohibited secondary effect (not being assembly-neutral) can be justified by testimony that the true objectives were the primary effects of public safety and capitol security.

Common examples of the "double effect" doctrine are the Allies fire-bombing of civilian populations in Japan and in Dresden, Germany during World War II. The destruction of some military target or targets would be offered as the justifying objective and primary effect; the destruction of massive numbers of civilians would be the collateral damage, or secondary effect, necessary to achieve the primary objective. The problem with "double effect" reasoning is that a weak or disingenuous primary effect can be offered as the justifying motive requiring the massive collateral damage that is viewed as the less important secondary effect.

The legislators and Burgess will almost certainly agree that their objective was public safety and capitol security. But the chief result was an immediate sweeping the steps clean of politically motivated and engaged citizens. The legislators and Burgess may or may not have been content-neutral in enacting the LAC rule, but under the circumstances they were not speech and assembly neutral.

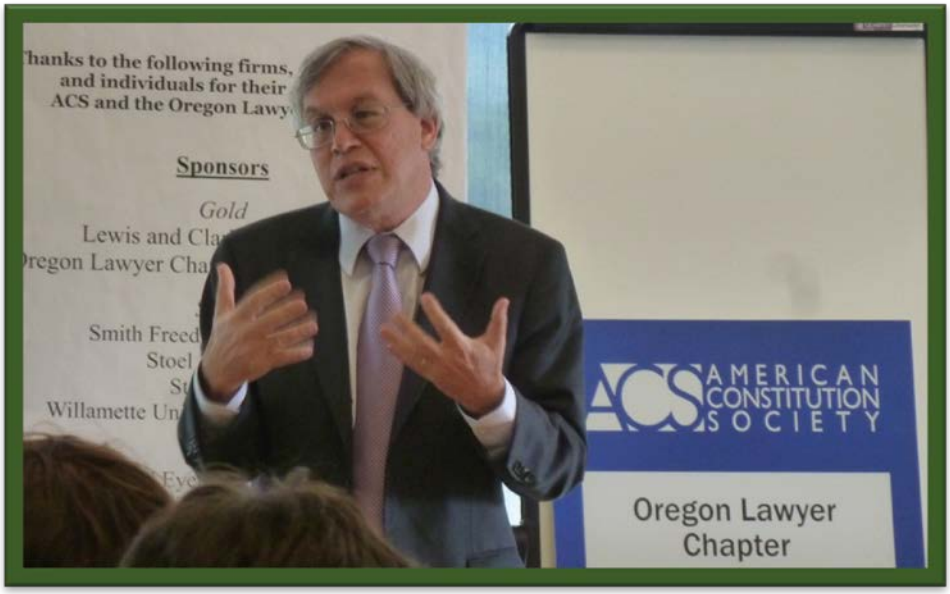
The state capitol building and its front steps are symbols of government, government by the people. It is a most fitting place for committed persons to assemble and to express their opinions on critical issues of the republic, like war and peace. If they are willing to stay out all night, night after night, legislators should welcome their participation in the democratic process. Whether the issue is war or peace, the right to own guns, immigration, or abortion, concerned citizens are of value to the democratic project. A legislative committee and its administrator should not be permitted to eliminate such speech and assembly without meaningful and effective review by the highest court of this state. In *Babson*, that will require the Oregon Supreme Court to decide to consider a facial challenge to the LAC rule governing the use of the capitol steps. I expect that it will.

Les Swanson is a lawyer with a background in philosophy, with strong interests in political and legal philosophy and constitutional law. Nearing retirement, Mr. Swanson enjoys reading, writing, and teaching grandchildren to be curious and passionate about the strange but wonderful world that we occupy.

ACS Hosts Judge Michael Simon and Dean Erwin Chemerinsky

Alycia Sykora

United States District Court Judge Michael Simon gave the opening presentation at the American Constitution Society's May CLE. The subject of his talk was "The Effect of *Twombly* and *Iqbal* on Civil Rights Cases and Access to the Courts." Perkins Coie, LLP hosted the May 24 event, with a full house in attendance. The CLE was organized by the Oregon Lawyer Chapter of ACS.



Erwin Chemerinsky, Dean of University of California-Irvine School of Law, followed Judge Simon with an hour focused on the United States Supreme Court's recent cases. Dean Chemerinsky also provided insight into cases still pending this term.

Separately, in June, Chuck Tauman, Chair of the American Constitution Society's Oregon Lawyer Chapter, accepted the ACS Membership Award. The award, presented in Washington, D.C., is given to the chapter with the highest membership increase in a year's time.

Above: Chuck Tauman, Judge Michael Simon, and Willamette Law Professor Norman Williams, at Perkins Coie, LLP

Left: Azeena Dargis, of Perkins Coie, LLP, with Erwin Chemerinsky

State v. Hemenway:
What Should the Court Do With a Decision it Shouldn't Have Been Able to Make?

J. Aaron Landau

An odd but important question of justiciability turns up occasionally in Oregon cases, and it remains at this point unanswered: When a court issues a decision in a case, but later discovers facts that establish that the case was moot before the decision issued – and thus that the court had no authority to decide the matter – what should the court do with its decision? May the court simply move on and leave the past behind it, or must its decision be vacated? What if the court's decision was especially helpful or important, providing just the right set of facts to help generate a key development in the law? May the court even consider such circumstances in the first place, or is vacatur in such cases required as a matter of the Oregon Constitution's limits on judicial power?

Not only has the Oregon Supreme Court indicated differing answers to those questions in different cases, it has in one recent case acknowledged that inconsistency and opted not to resolve it – leaving the question for another day.

That case, *State v. Hemenway*, 353 Or 498, 153 P3d 109 (2013), presented a textbook illustration of the issue. At issue in the underlying criminal case was the question whether defendant's consent to a search was the result of "exploitation" of unlawful police conduct, such that the evidence obtained should have been excluded under Article I, section 9 of the Oregon Constitution. The case gave the court the opportunity to revisit the governing case law and ultimately to disavow and replace a key part of its prior test.

Less than one month later, counsel for defendant informed the court that defendant had died nearly a year earlier. In a motion to vacate the court's opinion, defense counsel argued that the case became moot when defendant died and thus was moot before the court issued its decision; as a result, defense counsel argued, the court's decision on the merits could not stand. The state disagreed. Although the state acknowledged that the case became moot before the court issued its decision, it contended that in light of the opinion's important refinement of the law governing consent-search cases, "the public interest in leaving the court's decision undisturbed far outweighs any equitable interests supporting vacatur."

But are such factors relevant to the inquiry at all? May the court consider the usefulness of its prior decision in determining whether to vacate it as moot, or do underlying principles of justiciability require that such a decision be vacated? It is that question to which more than a decade of Supreme Court case law has suggested inconsistent answers.

For instance, in in *First Commerce of America, Inc. v. Nimbus Center Assoc.*, 329 Or 199, 986 P2d 556 (1999), the Supreme Court determined that a settlement entered into before the case reached the Court of Appeals had rendered the case moot. In dismissing the appeal, the Supreme Court explained that "[m]ootness is a species of justiciability" and that, under the Oregon Constitution, "a court of law exercising the judicial power of the state has authority to decide only justiciable controversies." *Id.* at 206. The Supreme Court then turned to the question of what to do with the Court of Appeals' decision and the trial court's judgment, acknowledging that its prior decisions on that question had been "inconsistent". After a brief discussion, the court concluded that "when a case becomes moot on appeal or on review," it should "vacate both the decision of the Court of Appeals and the circuit court judgment," because vacation "conveys the message that the decision on the merits ought not to have been rendered at all[.]" *Id.* at 208-09.

A few years later, the Supreme Court made clear that *Nimbus* did not mean that vacatur necessarily would be appropriate in every instance of mootness – and particularly not as to decisions in cases that are only *later* rendered moot. In *Kerr v. Bradbury*, 340 Or 241, 131 P3d 737 (2006), voters challenged the Secretary of State's decision to approve an initiative petition for circulation on constitutional grounds. After the Court of Appeals issued a decision on the merits but before the Supreme Court could do the same, the deadline for submitting signatures passed without petitioner having gathered enough to qualify for the ballot. The Supreme Court concluded the matter had thus been rendered moot, "because Article VII (Amended), section 1, of the Oregon Constitution constrains this court from deciding a matter that is no longer a controversy between the parties." *Id* at 245. The court then turned to the question whether vacatur of the Court of Appeals' decision – normally an "extraordinary remedy" to which a party must show an "equitable entitlement" – was appropriate. *Id*.

The court at that point observed that its case was (unlike *Hemenway*) one that became moot only *after* it had been adjudicated, because the petitioner's failure to submit enough signatures "did not occur until after the Court of Appeals had rendered its decision." *Id*. at 251. "In short," the court explained, "this is not a situation in which the Court of Appeals ought not to have rendered a decision on the merits." *Id*.

Having established that fact, the court proceeded to inventory whether other facts would "militate against requiring vacatur," such as whether leaving the opinion to stand would interfere with the Secretary of State's proper execution of his official duties. *Id*. Finding that no such interference or unfairness would result, the Supreme Court let the decision stand.

At that point, one could have persuasively argued that the Supreme Court in *Kerr* intended either of two outcomes. On one hand, the court could have intended the question whether the court "ought not to have rendered a decision on the merits" to be a threshold matter; if the case at issue was already moot and the court handed down a decision on the merits anyway, under principles of justiciability the decision could not stand, leaving no need to determine whether other facts "militate" in one direction or the other. On the other hand, the Supreme Court could have intended that question merely to be one of a laundry-list of factors to be considered, such that even where a court issues a decision in an already-moot case, the court's decision may be left to stand as good law so long as other "equitable considerations" support doing so.

Less than a year after *Kerr*, the Supreme Court indicated that the latter interpretation was correct. In *Terhune v. Myers*, 342 Or 376, 153 P3d 109 (2007), the court heard a challenge to a ballot title on an initiative petition, ultimately concluding that the ballot title did not comply with applicable requirements and referring it to the Attorney General for modification. Unbeknownst to the court, however, the chief petitioner for the underlying initiative had withdrawn the petition at the Secretary of State's office nearly six months before the court issued its opinion – leaving no controversy for the court to adjudicate. Only hours after the court's opinion was distributed, the Attorney General notified the court of petitioner's withdrawal of the initiative and requested that the court vacate its opinion. The court readily acknowledged that, although it had not been made aware at the time, the withdrawal of the initiative petition rendered moot the parties' dispute over the sufficiency of the Attorney General's certified ballot title before the court issued its opinion. *Id*. at 378.

Thus, the Supreme Court found itself with exactly the kind of situation *Kerr* was not – a case that lacked a justiciable controversy between the parties, and a merits decision that was issued anyway.

The court turned to *Kerr* as its controlling authority, describing that case as having held "that a request to nullify an appellate decision issued after the case has become moot invokes the court's equitable power of vacatur." Although *Kerr* did not say that, exactly – the court in *Kerr* was never presented with "an appellate decision issued after the case has become moot," and it never articulated any rule specifically applicable to that circumstance – the court nevertheless proceeded to analyze the case under what it called *Kerr*'s "list of factors

that may inform the court as to whether a party has shown an equitable entitlement to vacatur." *Id*. at 381.

Considering the case in light of those factors, the court saw "no argument that unfairness or inequity will result" from allowing the opinion to stand, no indication that doing so would "create a hardship for the Attorney General," and no reason "that granting vacatur would serve the public interest." *Id*. Accordingly, the court let the opinion stand.

Puzzlingly, although it initially explained that under *Kerr* a court "must consider whether, under the facts, the court that rendered the challenged opinion should not have rendered a decision at all on the merits," the Supreme Court made no further mention of whether that was the case with respect to its own decision on the merits. In fact, the court in *Terhune* gave no indication that the question whether it had the power to render that decision in the first place was considered at all.

Meanwhile, the Supreme Court in other cases continued to reaffirm the fundamental principle that, as a matter of Oregon Constitutional law, the "judicial power" conferred on the courts extends only to justiciable controversies, and that Oregon courts are therefore *without jurisdiction* to decide moot cases. *E.g.*, *Yancy v. Shatzer*, 337 Or 345, 363, 97 P3d 1161 (2004) ("Petitioner has requested this court to decide a matter that no longer is a controversy between the parties. As we have explained, Article VII (Amended), section 1, of the Oregon Constitution constrains us from doing so."); *id*. at 362 ("...the prevailing view throughout the American legal landscape in 1857 was that the constitutional grant of judicial power did not include the power to decide cases that had become moot at some stage of the proceedings.").

Those two analyses, however, cannot exist together. If *Terhune* is correct that a decision rendered in an already-moot case may be left to stand so long as equitable considerations support that outcome, then the central principle of *Yancy* and its related case law – that courts are empowered to decide only justiciable controversies – is no longer correct. Alternatively, if *Yancy*'s view of the constitutional limits on judicial power is adhered to, then *Terhune* would appear to have been wrongly decided; under *Yancy*, a decision adjudicating the merits of a case after it has become moot simply is not a valid exercise of the court's power. Unless the court intended to unravel decades of authority concerning the judicial power, it would seem that *Terhune* must eventually be revisited or abandoned altogether. To do so, the court just needed to wait for the right set of improbable circumstances.

Hemenway seemingly presented exactly that opportunity. The Supreme Court had issued an opinion on the merits in a case where the only individual with any vested stake in the outcome had died well before adjudication. The case was undeniably moot before the court's opinion issued, and the court readily admitted as much. *Hemenway*, 353 Or at *3.

Ultimately, however, the Supreme Court in *Hemenway* declined to resolve the question. The court acknowledged that the case before it "became moot when defendant died and thus was moot before this court issued its decision," and it agreed that under *Yancy* such a lack of controversy meant "the decision should be vacated" because the court "lacked 'judicial power' conferred by Article VII (Amended), section 1 of the Oregon Constitution to issue the decision that it did[.]" *Id*. at *2. The court went on, however, to note that its decisions in *Kerr* and *Terhune* suggested the decision whether to vacate was instead a matter of "discretion" based on "equitable principles." *Id*.

Rather than reconcile those competing analyses, the court simply concluded that it did not matter. The case did "not require us to resolve the tension in our prior decisions," the court explained, because under either analysis the court would "reach the same conclusion" to vacate the opinion. *Id*. To illustrate, the court exhaustively inventoried each relevant "equitable consideration" – including the public interest in judicial precedents, the effort expended by the parties, and the fact that the case was not mooted by a party's voluntary action – concluding that such considerations ultimately "militate in favor of vacatur." Thus, it declared, "we should vacate our decision in this case, whether the issue is analyzed as one of the

court's lack of jurisdiction to decide a moot case or as one of the court's exercise of its equitable powers." *Id.* It would not, however, announce which analysis was correct. That question would have to wait for another day.

Given the almost perfectly inconsistent precedents at play, it is perhaps difficult not to see the result in *Hemenway* as anticlimactic or even disappointing. But there is, at least for those who would prefer to see *Yancy* win this particular battle, a silver lining. Despite the fact that there is something inescapably unsatisfying about an opinion that engages in two independent legal analyses but refuses to determine *which* of them is the appropriate one for purposes of future disputes – we want to know *what the law is!* – it is probably equally true that such a restrained approach is, in itself, a reaffirmation of the principles the court in *Yancy* espoused. The court's charge is to decide only as much as is necessary to resolve the case before it and no more, and not to engage in legal questions the answer to which has no practical effect on the parties. By opting not to resolve which of its prior decisions should control, the Supreme Court in *Hemenway* did not simply kick the can down the road. Rather, it opted to wait for a case in which the answer to that question mattered to those before the court. To those with a more restrained view of the "judicial power" conferred on the court by the Oregon Constitution, that result should be reassuring – as it is precisely what *Yancy* would require.

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His practice has focused on issues of government and public law, including issues concerning public records, public meetings law, public employees' retirement law, state and federal constitutional law, and questions of state and local government authority.

OSB & Professionalism Commission Awards Nominations

Paul Nickell

Every year the OSB honors Oregon's most outstanding lawyers, judges, and citizens, but we can't do it without your help. The OSB is currently accepting nominations for the following awards:

OSB Award of Merit
Wallace P. Carson, Jr. Award for Judicial Excellence
President's Affirmative Action Award
President's Membership Service Award
President's Public Service Award
President's Public Leadership Award
OSB Sustainability Award

The Joint Bench/Bar Commission on Professionalism is also accepting nominations for this year's Edwin J. Peterson Professionalism Award. The deadline for all nominations is 5:00 pm on Friday, June 28. Information can be found at www.osbar.org or contact Kay Pulju, OSB Member & Public Services Department, at 503-620-0222 ext. 402, 1-800-452-8260 ext. 402 or e-mail kpulju@osbar.org. This year's awards luncheon is Thursday, December 5, at The Governor Hotel in Portland.

Paul Nickell is the Constitutional Law Section's Bar Liaison and the Editor of the Bar Bulletin.

New Book on the Oregon Constitution

Erin Lagesen

In June 2013, the Oregon State Bar Legal Publications division released the first edition of new Bar Book: Oregon Constitutional Law. Notwithstanding Oregon's history of independent constitutionalism, and the pronounced role the Oregon Constitution plays in many of the cases litigated in the Oregon courts, the book is the first OSB guide for practitioners focused solely on the Oregon Constitution.

The project began in 2011, when OSB Legal Publications asked the Executive Committee of the Constitutional Law section whether it would be willing to take on the project of putting together the book. The Executive Committee decided to pursue the project, and formed sub-committee of editors to spearhead it: Justice Jack Landau, Judge David Schuman, Alycia Sykora, Chin See Ming, Bob Steringer, and Ed Trompke. The editors identified the subject matter to be addressed in the book, choosing to focus on aspects of the constitution and constitutional litigation not covered in other bar publications, such as the publications on the criminal procedure provisions of the Oregon Constitution. The editors then drafted constitutional practitioners from a variety of public and private practice backgrounds to write the chapters of the book. The resulting book provides practical insight into how the Oregon Constitution can play a role in practice in a wide range of ways never before discussed in an OSB practice guide.

The book starts with an overview of "Constitutionalism" written by Justice Landau and Judge Schuman. The chapter provides an overview of the state constitution and a discussion of the Oregon courts' "first things first" approach to issues that implicate both the state and federal constitutions. It then provides an outline of the Oregon courts' approach to interpreting provisions of the state constitution, discusses what provisions the courts interpret to parallel federal constitutional provisions, and what provisions the Oregon courts interpret differently. Finally, the chapter identifies useful resources for grappling with, and developing arguments about, issues of Oregon constitutional law.

The remaining 17 chapters outline (1) the substantive law under the provisions of the constitution that frequently play a role in practice; (2) the practical issues that arise in constitutional litigation; and (3) the limitations on court authority to resolve constitutional issues. The book reviews the substantive and procedural individual rights conferred by the religion provisions (Article I, sections 2 and 3); the speech, petition, and assembly provisions (Article I, sections 8 and 26); the equal privileges and immunities provision (Article I, section 20); the remedies clause, speedy trial provision, and open courts provision (Article I, section 10); the civil and criminal jury trial provisions (Article I, sections 11 and 17); the arms provision (Article I, section 27); the contract clause (Article I, section 21); and the takings clause (Article I, section 18).

In addition, the book discusses the constitutional provisions and doctrines governing the structure, operation and authority of Oregon state and local governments, including the initiative and referendum provisions, the home rule provisions, tax limitations, the public finance provisions, and the separation of powers principles applicable to the Oregon constitution. Finally, the book contains two chapters on the related topics of litigating the constitutional case and principles of justiciability.

The book's broad scope will be useful both to lawyers who represent state and local governments, to lawyers who represent clients in cases and transactions involving state and local governments, and to lawyers representing clients in private disputes that are regulated through damages caps or other statutory or regulatory limitations. The outlines of the

substantive law on the rights protected by the constitution will assist attorneys in assessing how, if at all, the state constitution may play a role in a particular case or transaction. The chapters discussing the Oregon courts' approach to state constitutional issues and the practicalities of litigating a constitutional issue will then help attorneys develop the constitutional issues that may be presented by the cases they are handling.

The book currently is available to all bar members in the "BarBooks™" section of the OSB website. The executive committee hopes that you will be able to make use of this valuable new resource.

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Chapter 3

The Oregon Constitution and Cases in 2012

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

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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* 483 (reprinted in CLASSICS IN POLITICAL PHILOSOPHY 3d ed, Jene M. Porter, ed.) (2000).

I. DISTRIBUTION OF POWER WITHIN THE STATE

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

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

"Under our constitutional system of government, the legislative, executive and judicial departments are required to function exclusively within their respective spheres." *State v Rudder*, 137 Or App 43, 48, *rev'd on other grounds*, 324 Or 380 (1996) (quoting *U'Ren v Bagley*, 118 Or 77, 81 (1926)).

A. Separation of Powers

Oregon Constitution: 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).

"[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 on other grounds*, 324 Or 380 (1996) (quoting *U'Ren v Bagley*, 118 Or 77, 81 (1926)).

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).

B. Judicial Power and Justiciability

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

> "**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

Oregonian Publishing Company, LLC v The Honorable Nan G. Waller and State of Oregon, 2012 WL 5286194 (10/24/12) (Brewer, Armstrong, Duncan) (Multnomah) Judge Waller denied The Oregonian's request for access to a "shelter care order" that the judge had made in a juvenile dependency case. Rather than filing a mandamus petition ("a well-established mechanism for seeking review"), The Oregonian instead sued Judge Waller, asserting claims under the Public Records Law and the Declaratory Judgments Act. The Oregonian sought declaratory and injunctive relief declaring the "shelter care order" open for public inspection, ordering defendant Waller to release the shelter care order to The Oregonian, and awarding attorney fees against her. The trial court in this case (Judge Frank Bearden), agreed with The Oregonian, granting declaratory relief, denying injunctive relief, and ordering Judge Waller to pay $69,960 in attorney fees and costs to The Oregonian.

Judge Waller appealed, arguing that the Multnomah County Circuit Court lacked jurisdiction and authority under the Public Records Law and the Declaratory Judgment[s] Act. The Oregonian also appealed, arguing that the trial court should have granted The Oregonian attorney fees against the State of Oregon.

The Court of Appeals reversed and remanded with instructions to dismiss the action. The Oregonian's appeal was dismissed as moot. The State of Oregon's cross-appeal was dismissed as moot.

The court explained: "Nothing that we are aware of in the Oregon Public Records Law authorizes a requestor to sue a judge who has made an adverse public records ruling on a request confided to her authority, merely because the requestor is dissatisfied with the adjudication." The Oregonian contended that a statute (ORS 419A.255) is unconstitutional under Article I, section 10, to the extent that it expressly prohibits public disclosure of the juvenile court order in this case or, alternatively, accords the juvenile court discretion not to publicly disclose the order. The Court of Appeals determined that even though The Oregonian framed its first claim under the Public Records Law, it is really a claim for declaratory relief challenging Judge Waller's adjudication, therefore the Public Records Law "could not furnish a basis for disclosure of the order unless [The Oregonian] is entitled under Article I, section 10, to a declaratory judgment requiring defendant Waller" to consent to the disclosure, despite her prior ruling denying disclosure. Then the Court of Appeals concluded that The Oregonian's claims are not cognizable in a circuit court action for declaratory judgment. Judge Waller's decision, in which she concluded that the Juvenile Code prohibits public inspection of the "shelter care order" and she denied the request for her consent to disclose part of it, was not reviewable "in a declaratory judgment claim by a different circuit court judge in a separate

lawsuit." The Court of Appeals quoted Article VII (Original), section 9, of the Oregon Constitution as the source of circuit court jurisdiction, and concluded:

> "[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."

"Declaratory judgment is not a substitute for a new trial or an appeal, and it will not lend itself for use as a collateral attack on a prior judicial decision by a court of competent jurisdiction." (Citing *LaMarche v State of Oregon*, 81 Or App 216, *rev den*, 302 Or 299 (1986)). "In bringing this action, plaintiff eschewed a well-established mechanism for seeking review of defendant Waller's decision by a higher court, not by another circuit court judge. Plaintiff was entitled to seek mandamus review of defendant's decision by the Oregon Supreme Court, as it has done in the past in other cases."

1. Subject Matter Jurisdiction

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

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)).

State v Blok, 352 Or 394 (9/20/12) (Balmer) In this original mandamus proceeding, relator petitioned for an alternative writ seeking to compel the trial court to modify the restrictive conditions in his pretrial release agreement. The Court issued the writ, the trial court declined to change its order, and the parties argued the case before the Court. Relator changed his position at oral argument from his written briefing, and conceded the issue he'd sought mandamus for. The Court dismissed the alternative writ: "This Court's exercise of its mandamus power is discretionary. *See* Or Const, Art VII (Amended), §2 ('the supreme court may, in its own discretion, take original jurisdiction in mandamus'); *State ex rel Marbet v Keisling*, 314 Or 235, 238, 838 P2d 585 (1992) (applying principle)." Here, where relator conceded that the trial court's restrictive condition is permissible in some circumstances and where he orally argued a position "that is not the legal question that was presented in the petition or briefed in this court," the Court exercised its discretion to dismiss the writ.

(a). Standing

(i). Oregon Constitution

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). "[W]hether a person is entitled to seek judicial relief depends upon the type of relief sought and commonly is governed by a specific statutory standard." *Id*. at 384.

"'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, 760 P2d 846 (1988) (discussing principle). 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, 919 P.2d 1168 (1996)." *Kellas v Dep't of Corrections*, 341 Or 471 (2006).

(ii). U.S. Constitution

"A suit brought by a plaintiff without Article III standing is not a 'case or controversy,' and an Article III federal court therefore lacks subject matter jurisdiction over the suit." *Cetacean Community v Bush*, 386 F3d 1169, 1174 (9th Cir 2004) (citing *Steel Co. v Citizens for a Better Environment*, 523 US 83, 101 (1998)).

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)).

(b). Ripeness

(i). Oregon Constitution. "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)).

(ii). U.S. Constitution. 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).

(c). Mootness

(i). U.S. Constitution. 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).

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

In 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)).

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

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)).

State v Hauskins, 251 Or App 34 (7/05/12) (Schuman, Wollheim, Nakamoto) (Tillamook) While he was on probation for felony meth possession, defendant's urine tested positive for drugs and then he admitted to his probation officer that he "used." He had also failed to seek drug treatment despite the court's order requiring him to do so. The court held defendant in contempt under ORS 33.065 and 33.105(2) for violating

his probation. He moved for a judgment of acquittal after his urinalysis was not offered into evidence and his confession was uncorroborated under ORS 136.425 (a confession alone is insufficient to warrant conviction without other proof). The trial court denied the motion and imposed a sanction of 180 days in jail.

The Court of Appeals reversed. The state first argued that this appeal is moot because defendant had already served his time and was released. The court at length assessed its recent conflicting case law on whether a defendant's completion of a punitive contempt sanction rendered an appeal moot. The court expressly concluded here, that "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." The court was "particularly persuaded" because the sanction for punitive contempt is six months in jail and all criminal procedures (except a jury trial right) apply to contempt proceedings. In short: "the sanction having been served does not render the appeal moot." And as to the substance of the appeal, defendant's probation status and failure to undergo drug treatment "does not provide independent proof that defendant had actually used drugs in violation of his probation." Under the statute requiring corroboration of a confession (ORS 136.425), the evidence is insufficient to support a conviction.

2. Inherent Authority

> "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).
>
> On 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 ex rel O'Leary v Jacobs*, 295 Or 632, 636 (1983). The common law rule includes an exception: If the sentence is invalid because it is contrary to law in some respect, the court is deemed to have failed to pronounce any sentence, and thus it has not yet exhausted its jurisdiction and can substitute a valid sentence for the one that is void. *State v Nelson*, 246 Or 321, 324, *cert denied* 389 US 964 (1967). That appears to be the only exception recognized in the common law." *State v Johnson*, 242 Or App 279 (2011).

State v Spainhower, 251 Or App 25 (7/05/12) (Brewer and Haselton) (Umatilla) A jury convicted defendant of harassment. Defendant told the trial court that the verdict was an injustice. The trial court told him to be quiet but he "continued to vehemently object to the verdict." The trial court held defendant in summary contempt (ORS 33.096) and set a hearing on contempt sanctions. But then the trial court granted defendant a new trial on the harassment charge. Nine months later that harassment trial occurred. He was acquitted. The prosecutor asked the court to sanction defendant based on his in-court behavior nine months earlier. The trial court sanctioned defendant to two years of bench probation and 30 days in jail, suspended as long as defendant completed probation, and $973 in fines, also suspended.

The Court of Appeals reversed. It traced the history of courts' authority in contempt cases: "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." (Citing *Rust v Pratt*, 157 Or 505 (1937) and *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."

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. In this case, the court concluded that the word "summarily" in the contempt statute refers to procedures and timing. Under the statute (ORS 33.096) and due process, "direct contempt sanctions must be imposed at the first reasonable opportunity, usually at or before the end of trial. Given that constraint, the court's imposition of sanctions here came too late." Generally, "a sanction imposed months or years later would not logically serve" that statutory "purpose of preserving order in the court or protecting the authority and dignity of the court."

Rather than end the matter at the statutory level, the Court of Appeals then turned to due process to arrive at the same conclusion. The "inherent power to summarily punish a direct contempt is subject to constitutional limits." The court recited several US Supreme Court cases on the subject "as useful context in considering the temporal due process limits that the United States Supreme Court has applied to a court's authority to summarily punish a direct contempt." The limiting temporal principle is: "The court must impose any sanction at the first reasonable opportunity, usually at or before the end of trial." In some cases that will be impractical, such as when "immediate security issues" require a later sanction, or when an attorney is being sanctioned. The record here discloses no reason why an almost 10-month delay was required, other than convenience, which is insufficient. The delay exceeded the trial court's statutory authority under ORS 33.096.

3. *Stare decisis*

Note: *Stare decisis* may be a self-imposed limit on judicial authority to decide what the law is. 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. *Farmers Insurance Co. v Mowry*, 350 Or 686 (2011). 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)).

Cf. State v Moore, 247 Or App 39 (12/14/11), ***review allowed*** 352 Or 25 (5/03/12) (Haselton, Armstrong, Duncan) (Tillamook) (See also "Consent," *post*). The Court of Appeals declined the state's invitation to revisit its recent full-court analysis in *State v*

Machuca, 231 Or App 232 (2009), *rev'd on other grounds*, 347 Or 644 (2010), where it held that a defendant's consent to blood or urine testing is not voluntary under Article I, section 9, if the consent is given just after being injured, arrested, and receiving statutory implied consent warnings (threat of economic harm and loss of driving privileges). The court here explained why, under *stare decisis* principles, it would not just overturn its recent decision: "To revisit and repudiate *Machuca I*, 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.'" (Quoting *Farmers Insurance Co. v Mowry*, 350 Or 686, 698 (2011) and citing Alexander Bickel, THE LEAST DANGEROUS BRANCH (1962)). And the state did not present evidence that there had been a change in the law or that the decision was plainly wrong. The court affirmed the trial court's suppression of defendant's blood and urine after he was involved in a fatal traffic wreck.

4. Policy Questions

(i). 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").

(ii). U.S. Constitution

Zivotofsky v Clinton, 132 S Ct 1421 (3/26/12) (Roberts for majority, Breyer dissenting) In 2002, Congress enacted the Foreign Relations Authorization Act that allows Americans born in Jerusalem to list "Israel" as their birthplace on their passports. The State Department refused to follow that law, stating that it would not take a position on the political status of Jerusalem. Zivotofsky is an American who was born in Jerusalem in 2002 to two American parents. His mother filed an application for a passport (and a consular report) for him with "Jerusalem, Israel" to be listed as his place of birth. The State Department told his mother that only "Jerusalem" (not "Israel") would be listed. The parents filed a complaint seeking a declaratory judgment and an injunction ordering the Secretary of State to list the child's birthplace as "Jerusalem, Israel." The district court dismissed the case on grounds that the child lacked standing and the case presented a "nonjusticiable political question." The D.C. Circuit panel reversed, stating that he did have standing, and remanded for additional factfinding. The district court again concluded that this was a nonjusticiable political question. The D.C. Circuit panel affirmed.

Held: The political question doctrine does not bar review of this case. The child "does not ask the courts to determine whether Jerusalem is the capital of Israel. He instead seeks to determine whether he may vindicate his statutory right * * * to choose to have Israel recorded on his passport as his place of birth." The only question is "whether the statute impermissibly intrudes upon Presidential powers under the Constitution. If so, the law must be invalidated and Zivotofsky's case should be dismissed for failure to state a claim. If, on the other hand, the statute does not trench on the President's powers, then the Secretary must be ordered to issue Zivotofsky a passport that complies with"

the statute. The "only real question for the courts is whether the statute is constitutional. 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 Constituiton, '[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.'" Remanded.

C. Legislative Power and Immunity

1. Power

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

"**[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

"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,* 2012 WL 5285357 (2012).

2. Immunity: 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

State v Babson, 249 Or App 278 (4/11/12) (Schuman, Wollheim, Nakamoto) (Marion) (*petitions for review filed)* (See also "Expression and Assembly," *post*). On the state

capitol steps, defendants conducted a day-and-night vigil to protest the deployment of the Oregon National Guard to Iraq and Afghanistan. A legislative rule prohibits using the capitol steps between 11pm and 7am. Defendants were charged with second-degree criminal trespass, as a violation rather than a crime. They subpoenaed the co-chairs of the Legislative Administrative Committee (LAC) to question the legislators' motives on enforcing the overnight ban as against them. The trial court quashed those subpoenas. They were convicted and fined $500 each. They appealed contending that the overnight ban violated various constitutional rights (speech, assembly) and that the debate clause did not require the trial court to quash their subpoenas.

The Court of Appeals reversed and remanded on the debate clause issue to allow defendants to question the two legislators as to "the motive driving the enforcement" of the overnight ban, whether it "was a desire to protect public safety * * * or to stifle defendants' expression." The Court of Appeals determined that the trial court's error in quashing defendants' subpoenas must be remedied on remand before the court can determine whether the arrest violated Article I, section 8, and section 26 (speech and assembly), which are addressed, *post*.

The debate clause in Article IV, section 9, "has never been construed by an Oregon court." To do so, the court's goal is to discern the drafters' and adopters' intent, per *State v Hirsch/Friend*, 338 Or 622, 631 (2005). The clause is interpreted by considering the words as understood by the drafters "and yet, at the same time," the court is to "apply faithfully the principles embodied in the Oregon Constitution to modern circumstances as those circumstances arise," per *State v Rogers*, 330 Or 282, 297 (2000).

"It is beyond dispute that, no matter how expansively one wants to construe the text of the Debate Clause, its literal language does not prevent defendants from compelling the legislators to answer questions about whether they instructed the LAC administrator or the state police to arrest defendants because of their expression" because such instruction could not have occurred "in debate in either house." The court nevertheless moved from text to historical circumstances: the debate clauses originated in the common law of England, were first reduced to statutes in 1689 in the English Bill of Rights, appeared in "the constitutions of the colonies, the Articles of Confederation, and, of course, the United States Constitution at Article I, section 6."

The Court of Appeals traced the history of the Debate Clause. Three identified principles underlie it: (1) to protect the legislative branch from the crown, and in America, from the other branches; (2) to enable legislators to speak freely without fear of retribution from the public or other branches; and (3) to protect legislators from being distracted by the necessity of defending themselves in court. In sum, the "rule applies not only to speech uttered in debate, but to written reports, legislation-related discussion in committees, resolutions, votes, and 'everything said or done by a member, as a representative, in the exercise of the functions of that office, so long as those words are uttered 'in session.'" (Citations omitted). "The clause does not apply to written or spoken words uttered while the legislature is not in session, nor to words that are uttered beyond the exercise of the legislative function." Thus "defendants were entitled to question the legislators, but only about any instructions or other communications that they might have given to or had with the LAC administrator or others regarding *enforcement* (as opposed to *enactment*) of the overnight rule." The speech defendants here sought to inquire about occurred well after the process of enacting the overnight rule. Once that rule was enacted, the legislative function ended, and with it the immunity conferred by the Debate Clause ended as well. The acts, if they occurred, were not essential to legislating. Therefore the trial court erred in quashing the subpoenas. The error was prejudicial.

3. Initiative and Referendum

See Article IV, section 1, of the Oregon Constitution

American Energy, Inc. v City of Sisters, 250 Or App 243 (5/31/12) (Ortega, Brewer, Sercombe) The city council adopted an ordinance imposing a tax on fuel dealers. A city resident later filed a referendum and referred the ordinance to voters under Article IV, section 1, of the Oregon Constitution. Before the voters could vote on that referendum, the Oregon Legislative Assembly enacted an act that placed a moratorium on local fuel taxes. After that (during the statewide moratorium), the voters approved the ordinance. So, the city council adopted the ordinance before the moratorium, but the voters approved it during the moratorium.

Plaintiff sought to enjoin the city from implementing the ordinance. Plaintiff argued that the ordinance was void because it was enacted during a state moratorium on setting local fuel taxes. Both parties moved for summary judgment. The trial court granted summary judgment for defendant and denied plaintiff's motion for summary judgment.

The Court of Appeals affirmed the trial court's conclusion that a city ordinance was enacted when the city council adopted it – not when the people approved it, and the ordinance was not enacted during the moratorium. The Court of Appeals provided "a short overview of the citizen referendum process lying at the center of this dispute," which is in Article IV, section 1, subsections (2), (3), and (5):

> "(2)(a) The people reserve to themselves the initiative power, which is to propose laws and amendments to the Constitution and enact or reject them at an election independently of the Legislative Assembly.
>
> * * * * *
>
> (3)(a) The people reserve to themselves the referendum power, which is to approve or reject at an election any Act, or part thereof, of the Legislative Assembly that does not become effective earlier than 90 days after the end of the session at which the Act is passed.
>
> * * * * *
>
> "(5) The initiative and referendum powers reserved to the people by subsections (2) and (3) of this section are further reserved to the qualified voters of each municipality and district as to all local, special and municipal legislation of every character in or for their municipality or district * * * ."

The Court of Appeals stated: "There 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." As to this case, the text of subsections (2) and (3) (quoted above), 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." Cases involving similar issues show that "an ordinance is enacted when approved by the governing body and not when subsequently approved by a citizen referendum." The ordinance at issue was enacted when the city adopted it.

II. FREE EXPRESSION

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

A. Origins & Interpretation

Origins. "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).

Article I, section 8, of the Oregon Constitution is identical to Article I, section 9, of the Indiana Constitution of 1851. Palmer, *The Sources of the Oregon Constitution*, 5 Or L Rev 200, 201 (1926). The "Bill of Rights of the Oregon Constitution is drawn immediately from that of Indiana, see Carey, ed., THE OREGON CONSTITUTION (1926) p 28 [but] the prototype of all state freedom of speech provisions on the Oregon model appears to be that of the Pennsylvania Constitution of 1790. *** Earlier state constitutions, dating from the Revolutionary period, contained more general guarantees of free speech comparable to that of the First Amendment." *State v Jackson*, 224 Or 337, 348-49 (1960).

Interpretations. 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 Court of Appeals has concluded: "the analytical method set out in *Robertson* controls our evaluation of the parties' Article I, section 8, contentions. Although the Supreme Court has suggested that, because it is part of the original constitution, a different, more originalist, interpretive approach applies to Article I, section 8, the fact remains that the court has yet to overrule *Robertson.* Moreover, as in *Stranahan,* the parties in this case have not argued that anything but the *Robertson* analysis applies. Lacking any assistance from the parties, we decline to undertake on our own an analysis of Article I, section 8, that departs from the method set out in *Robertson." Leppanen v Lane Transit District,* 181 Or App 136, 142 (2002) ("In prohibiting the solicitation of initiative petition signatures, [an ordinance] certainly prohibits a form of speech," based on content, and violates Article I, section 8).

B. Expression and Assembly

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

State v Babson, 249 Or App 278 (4/11/12) (Schuman, Wollheim, Nakamoto) (Marion) (See also "Immunity: The Debate Clause," *ante*). A legislative committee established a rule prohibiting use of the state Capitol steps between 11:00 pm and 7:00 am (the "overnight rule"). Defendants were arrested while holding an overnight vigil on the Capitol steps and were charged with criminal trespass as a violation. The trial court quashed defendants' subpoena directed to two legislators.

The Court of Appeals held that the rule was properly promulgated and that it facially does not violate any provision of the Oregon Constitution. The Court of Appeals remanded to determine if the rule, as applied to defendants, violates defendants' rights to free expression and assembly. Defendants, on remand, are permitted to question two legislators to determine their motive in enforcing the rule against defendants. The Court of Appeals' reasoning on free expression and assembly is as follows:

State v Robertson, 293 Or 402 (1982), *State v Plowman*, 314 Or 157 (1992), cert den, 508 US 974 (1993), and other cases "divide the universe of enactments that are subject to a challenge" under Article I, section 8," into three categories. The first is "enactments directed toward expression per se," such as in *State v Henry*, 302 Or 510 (1987). The second is enactments "directed toward some regulable results and 'expressly prohibit' expression used to achieve those results," as in *Plowman*. The third is "enactments that regulate or prohibit conduct 'without referring to expression at all,' but may when enforced "interfere with a person's expression," under *Plowman*. Each category is reviewed under different rules. "Thus, the first step in reviewing an enactment under Article I, section 8, is to determine the enactment's category."

Here, defendants' insistence that the overnight rule falls into the second category "demonstrates a fundamental misunderstanding of clear and settled Article I, section 8, jurisprudence. Statutes fall into the first category only if they expressly forbid speech. * * * They fall into the second category only if they specify a harm and 'expressly' provide that speech or some other form of intentionally communicative activity is one way to cause that harm. * * * The overnight rule does not expressly or obviously regulate speech or communication; rather it addresses conduct that, in some situations (such as the one at issue here – an overnight protest) may involve expression, but in other situations (for example, a late night capitol steps skateboarder or passed-out drunk) do not. Such enactments, the Supreme Court emphatically and recently held, cannot be subjected to a facial challenge – that is, a challenge asserting that the enactors of the rule violated the constitution *when they enacted it*, regardless of how the enactment is enforced. *State v Illig-Renn*, 341 Or 228, 233-34 (2006)." (Citations omitted). "Rather, such enactments are susceptible to challenge only as applied to the facts of a particular case."

A "person cannot immunize herself or himself from the application of speech-neutral laws by accompanying otherwise illegal conduct with expressive activity. Speech accompanying punishable conduct does not transform conduct into expression under

Article I, section 8." (Citations omitted). "Rather, to determine whether the enforcement of a speech-neutral statute violates an individual's rights under Article I, section 8, we apply the analysis that we described and explained in *City of Eugene v Lincoln*, 183 Or App 36, 43 (2002)." The issue here "is whether the state's enforcement of the overnight rule against defendants was directed toward defendants' expression or toward some speech-neutral objective."

The Court of Appeals remanded to the trial court because the trial court "erroneously excluded evidence" that "could have led to a different outcome." Specifically, defendants are entitled to question the co-chairs of the legislative committee "to determine whether they instructed" anyone "to enforce the overnight rule against defendants based on disapproval of the content of defendants' expression." Defendants do not seek to question the co-chairs regarding the enactment of the rule but just regarding enforcement of the rule. The trial court had quashed defendants' subpoenas to the co-chairs on grounds that they are immune from process under Article IV, section 9, of the Oregon Constitution (the Debate Clause). The Court of Appeals here construed the Debate Clause (see, Debate Clause, *post*), and concluded that "the clause does not apply to written or spoken words uttered while the legislature is not in session, nor to words that are uttered beyond the exercise of the legislative function." Therefore, "defendants were entitled to question the legislators, but only about any instructions or other communications that they might have given to or had with the LAC administrator or others regarding *enforcement* (as opposed to *enactment*) of the overnight rule." The error in quashing the subpoenas must be addressed before the court can determine if Article I, section 8, or section 26, was violated by defendants' arrest.

As for assembly under Article I, section 26, the Court of Appeals agreed that defendants "were engaging in activity protected by Article I, section 26, when they were arrested," per *Lahmann v Grand Aerie of Fraternal Order of Eagles*, 202 Or App 123 (2005), *rev denied*, 341 Or 80 (2006). But that fact alone "does not mean that the arrest violated their rights of assembly, instruction of legislators, or application to government for redress of grievances – what we for convenience refer to as assembly rights." Similar analyses apply to speech and assembly rights under the Oregon Constitution. The "overnight rule is assembly-neutral." Article I, section 26, "encompasses three protected activities: peaceful assembly for political purposes, instruction of representatives, and application to government for redress of grievances." The overnight rule does not expressly mention or imply any of those activities. Defendants' "challenge under Article I, section 26, can succeed only if defendants can establish that no evidence supports the trial court's finding that the rule was enforced for public safety reasons and not for reasons having to do with assembly rights." The court's error in quashing the subpoenas must be remedied first.

C. Politicking, Campaigning, and Lobbying

1. 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*, __ Or __ (2012), 2012 WL 5285357.

(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 [in *Citizens United*]." *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).

Summary of *Citizens United*:
Austin v. *Michigan Chamber of Commerce*, 494 U. S. 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 U. S. 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.

Cf. Sanders Co. Republican Central Committee v Bullock, 2012 WL 4070122 (9th Cir 9/17/12) (Schroeder, Gould, Rakoff) Since 1935, Montana has elected its judges through nonpartisan elections. It is a crime for any political party to endorse or contribute to a judicial candidate in Montana. The local Republican Committee sought to spend money and endorse judicial candidates and sued the state's Attorney General and others, contending that "Montana's ban on political party endorsements is an unconstitutional restriction of its First Amendment rights of free speech and association." The district court denied the Republican Committee's request for an injunction.

The Ninth Circuit reversed and granted "immediate injunctive relief" because the "voters of Montana are * * * deprived of the full and robust exchange of views to which, under our Constitution, they are entitled." The reasoning is:

The "First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." *Citizens United v FEC*, 558 US 310, 130 S Ct 876, 898 (2010). Political speech "including the endorsement of candidates for office – is as at the core of speech protected by the First Amendment."

"The threat to infringement of such First Amendment rights is at its greatest when, as here, the state employs its criminalizing powers." As "in *Citizens United*, if the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, simply for engaging in political speech." *Citizens United*, 130 S Ct at 904.

This Montana statute "on its face" is "a content-based restriction on political speech and association, and thereby threatens to abridge a fundamental right," and thus "is subject to strict scrutiny." *Citizens United*, 130 S Ct at 882. "Montana has a compelling interest in maintaining a fair and independent judiciary. Where Montana and the district court err, however, is in supposing that preventing political parties from endorsing judicial candidates is a necessary prerequisite to maintaining a fair and independent judiciary." That "doubtful proposition" both "flies in the face" of "the other 38 states that elect their judges" that "not only allow party endorsements but require party nominations." Montana thus "lacks a compelling interest in forbidding political parties from endorsing judicial candidates" and even it had a compelling interest, the law "is not narrowly tailored."

D. Stalking

1. Civil Stalking

> "A person may obtain a stalking protective order in two ways. One method involves filing a complaint with law enforcement. See ORS 163.7335 to 163.744. The other method * * * does not require law enforcement involvement. The victim instead directly petitions the circuit court to issue a civil stalking protective order. ORS 30.866." *State v Ryan*, 350 Or 670 (2011).
>
> To obtain a Stalking Protective Order (an SPO), the petitioner must meet the statutory requirements and "if the contact involves speech, Article I, section 8, of the Oregon Constitution requires proof that the contact constitutes a threat. A threat 'is a communication that instills in the addressee a fear of imminent and serious personal violence from the speaker, is unequivocal, and is objectively likely to be followed by unlawful acts.' *State v Rangel*, 328 Or 294, 303 (1999). But a threat does not include 'the kind of hyperbole, rhetorical excesses, and impotent expressions of anger or frustration that in some contexts can be privileged even if they alarm the addressee.' *State v Moyle*, 299 Or 691, 705 (1985)." *Swarringim v Olson*, 234 Or App 309, 311-12 (2010).

K.R. v Erazo, 248 Or App 700 (3/14/12) (Duncan, Haselton, Armstrong) (Washington) Both parties to this stalking case are "frequent shoppers at a Goodwill outlet store" who are particularly interested in "the bins" of "product" that would be wheeled in so that shoppers could "dig through the bins." One shopper said it is "like the Three Stooges gone nuts." The alleged stalker in this case is a re-seller who pioneered a new shopping method by using a handheld electronic scanner. A "new, more aggressive atmosphere permeated the culture" of this outlet store. The alleged stalker pushed the victim in this case 10 times over a two-year period, followed her around the store, yelled at her, and called her names. He said he "can do whatever he wants" and once he "slugged" her and "knocked her off balance." The trial court issued a stalking protective order against the stalker.

The Court of Appeals reversed under Article I, section 8, and *State v Rangel*, 328 Or 294, 303 (1999), which require proof of a "threat" whenever the alleged stalking involves speech. The Court of Appeals assumed that the slugging incident was one contact, but because the statute (ORS 30.866) requires two contacts in two years, this SPO fails. Name-calling is insufficient to meet the *Rangel* standard for speech-based contacts. This stalker's acts of following the victim around the store do not provide a basis for "objectively reasonable apprehension or fear resulting from the perception of danger," as the element of "danger" is used in ORS 163.170(1) and is defined under Webster's Third New International Dictionary.

T.M.B. v Holm, 248 Or App 414 (02/29/12) (Duncan, Haselton, Armstrong) (Coos) The stalker and the victim live in the same housing development. The victim uses a cane and has a leg brace. While he walked his dog, the stalker came up behind him on a rider lawnmower and said, "I want to talk with you." The victim said, "I have nothing to say to you. Leave me alone." The stalker continued following the victim on his lawnmower, right on his heels, even when the victim crossed the street 3 times to get away, because his dog was frightened and was pulling him. The stalker said, "If you don't stop it, things will get worse for you." The victim's wife drove by and the stalker, on his lawnmower, told her, "I'm going to tell you what I told your husband: You leave us alone, and we'll leave you alone." The trial court entered a permanent SPO under ORS 163.738(2)(a)(B), which requires at least two unwanted contacts and when speech is involved, the "contact" must constitute a "threat."

The Court of Appeals affirmed. The "contact" with the victim's wife is not a threat under *Rangel*, but it can be relevant context for nonexpressive contacts. The nonexpressive conduct that is a "contact" is following the victim with a lawnmower. The other "contact" was not part of this appeal, but it apparently "took place at a community meeting" of a homeowners' association. Also, 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.

S.A.B. v Roach, 249 Or App 579 (5/02/12) (Duncan, Armstrong, Haselton) (Clatsop) The trial court entered a temporary SPO under ORS 30.866(1)(a) without specifying which "contacts" it relied on to find at least two contacts. When alleged contacts involve speech, then Article I, section 8, as interpreted in *Rangel*, is implicated. In a relatively lengthy opinion, the Court of Appeals parced out three episodes of neighbor-to-neighbor incidents involving a fence or boundary line dispute. The conduct at issue involved stating insults and obscenities, picking up an axe or a hoe, spraying a person with a water hose, all while on one's own property. None of it was a qualifying "contact" for issuance of an SPO. A separate "gun incident" does qualify as a contact, but the statute requires two contacts. In short, the Court of Appeals found that only one "contact" was actionable, and the statute requires two. Reversed.

J.L.B. v Braude, 250 Or App 122 (5/16/12) (Hadlock, Ortega, Sercombe) (Deschutes) This is an appeal from two civil SPOs. The alleged victim in both cases is the ex-wife. The alleged stalkers are the ex-husband and his new wife. The victim alleged that the new wife had: "smiled" at her in a store parking lot; walked past her in a store parking lot where the victim worked; inquired into her bank and gas accounts; and contacted the kids' school. The victim also alleged that both the ex-husband and his new wife had "driven by her rural home in a manner that caused her alarm" more than a dozen days, parking for 10 minutes on the road or driving slowly between 5 and 8:30 a.m., in a manner that indicated the victim was being watched. The victim emailed her ex-husband to tell him it was stalking, but the new wife drove by to take a picture, for post-judgment modification proceedings in an apparent ongoing divorce matter, because the new wife and ex-husband believed the victim had a boyfriend living with her. "Undisputed evidence established that nobody who observed the incidents ever saw either of respondents' cars travel onto [the victim's] property." Likewise no one ever saw the alleged stalkers get out of their cars, gesture, or try to speak with the victim. The victim said that the ex-husband had "ranted and raved" once and broke through a locked door many years earlier, and that he had physically grabbed her years before. The victim did not allege that any "contacts" involved speech or other expression protected by Article I, section 8. The trial court entered permanent SPOs under ORS 30.866.

The Court of Appeals reversed: "the record does not support the trial court's determination that unwanted contacts caused petitioner reasonable apprehension for her personal safety." Driving by the victim's house was "unwelcome and unsettling" but did not evince a threat, and in no way did the ex-husband and new wife try to communicate with the victim. The ex-husband's custody arrangement required him to have contact with the victim. The ex-husband's violent acts occurred 5 years before the SPO petition was filed.

E.O. v Cowger, 252 Or App 315 (9/12/2012) (per curiam) (Ortega, Sercombe, Hadlock) (Lane) The Court of Appeals reversed the trial court's entry of a permanent SPO because "the transcript reveals that all of the respondent's contacts * * * involved expression" and none involved "threats of the kind required under *Rangel* and *Falkenstein*." Under those cases and Article I, section 8, the contacts must involve threats that instill a fear of imminent and serious personal violence from the speaker, are unequivocal, and are objectively likely to be followed by unlawful acts."

2. The Crime of Violating an Existing SPO

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."

State v Nahimana, 252 Or App 174 (8/29/12) (per curiam) Armstrong, Brewer, Duncan) (Multnomah) Defendant was convicted of both of stalking (ORS 163.732) and violating an SPO (ORS 163.750) for sending electronic communications from his MySpace account to the victim's account. On appeal, the state conceded that under the narrowing requirement from *State v Rangel*, 328 Or 294 (1999), the evidence is insufficient to convict him of stalking. But under *State v Ryan*, 350 Or 670 (2011), *Rangel*'s narrowing standard does not apply to the crime of violating an existing SPO, thus his convictions for violating the SPO are affirmed (he does not attack the underlying SPO).

State v Nguyen, 250 Or App 225 (5/31/12) (Ortega, Haselton, Schuman) (Multnomah) Defendant was convicted of violating an SPO under ORS 163.750. The victim had an SPO that prohibited defendant from contacting her in any way, including via electronic messages. The stalker sent her several text messages despite the SPO, such as:

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

A jury convicted defendant based on those text messages, over his objection that a judgment of acquittal should have been entered because he engaged in constitutionally protected speech.

The Court of Appeals affirmed his convictions (on remand after *State v Ryan*, 350 Or 670 (2011). 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." In this case, defendant never challenged the underlying SPO, thus the trial court did not err.

3. Terminating an SPO

C.L.C. v Bowman, 249 Or App 590 (5/02/12) (Duncan, Armstrong, Haselton) (Multnomah) ORS 30.866 – which allows for a victim to petition and obtain a civil SPO directly with the court without having law enforcement issue a complaint to the stalker – 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.

In a footnote that covers two half-pages, the Court of Appeals indicated that the stalker had not spoken to the victim in 10 years, he had not sent her letters in 6 years, and that he has avoided contact with her. But apparently he has posted information somehow, somewhere on "a social networking website of which both parties were members," and he sent the victim's lawyer and boyfriend letters about her. The stalker petitioned the court to terminate the SPO, and the trial court terminated it because the website postings were "perhaps ill advised" but "it was speech" and thus the Internet postings did not meet the standards for speech-based contacts under *Rangel*, so the trial court did not consider the website postings in the hearing to determine if the SPO should terminate.

The Court of Appeals reversed and remanded: the website postings as "constitutionally protected speech" may be considered in determining the termination of an SPO. And the trial court "has the opportunity to make demeanor-based credibility findings" in that hearing.

4. The Crime of Stalking

State v Nahimana, 252 Or App 174 (8/29/12) (Per Curiam: Armstrong, Brewer, Duncan) (Multnomah) Defendant was convicted of both of stalking (ORS 163.732) and violating an SPO (ORS 163.750) for sending electronic communications from his MySpace account to the victim's account. On appeal, the state conceded that under the narrowing requirement from *State v Rangel*, 328 Or 294 (1999), the evidence is insufficient to convict him of stalking. But under *State v Ryan*, 350 Or 670 (2011), *Rangel*'s narrowing standard does not apply to the crime of violating an existing SPO, thus his convictions for violating the SPO are affirmed (he does not attack the underlying SPO).

5. Jury Right in Civil Stalking Cases Seeking Money Damages

M.K.F. v Miramontes, __ Or __ (9/20/12) (SC S058847) (Walters) Plaintiff filed a petition under ORS 30.866 for two things: (1) a stalking protective order and (2) compensatory money damages. She alleged that defendant had engaged in knowing and repeated unwanted sexual contact for two years that – in addition to causing her reasonable apprehension regarding her safety – had cost her sick time, annual leave, lost wages, counseling expenses, and attorney fees. Defendant demanded a jury trial on her claim for damages. The trial court disagreed, heard the case without a jury, and entered a general judgment for compensatory damages for $42,347.78 plus a supplemental judgment for reasonable attorney fees. The Court of Appeals held that defendant did not have a statutory or a constitutional right to a jury trial.

The Supreme Court reversed: "the parties are entitled to a jury trial on the claim for money damages." (Note that the Court used the words "the parties" rather than "the defendant" who had asked for a jury. Plaintiff here argued (unsuccessfully) that defendant has no jury trial right.).

First, the civil stalking statute at ORS 30.866 does not grant a jury trial right. The Court then turned to two provisions of the Oregon Constitution: Article I, section 17, and Article VII (Amended), section 3. The Court did not separately analyze those two distinct provisions. It reviewed numerous prior cases and reasoned: "our cases do not support plaintiff's argument that newly created statutory claims that provide new remedies necessarily are not 'of like nature' to any claim known at common law and, for that reason, are not triable to a jury." Significantly, the parties and the Court agreed that if plaintiff had sought nothing but money under the statute, then her claim would have been "at law" and 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, the parties and the Court agreed that if plaintiff had sought 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.

The Court traced the history of relevant rules of civil procedure and numerous cases (not the Court of Appeals' cases, just Supreme Court cases, see footnote 7). It then explained: "Because Oregon has eliminated the procedural distinctions between law and equity, there is no longer any necessity for or benefit in perpetuating that system. * * * In sum, it is neither necessary nor advantageous * * * to decide the substantive question of whether a party is entitled to a jury trial based on whether a case is 'essentially' equitable in nature, or whether a court of equity would have had 'incidental' jurisdiction to decide a legal issue as an adjunct to deciding an equitable issue in 1857. Rather, 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. To reach a different conclusion would be to import into current practice procedures that may have been necessary at one time but that our legislature has long since abandoned. Instead, we conclude that 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.'"

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."

E. Profanity, Obscenity, and Fighting Words

"We die of words."

> -- Robert Conquest, *George Orwell* (1969), reprinted in Christopher Hitchens, WHY ORWELL MATTERS 1 (2002).

1. Article I, section 8

Obscenity is not a "historical exception" to the protections of Article I, section 8. *State v Henry*, 302 Or 510, 525 (1987): "We hold that characterizing expression as 'obscenity' under any definition * * * does not deprive it of protection under the Oregon Constitution." "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. First Amendment

"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.").

"One man's vulgarity is another's lyric." *Cohen v California*, 403 US 15, 25 (1971) ("F*** the Draft" written on a jacket worn in a courthouse hallway).

"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) (attendee's sarcastic "Nazi" salute given to city council during public comment period of meeting was protected by First Amendment).

III. RELIGION

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

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

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

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

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

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

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

One 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 Grover's desire for a "complete divorce of church and state," "shows that a majority of the members of the constitutional convention favored a more explicit separation of church and state than could be found in any other state constitution of the time." *Id*. at 559.

"The religion clauses of Oregon's Bill of Rights, Article I, sections 2, 3, 4, 5, 6 and 7, are more than a code. They are specifications of a larger vision of freedom for a diversity of religious beliefs and modes of worship and freedom from state-supported official faiths

or modes of worship. The cumulation of guarantees, more numerous and more concrete than the opening clause of the First Amendment, reinforces the significance of the separate guarantees." *Cooper v Eugene School District 4J*, 301 Or 358, 371 (1986).

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).

Cf. State v Worthington, 251 Or App 110 (7/11/12) (Ortega, Brewer, Sercombe) (Clackamas) Defendant is a member of the "Followers of Christ Search" who believes in faith healing, which is praying, "laying of hands, and anointing with olive oil to heal the sick." Going to a doctor means the practitioner lacks faith in God. Defendant and his family have never used modern medicine. At age 3 months, defendant's baby developed a swelling on her neck. By age 14 months, the swelling got worse. The baby became sicker. Defendant's parents and churchmembers visited his home and fasted, prayed, laid their hands on the baby, then put olive oil on her. Defendant's wife gave her a water bottle that had water and wine in it. The baby did not rest at all that night and the next day the family and church members performed the same routine. The baby stopped breathing. Defendant put olive oil on her. She died. The autopsy showed that she was in the lowest fifth percentile for weight and height. Her death was caused by pneumonia and a blood infection (sepsis) related to a large cystic hygroma. The cyst compromised the baby's ability to fight off the pneumonia. Defendant and his wife were indicted for second-degree manslaughter and second-degree criminal mistreatment. He proposed a jury instruction that would have required the state to prove that he knew his action, or failure to act, would cause his daughter's death. The state responded that the statute defining "knowingly" does not require knowledge that a particular result would occur. The trial court did not give his requested instruction.

The jury acquitted the wife of both charges, and acquitted defendant of the manslaughter charge but convicted him of mistreatment. He appealed, arguing that "because his failure to seek medical attention for his daughter is rooted in his religious practice of faith healing, the state could not convict him of second-degree criminal mistreatment based on a criminal negligence standard."

The Court of Appeals affirmed. It did not reach the constitutional issue under Article I sections 2 and 3, of the Oregon Constitution or case law applying those constitutional provisions. Instead, it concluded that the trial court correctly denied his requested jury instruction because the state is required to prove only that he knowingly withheld necessary and adequate medical care, not that he knew that death would result. The Court of Appeals also held that a "motion in arrest of judgment" and a "demurrer" is not the proper way to raise an as-applied constitutional challenge.

IV. 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, US Const

A. Origins & Meaning

1. Origins

Judge Deady, who was a primary force in the Oregon Constitutional Convention, wrote later in an opinion 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.). But that may just be his personal view as one of 60 convention delegates: "Deady promoted Southern proslavery views" and "remained committed, to the end of his life, to a complex strain of eighteenth-century ideas." David Alan Johnson, FOUNDING THE FAR WEST 152 (1992).

The wording of Article I, section 9, is similar with its counterpart in the Indiana Constitution of 1851. Palmer, *The Sources of the Oregon Constitution*, 5 Or L Rev 200, 201 (1926).

"If Oregon's provision was patterned after Indiana's, however, it is clear that both were patterned after the Fourth Amendment, which was the common practice in mid-nineteenth-century constitutional drafting." 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).

2. Meaning

"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).

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

B. Probable Cause

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

***State v Shirk*,** 248 Or App 278 (02/23/12) (Ortega, Wollheim, Sercombe) (Hood River) (See also "Residences and Premises - Exigencies/Emergencies as Exceptions," *post* and "Exigent Circumstances," *post*). Officers arrived at a motel room to arrest a man on an outstanding warrant. That man's female companion (defendant) was with him in the hotel room when officers knocked on the door. Defendant came to the door and officers could see the man, in his underwear, with a baby on the bed. Defendant said that was her baby and the man was the "baby's daddy." Officers arrested the man, who had put on his pants, patted him down, and found a meth pipe in his pants pocket. An officer knew that defendant earlier had killed her baby by smothering it accidentally on a bed after a meth binge when she was involved with this same man. No evidence in the record showed that officers knew she was on probation for killing her baby. Officers became concerned about this baby on the bed with this same man, especially

given the meth pipe he'd had in his pants pocket. Officers asked defendant if there could be meth in the room, if the baby was all right. They wanted to look around the room for meth, they said. When questioned, defendant admitted that she had used meth a week earlier, but kept fixating on the fact that her man was going to jail, and not focusing on the potential for meth with her baby in her room.

Defendant refused to let the officers in, and tried to shut the door on them. As a result of her refusal to consent, officers forcibly dragged her into the hallway, handcuffed her, and put her in a seated position on the hallway floor. After that, she consented to a room search. A knife and digital scale were under the mattress and bed. She was never given *Miranda* warnings. She was charged with having violated a condition of her probation by endangering the welfare of a minor.

Defendant moved to dismiss the motel-room evidence. The trial court denied the motion to dismiss the drug items but granted her motion to dismiss her statement about using meth. Defendant then was found to have violated her probation and three years were tacked on to her probation as a consequence.

The Court of Appeals reversed and remanded: defendant was illegally seized. The state argued on appeal that officers had "probable cause to believe she had violated her probation" and thus they legally seized her. The Court of Appeals disagreed, reasoning as follows: Defendant was illegally seized because no officer testified that anyone was investigating her for endangering the welfare of the baby, and no officer testified that anyone knew she was on probation. Officers testified that: (1) they were merely temporarily detaining defendant while arresting the man; (2) she was not the subject of a criminal investigation; and (3) no officer "evinced a belief that she had committed a crime." Therefore, no officer met the first part of the "probable cause" analysis: no officer had a subjective belief that a crime had been committed.

C. Protected Interests

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).

1. Privacy Rights – Searches Defined

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

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

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, as opposed to the government official whose conduct is being challenged, would have felt free to ender 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).

2. Possessory Rights – Seizures Defined

(a). Seizure of Property

(i). 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).

(ii). Fourth Amendment

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

(b). Seizure of Persons

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

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

(1). Mere conversations, in a public place, 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. (Reasonable suspicion is not required).

(2). "Stops" or "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: a traffic stop or a nontraffic stop, for example. Note that pedestrians can be "stopped" on the street but they also can be "stopped" as a traffic infraction, such as for crossing against a light. That difference appears to matter because if a pedestrian is stopped pursuant to a traffic code, the legal standards differ from a pedestrian stopped pursuant to another non-traffic reason.

(i). Pedestrians in 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).

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). Pedestrians or bicyclists in traffic stops or motorists in traffic stops: A traffic stop is not an ordinary police-citizen encounter because, in contrast to a person on the street who can end the encounter at any time, a motorist stopped for an infraction is not free to end the encounter when he chooses. *State v Rodgers/Kirkeby*, 347 Or 610, 623 (2010). But even if a person is walking or biking – not driving – the person comes within the ambit of the traffic stop. 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).

(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) (citing *Holmes* and ORS 133.005(1) (defining "arrest")); *cf. Papachristou v City of Jacksonville*, 405 US 156, 169 (1972) ("We allow our police to make arrests only on 'probable cause'" under the Fourth and Fourteenth Amendments); *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.").

D. Place

1. Violations under Traffic Codes

Generally: 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.")

(a). Vehicles

(i). The Stop

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

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) (defendant, a passenger in a car stopped for speeding, "was seized in violation of Article I, section 9, * * * when [the officer] took and retained defendant's identification without reasonable suspicion of criminal activity.")

Parked cars: Where there is no traffic code violation, an officer may "stop" the person in the driver's seat of a parked car only on reasonable suspicion of criminal activity. *State v Jones*, 245 Or App 186 (2011).

Drivers: A statute (ORS 810.410(3)(b)) and most cases require probable cause to believe that a driver has committed a traffic infraction: An "officer who stops and detains a person for a traffic infraction must have probable cause to do so, *i.e.*, the officer must believe that the infraction occurred, and that belief must be objectively reasonable under the circumstances." *State v Matthews*, 320 Or 398, 403 (1994) (*held*: ORS 810.410(3)(b) requires that "a traffic stop must be based on probable cause" which has been defined in cases interpreting Article I, section 9). *See also State v Wentworth*, 252 Or App 129, 131 (2012) ("To lawfully stop and detain a person for a traffic infraction, an officer must have probable cause to believe that that infraction has been committed."); *State v Ordner,* 252 Or App 444 (2012) (To be lawful, the state must prove that "the officer who seized the defendant had probable cause to believe that the defendant had committed a traffic offense." (citing *State v Isley*, 182 Or App 186, 190 (2002)); *State v Nguyen*, 223 Or App 286, 289 (2008) ("In order to stop and detain a person for a traffic violation, an officer must have probable cause to believe that the person committed a violation. ORS 810.410; *State v. Matthews*, 320 Or 398, 403, 884 P2d 1224 (1994).") (statutory decision); *State v Isley*, 182 Or App 186, 190 (2002) (to stop and detain a person lawfully for a traffic infraction, an officer must have probable cause to believe that an infraction has been committed. *State v Matthews*, 320 Or 398, 403 (1994).");

State v Tiffin, 202 Or App 199, 203 (2005) ("An officer may lawfully stop and detain a person for a traffic infraction if the officer has 'probable cause to believe that an infraction has been committed.' *State v Isley*"); *State v Rosa*, 228 Or App 666, 671 (2009) ("Article I, section 9, requires that an officer who stops a person for a traffic infraction have probable cause to believe that the person has committed the infraction. *State v. Matthews*, 320 Or 398, 403, 884 P2d 1224 (1994)."); *State v McBroom*, 179 Or App 120, 123 (2002) ("Oregon statutes require probable cause to stop a person for a traffic infraction. *State v Matthews*"); *State v Hall*, 238 Or App 75 (2010) ("Police can conduct a stop for violation of a traffic offense if they have probable cause to believe that the offense has occurred and that belief is reasonable. *State v Matthews*, 320 Or 398, 402 (1984)."); but see *State v Broughton*, 221 Or App 580, 587 (2008), *review dismissed*, 348 Or 415 (2010) (citing *State v Amaya*, 176 Or App 35, 43 (2001), *aff'd on other grounds*, 336 Or 616 (2004)) ("Traffic stops must be supported by reasonable suspicion that the person stopped has committed a traffic infraction.")

State v Ordner, 252 Or App 444 (9/26/12) (Brewer, Armstrong, Duncan) (Josephine) Officer saw defendant drive by then followed him. Officer believed that defendant had failed to put on his turn signal for at least 100 feet before turning and that he turned too widely. Officer captured this on his patrol car's video equipment. Officer stopped defendant and obtained evidence to arrest defendant for DUII and possession of marijuana. Defendant moved to suppress. The video showed that defendant had used his turn signal 96.4 feet before turning. A defense expert opined that the video showed that defendant had signaled between 177 and 204 feet before turning and he had not turned widely. The sole issue was the officer's objective reasonableness of the officer's belief that he had committed the infractions. He argued that the officer did not have objective probable cause to stop him. The prosecutor argued that the officer did have objective probable cause to stop him. The trial court concluded that the officer's subjective belief that defendant made a too-wide turn was objectively reasonable (the court did not make findings about the signaling distance). The trial court denied the motion to suppress, concluding that the officer had probable cause to believe defendant had failed to drive within a lane and had illegally crossed a center line.

The Court of Appeals affirmed. The law is this: "When a defendant moves to suppress evidence obtained pursuant to a warrantless seizure, the state has the burden of demonstrating the lawfulness of the seizure. *State v Sargent*, 323 Or 455, 461 (1996). The state may meet its burden by proving that the officer who seized the defendant had probable cause to believe that the defendant had committed a traffic offense. *State v Isley*, 182 Or App 190 (2002). 'Probable cause exists if, at the time of the stop, the officer subjectively believes that the infraction occurred' and that belief is objectively reasonable. *Id*."

Neither statute on which the trial court relied justified its conclusion that the officer's belief was objectively reasonable. But "a misidentification of the statute that applies to the conduct is not dispositive" under *State v Matthews*, 320 Or 398, 404 (1994). Both parties understood at trial that the issue was whether the officer correctly had discerned that defendant had not stayed within his lane while turning. This record would not have developed differently. The issue is whether the officer's belief that defendant committed a traffic infraction was objectively reasonable. After watching the video, the Court of Appeals concluded that "that visual evidence made it objectively reasonable for the officer to believe that defendant had committed the offense of failure to drive on the right * * * and failing to drive on the right side of the road. Because the officer had probable cause to believe that defendant had committed the offense of

failure to drive on the right, the ensuing traffic stop was lawful and the trial court properly denied defendant's motion to suppress."

State v Mazzucchi, 252 Or App 122 (8/29/12) (Ortega, Brewer, Sercombe) (Jackson) Defendant was a passenger in a car stopped for speeding. The driver (young, bad complexion, decaying teeth, "over the top nervous") said she did not have a driver's license and the car was defendant's father's, and gave officer a state ID card. Officer told defendant if he wanted to drive the car away, defendant could give the officer his license, which defendant did, and officer ran a DMV, warrant, and criminal history check. While that check was being run, the driver said she had not used meth for about a year. Officer began writing her a ticket for speeding and driving without a license and the records check came back showing that she had prior drug arrests, which caused the officer to form reasonable suspicion that she was involved with drug use, so he asked her about her prior arrests, and she started to cry. She consented to a search of her suitcase. Defendant signed a consent form without questions or hesitation about 15 minutes after the traffic stop started. He was not handcuffed or questioned. Another officer was present and found meth residue on meth pipes in defendant's suitcase and defendant admitted they were his. The trial court denied his motion to suppress.

The Court of Appeals affirmed: he was not "seized" when the officer took his license to run a records check to determine if he could drive the car, per *State v Morgan*, 226 Or App 515, 519, *aff'd*, 348 Or 283 (2010). Defendant also was not "seized" when his records check came back clear and the officer asked to search the car, because when requesting his consent, there is "no evidence that the officers acted coercively toward defendant," and the officer's failure to tell defendant he was free to leave does not make the encounter a "seizure" without some show of authority, per *Morgan* and *State v Smith*, 247 Or App 624, 628-29 (2012). The "question is whether a reasonable person in defendant's circumstances would have believed that his liberty or freedom of movement was being restricted when [the officer] asked for his consent to search the car" under "the framework established by *Holmes*, *Rodgers/Kirkeby*, and *Ashbaugh*."

State v Smith, 247 Or App 624 (01/25/12) (Haselton, Brewer, Armstrong) (Multnomah) Defendant was a passenger in a stopped car. Officer determined that the driver's license had been suspended. The officer asked defendant for his name and wrote it down. Another officer approached defendant, asked him to step out, and asked if he had drugs or weapons. He did not tell defendant he was free to leave but his weapons weren't drawn, and he did not raise his voice. The officer had not positioned themselves in a way to suggest defendant was surrounded. Defendant told the officer that he had a pipe and rocks of crack. Officer seized that evidence and arrested defendant. The trial court denied defendant's motion to suppress. The Court of Appeals affirmed. Nothing about the situation was a constitutionally significant "show of authority." As in *Ashbaugh*, the officer did not "intentionally and significantly" interfere with defendant's liberty or freedom of movement.

State v Holdorf, 250 Or App 509 (6/20/12) (Schuman, Wollheim, Nakamoto) (Linn) Defendant was a passenger in car pulled over for an infraction at the K-Mart parking lot around 8:00 a.m. Officer suspected he was under the influence of meth. Defendant asked if he could leave. Officer said no, because he was worried that defendant might stab or shoot him. After the driver was arrested, officer returned to the vehicle and asked defendant if there were any weapons or contraband in it. Defendant said there was a pocket knife in it and the officer found it. Officer asked if there was anything else in the vehicle. Defendant said he had a pocket knife and reached into his pocket to extract it. Officer ordered defendant not to reach but defendant reached. Officer "restrained" defendant and told him to "settle down." Officer told him he was being detained, but was not under arrest, but officer read him his *Miranda* rights, handcuffed

him, and patted him down. Officer found a knife and a hard rectangle plus two more containers. Defendant would not consent to opening, a drug dog alerted to the containers, defendant consented to opening them, and they contained meth and marijuana. He moved to suppress all evidence on grounds that the officer stopped him without reasonable suspicion that he was involved in criminal activity. The trial court denied the motion.

The Court of Appeals reversed and remanded. 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," per *State v Ehly*, 317 Or 66, 80 (1993). Here, the officer testified that defendant appeared nervous and fidgety, he was with a person who had an outstanding felony warrant, and was in a vehicle that had been involved in an apparent drug deal, and the vehicle had attempted to elude police. But (1) defendant had no warrants; (2) mere association with a meth-involved person does not support reasonable suspicion that he, too, is involved with meth; and (3) a person's apparent recent drug use is insufficient to establish reasonable suspicion of present drug possession. The court here reiterated that every "reasonable suspicion" case must be decided on its own facts and cited its precedent:

> "attempting to fact-match with existing cases can be a fool's errand."

Here, under the totality of these circumstances of this case, "any suspicion that defendant was currently involved in criminal activity at the time and place where he was detained was not objectively reasonable." And the officer-safety exception applies either: officers could have let defendant go because it was 8:00 a.m. at the K-Mart parking lot and at least three armed officers were present.

State v Canfield, 251 Or App 442 (8/01/12) (Wollheim, Schuman, Nakamoto) (Washington) Defendant was a passenger in a car when police officers stopped the car. An officer had seen "defendant walking down the street" then defendant "crossed the street and walked quickly toward a mall" where he "got into a parked car on the passenger side." The officer approached the car, told defendant he thought "it was strange" that the car had moved a short distance then parked again. Officer asked both for ID, wrote their information on his hand, then returned the ID after 30 seconds. Officer asked if defendant had any weapons or drugs. Defendant said he had a pipe. Officer asked for consent to search both of them; they consented while officer put them in a "patdown" position with their fingers laced behind their backs. Officer said they were not under arrest and that defendant was free to leave. Officer found the pipe with marijuana residue, the driver said he had met defendant to buy marijuana, and defendant made incriminating statements. The trial court denied defendant's motion to suppress.

The Court of Appeals affirmed, citing *State v Ashbaugh*, 349 Or 297, 316-17 (2010), for the test to determine if "an encounter is a constitutionally significant seizure," which "is whether a reasonable person would have believed that his or her freedom of movement had been restricted by a police show of authority." The court cited *State v Parker*, 227 Or App 231 (2009), *rev den* 349 Or 664 (2011), *State v Wright*, 244 Or App 586 (2011), *State v Parker*, 242 Or App 387 (2011), *State v Radtke*, 242 Or App 234 (2011), *State v Jones*, 241 Or App 597 (2011), and *State v Smith*, 247 Or App 624 (2012) for their comparable facts. The court concluded under the totality of these factors that a reasonable person would not have believed that he was not free to leave after the officer told defendant he was free to leave:

- writing down defendant's information is one way an officer could convey that a defendant is not free to leave.

-telling defendant he was engaging in "strange" behavior may convey that a defendant is not free to leave.
- telling defendant he was not under arrest and was free to leave may convey that a defendant is free to leave.
- an officer keeping his voice at a normal decibel level may convey that a defendant is free to leave (a louder voice may be a show of authority).

Cf. State v Kolb, 251 Or App 303 (7/25/12) (Haselton, Armstrong, Duncan) (Douglas) This opinion did not cite Article I, section 9. The Court of Appeals reversed and remanded the trial court's denial of defendant's motion to suppress because, when the officer obtained defendant's driver's license to run a records check, that stop was not supported by reasonable suspicion that defendant presently possessed meth. The trial court erred by stacking inferences to conclude that defendant (a passenger) possessed meth or meth-delivery items (pipes needles, etc.) because she seemed to be under the influence of meth.

(ii). The Questioning

A traffic stop is not an ordinary police-citizen encounter because, in contrast to a person on the street who can end the encounter at any time, a motorist stopped for an infraction is not free to end the encounter when he chooses. *State v Rodgers/Kirkeby*, 347 Or 610, 623 (2010).

"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). Such questioning during an unavoidable lull (while a person looks for his ID or registration, or while police are running warrants checks) is permissible as long as it does not prolong the lull. *State v Jones*, 239 Or App 201, 208 (2010), *rev denied*, 350 Or 230 (2011). But 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).

A passenger in a stopped car may be unlawfully seized during the course of a traffic stop regardless whether he has no protected privacy or possessory interest in the vehicle. *State v Knapp*, 2012 WL 5286186 (10/24/12). What matters is if the passenger was unlawfully detained in violation of Article I, section 9, such as if the officer requests consent to search to seek evidence rather than proceeding with the traffic citation. *Id*. That determination is made under *State v Hall*, 339 Or 7 (2005), which "is not limited to the facts" of *Hall*. *Id*.

"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), *review denied* 352 Or 107 (2012).

"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).

State v Farrar, 252 Or App 256 (9/12/12) (Ortega, Brewer, Sercombe) (Douglas) Defendant was pulled over for a traffic infraction. The officer noticed that she and the passenger were lighting cigarettes as he approached. The officer became suspicious because that is unusual and people may light cigarettes because they are nervous or to mask the smell of illegal drugs. Defendant was "extremely nervous," was grinding her teeth, clenching her jaw, and she fumbled for her documents. The officer believed that she was using meth, but not enough to initiate a DUII investigation, and he believed that she may have meth in her purse because that's where people often keep drugs. After defendant gave the officer all of the necessary information, the officer asked her if there was anything illegal in her car, she said no, then the officer asked if there was anything in her purse that he should know about, she said no, then the officer asked why she would not let him search her purse. She said she had personal things in her purse that she did not want the officer to see. The officer said he would get a drug dog. Defendant said she was not trafficking drugs, that she just came from the airport. The officer kept on: he asked for consent to search the car and purse. Defendant consented to the car search. She stood by with her purse while one officer rummaged through the car. Another officer then sidled up to defendant and asked for consent to search her purse. Defendant showed the officer the contents by flipping through the items herself. The officer saw that there was a small coin purse that defendant had not opened, so he said that she "needed to be honest" and that they "both knew what was in the coin purse." She then showed him a vial of meth, a razor, and a straw. She moved to suppress the purse evidence, and the trial court denied that motion.

The Court of Appeals reversed and remanded. The totality of the facts did not provide reasonable suspicion that defendant possessed meth when she was stopped and the extension of the traffic stop was not lawful, and her consent was the unattenuated result of that unlawful stop. "An officer unlawfully extends the scope of an otherwise lawful stop if the officer questions the person about matters unrelated to the basis for the traffic stop without reasonable suspicion of criminal activity. *State v Bertsch*, 251 Or App 128 (2012)." Here, the officer's "subjective belief was not objectively reasonable" because evidence of meth use, "without more, does not give rise to reasonable suspicion that defendant presently possesses more methamphetamine," even though reasonable suspicion is a "relatively low barrier." As to the officer's heightened suspicion after defendant refused to consent to a purse-search: "a person's assertion of a constitutional right cannot support a reasonable suspicion of criminal activity," as stated in *State v Rutledge*, 243 Or App 603, 610 (2011).

State v Bertsch, 251 Or App 128 (6/11/12) (Sercombe, Ortega, Brewer) (Deschutes) Officer received information that a wanted person was coming out of a drug dealer's apartment. Officer observed defendant, thinking it was the wanted person, come out of an apartment known to be a place where drugs were consumed in a high-drug-traffic apartment complex. She got into a car with a passenger who was known to associate with drug dealers and drove off, committing a traffic violation. Officer approached defendant, asked her to step out, told her he thought she'd gone into a drug apartment, asked if she was on probation, and asked if there were drugs or weapons in the car. She said no drugs or weapons were in the car. She left her purse in the car. Dispatch radioed that she had a suspended driver's license. The officer also realized defendant was not the wanted person. But officer sought her consent to search defendant's car, she asked if she could refuse consent, and the officer said she had the right to decline. The officer held her driver's license and after she declined consent, he asked "if there are no drugs in the car, why wouldn't she consent?" Several additional police officers and vehicles arrived, with a K-9 unit. Officer eventually sought consent a second time and she consented. Officer found a meth pipe in her purse. Charged with possession of meth, she moved to suppress the evidence as an unlawful extension of the traffic stop. At the hearing, the witnesses' testimony had factual inconsistencies. The court,

however, denied defendant's motion stating that it "adopts the testimony of witnesses as its findings of fact"). The trial court denied her motion to suppress.

The Court of Appeals reversed and remanded, citing its precedent. "The extension of a traffic stop beyond an investigation into a traffic violation is unlawful unless it is supported by reasonable suspicion of criminal activity. * * * A law enforcement officer has reasonable suspicion to temporarily detain a person if the officer is able to point to specific and articulable facts, interpreted in the light of the existing circumstances and his experience, that the person has committed or is about to commit a crime." Here, the facts do not give rise to a reasonable suspicion that defendant possessed drugs. "We have repeatedly said that a person's presence in a location associated with drug activity is insufficient to support an objectively reasonable belief that the person is himself or herself engaged in criminal activity." It "was not reasonable to infer that defendant, merely because she entered a residence associated with drug activity, was herself involved in criminal activity." Also, "it is not reasonable to conclude that a person is involved in drug crimes because he or she is in the company of a known drug user or dealer." "Nor is it reasonable to believe that a person possesses drugs because he or she has been convicted of drugs in the past." Here, the "only fact related to defendant herself was her probationary history for a past drug crime," and the "objective value of that fact is minimal." In sum, the extension of the stop violated Article I, section 9.

The next analytical step is the effect of that illegality: was defendant's consent search derived from, or was it the product of, that illegality? The test is in *State v Hall*, 339 Or 7, 34-35 (2005), basically, the time between the officer's illegality and the consent, any intervening circumstances, and mitigating circumstances (such as officers telling defendant s/he can refuse consent). Even though in other cases, when officers have advised defendants that they can refuse consent, the Court of Appeals has concluded that such advice mitigated the prior illegality, here the Court of Appeals did not find such mitigation. Here, as in *State v Shirk*, 248 Or App 278 (2012), the officer's advice did not mitigate: officer held defendant's license when she consented, defendant testified that officer badgered her ("if there are no drugs in the car, why wouldn't she consent?"), and there were several police offices and vehicles at the scene.

State v Kentopp, 251 Or App 527 (8/08/12) (Armstrong, Haselton, Duncan) (Jackson) Officer saw defendant driving without a seatbelt and pulled him over. Defendant had reached toward the passenger floor before the officer reached him, then he started visibly shaking. He had "gray, rotting teeth" consistent with meth use. A small cosmetic purse was on the passenger floor. Officer asked defendant for his driver's license but defendant said he'd left it at home, that he was borrowing his boss's car, and he did not have any registration or proof of insurance or an identification. He gave his name and birth date to the officer and asked officer to call his boss, and said that the purse was his boss's wife's purse. Officer called for backup. Officer asked defendant to get out, defendant looked "panicked" and reached for the keys. Officer put his leg against the car door so defendant could not get out. Defendant refused to give the officer his keys after officer demanded them. Officer took them out of defendant's hands anyway. 15 minutes into the stop, another officer arrived, defendant was patted down and given *Miranda* warnings. When asked, he responded that there were no drugs that he knew of in the car. Officer asked for consent to search the car, defendant refused, officer retrieved his dog. The dog alerted, officer handcuffed defendant, and defendant said there was a bag of meth in the purse. Officer searched the car and found the meth plus other drug items. 30 minutes after he'd pulled defendant over, the officer released defendant. Defendant moved to suppress on grounds that the evidence was obtained during an unlawful extension of a lawful traffic stop. The trial court denied defendant's motion to suppress.

The Court of Appeals reversed and remanded. The issue as framed by the parties is whether the officer's extension of the traffic stop by making unrelated drug inquiries "was justified by reasonable suspicion." (Presumably the Court of Appeals meant "reasonable suspicion of illegal drug possession"). The officer said he had subjective reasonable suspicion. The other component is objective reasonable suspicion. The court here explained that the officer's objective suspicion was based on these facts: (1) defendant made a furtive movements; (2) he seemed nervous; (3) he had gray, rotting teeth; (4) he seemed to be trying to flee; (5) he failed to have registration and proof of insurance; and (6) he said he was driving his boss's car. That is not sufficient to support objective reasonable suspicion. Citing precedent, the court stated that furtive movements alone do not support reasonable suspicion. Nervous demeanor and meth mouth "could arguably have led" the officer "to believe that defendant had used drugs in the past," but past drug use does not allow for reasonable suspicion that the person currently possesses drugs. Even track marks on arms fail to give rise of reasonable suspicion of drug possession. Even considered together, all the facts recited do not give rise to objective reasonable suspicion that defendant possessed drugs or any other crime.

State v Knapp, 2012 WL 5286186 (10/24/12) (Duncan, Armstrong, Haselton) (Washington) Defendant was a passenger in a car stopped for traffic infractions. One infraction was for his failure to wear a seat belt. Officer received ID from the driver and defendant. Defendant told the officer he was on parole for armed robbery. Officer called in to dispatch and asked if he was required to tow the vehicle because it had defective brake lights. Officer requested backup after dispatch said defendant had a "caution" for armed robbery. Minutes later, backup arrived, and the officer "received word" that he did not need to tow the vehicle. Officer asked driver for consent to search the vehicle. Driver consented. Driver and defendant got out of the car. Officer found meth where defendant had been sitting and arrested him. He moved to suppress. The trial court denied the motion, after agreeing with the state's position that "defendant claimed no possessory or privacy right as to the vehicle" and the evidence came from the driver's consent, so the driver "might have a good argument in favor of suppression * * * but defendant did not."

The Court of Appeals reversed and remanded. Per State v Presley, 181 Or App 296, 300 (2012), a "stop of the driver is a stop of a passenger, and the limitations on the officer's authority therefore apply to passengers as well as to the driver." Defendant here has "established that his personal rights were invalidated." He was unlawfully detained when the officer stopped processing the traffic citation and instead sought the driver's consent to search the vehicle, because at that point, the officer already heard back from dispatch and had all the information he needed to process defendant's seat belt infraction. There is no issue here that the officer extended the stop (the lull was avoidable) and there was no other legitimate reason to extend the stop.

To determine if suppression was proper, the court turned to *State v Hall*, 339 Or 7 (2005), which "is not limited to the facts under which *Hall* was decided). Under *Hall*, the first question is whether the defendant established minimal facts between the police illegality and the evidence. Here, the illegality was occurring "at the same time and place as the gather in of the evidence and involves the same police officer" thus there is "little difficulty discerning a 'minimum factual nexus.'" So the burden shifts to the state to show that the discovery of evidence was "independent of, or only tenuously related to, the unlawful police conduct." Under *Hall*, the state may prove that "either by showing that the evidence would inevitably have been discovered in the course of a lawful search, that the evidence derived from a source that was independent from the unlawful conduct toward the defendant, or that there is such a 'tenuous factual link to the disputed evidence that that unlawful police conduct cannot be viewed properly as the

source of that evidence." Here, there was no lawful search at any time, so the "inevitable discovery" and "independent source" arguments fail. The state failed to meet its burden to prove attenuation. The unlawful detention had not ended when the evidence was discovered, and defendant did not volunteer the evidence, in contrast with *State v Lay*, 242 Or App 38 (2011) which provides guidance in this type of factual scenario (passenger in stopped car).

(b). Bicycles

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

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).

State v Steffens, 250 Or App 742 (6/27/12) (Duncan, Armstrong, Haselton) (Multnomah) Defendant was riding a bike at 12:30 a.m. in a gang-heavy area. Defendant failed to signal a left turn. Two officers pulled him over, asked for ID, he gave his ID card, and seemed relaxed. He smelled of alcohol and had glassy eyes. Officer told him it was illegal to bike drunk. He shrugged. Nothing about him seemed gang-related. His arrest history showed 5 prior arrests including one a month earlier for a concealed weapon. Nothing showed a history of crime or violence. Officer had all info he needed to issue a citation except he didn't have defendant's phone number. Rather than just dealing with the citation, an officer confronted defendant about his arrest history, and asked if he was carrying a concealed weapon. Defendant became nervous and started shaking. He made no furtive movements, he denied having a weapon, and remained cooperative. Officer asked to search him, defendant said he would rather not, and started sweating and shaking more. Officer ordered defendant to put his hands on his head, defendant complied, breathed deeply, and dropped his head. Officer held defendant's hands on his head. Officer asked where the gun was. Defendant said, "just take my coat off." A gun was in his coat. He moved to suppress the gun as an unlawful extension of a valid stop. The trial court denied the motion under the officer-safety exception.

The Court of Appeals reversed, first identifying the legal standards. "During a traffic stop, an officer may investigate the traffic infraction for which a person is stopped. ORS 810.410(3)(b). During an unavoidable lull in that investigation, such as while awaiting the results of a records check, an officer is free to question the person about matters unrelated to the traffic infraction." But under Article I, section 9, the "officer is not similarly free to question the person about unrelated matters as an alternative to going forward with the next step in processing the infraction, such as the writing or issuing of a citation."

The "officer may extend a traffic stop in order to investigate a matter unrelated to the stop under certain circumstances." One of those is if the officer has "reasonable suspicion of further criminal activity." The other is the officer-safety exception to the warrant requirement: the officer may take "reasonable steps to protect himself or others if he has a "reasonable suspicion, based on specific and articulable facts, that the

citizen might pose an immediate threat of serious physical injury to the officer or to others then present." The state has the burden to prove the extension is justified.

Here, the officer's question to defendant about carrying a weapon was not related to the traffic citation and it did not occur during an unavoidable lull, therefore to be reasonable it had to be based on the officer-safety exception. That was not met in this case. A gang-concentrated venue does not count toward reasonableness. Defendant's demeanor is critical. Officer's knowledge of defendant's past conduct is relevant. The court here then stated that "fact matching is not always a useful exercise" and then fact matched to two cases. In sum, defendant was calm, relaxed, cooperative, so there was "no basis for a belief that he posed an immediate threat of serious physical injury to the officers." As for the arrest for possession a month earlier: "prior arrests or convictions – even recent ones – without more, do not provide reasonable suspicion that a person is currently engaged in illegal conduct."

State v Leino, 248 Or App 121 (02/15/2012) (Brewer, Schuman, Wollheim) (Multnomah), *rev denied* 352 Or 76 (2012) Around 3:00 a.m. an officer observed defendant riding a bicycle without a headlight, which is a traffic violation under ORS 815.280(2)(c). Defendant rode the bicycle into a garage. Officer called to defendant from the street to come and talk to him, then he told defendant the reason for the stop and asked for his identification. Officer called in defendant's identifying information to police dispatch. While the officer was speaking with the dispatcher, he noticed that defendant was fidgety and asked defendant to keep his hands in view. Defendant raised his hands and officer observed that defendant was carrying a knife clipped to the front pocket of his pants. Officer asked if he could search defendant, and defendant consented, which revealed drugs plus the knife. At around the time the officer was conducting the search, dispatch responded that defendant was "clear and valid." Defendant moved to suppress all the evidence. Defendant argued that the officer ran his information to check for outstanding warrants, which he contends was not reasonably necessary to the investigation of a routine, bicycle-related traffic violation. Conducting a warrant check, according to defendant, was equivalent to a criminal investigation without reasonable suspicion, and thus unlawfully extended the duration of the stop. The trial court denied his motion.

The Court of Appeals affirmed: Conducting a warrants or record check before issuing a citation did not impermissibly extend or expand the scope of the stop in this case. Article I, section 9, "is not implicated if an inquiry unrelated to a traffic stop occurs during a routine stop but does not delay it, that is, if it occurs during an 'unavoidable lull' in the investigation." "[Q]uestioning that transforms an encounter from a routine traffic stop into a criminal investigation is not unlawful if it occurs while an officer is lawfully and expeditiously conducting the traffic stop, and it does not result in an extension of that initial stop." A "police officer may stop and detain a person for a traffic violation for the purposes of investigation reasonably related to the traffic violation, identification and issuance of citation. ORS 810.410(3)(b)." Also, a bike stop does not require the same "checks" as a vehicle stop (which requires insurance, driver's license, and registration), but "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." (Citing *Rogers/Kirkeby*). In sum: "in the course of a lawful traffic stop, an officer's act of contacting dispatch with a person's identifying information is reasonably related to the identification of the person and the issuance of the citation. Determining that a defendant is, in fact, the person he or she claims to be is reasonably related to the identification of the person and the issuance of the citation."

(c). 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).

In contrast – and in addition -- a person walking/standing may be stopped on the street, in a park, or in an alley or parking lot, not for a traffic-code violation but for suspicion of criminal activity. Such stops require reasonable suspicion that the person was engaged in criminal activity. *See, e.g.*, *State v Morfin-Estrada*, 251 Or App 158 (7/11/12) ("A stop must be supported by reasonable suspicion."); *State v Musser*, 2012 WL 5286188 (10/24/12) ("To be reasonable, [the stop] must be supported by reasonable suspicion of criminal activity or an imminent threat of serious physical injury.")

State v Dennis, 250 Or App 732 (6/27/12) (Duncan, Armstrong, Haselton) (Washington) Officer saw defendant cross a street at a 45-degree angle, thereby violating a Beaverton City Code provision that requires people to cross at 90-degree angles. Officer activated his overhead lights to stop defendant for "jaywalking." That is a traffic code violation. Officer told defendant to keep his hands out of his pockets, asked if he had weapons, and defendant said he had a couple of knives. Officer asked him for ID. Defendant said his license had been confiscated recently but gave his name and birthdate. Officer relayed that data to dispatch. While waiting for an answer, defendant put his hands in his pockets. Officer asked to pat him down, defendant consented, and officer felt first a large lump (a large knife) then a medium lump (another knife), and a small lump, which defendant said was some tooth filling. Officer did not believe that small lump was a knife, but he asked to remove it, defendant consented, and it was a semitransparent container, which defendant said officer could open. It contained meth. Officer could not remember if he had heard back from dispatch (on whether defendant had outstanding warrants) when he asked for consent to open the meth container. The trial court listened to a recording of the officer's exchange with dispatch and concluded that dispatch took 30 seconds to report back to the officer. Defendant moved to suppress as an unlawful extension of the stop. The trial court denied his motion to suppress.

The Court of Appeals reversed and remanded. An officer is free to questions a person stopped for a traffic violating during an "unavoidable lull" (while waiting for a records check) but the officer cannot "question the motorist about unrelated matters as an alternative to going forward." The only issue here is whether the officer's request to remove the container was during an "unavoidable lull" because there is no question that the officer lacked reasonable suspicion that defendant was engaged in criminal activity or that he posed an immediate threat of serious physical injury. The state did not meet its burden here; that burden is that when the officer requested consent, the officer did not have information necessary to go forward with processing the infraction. Here the "unavoidable lull" was 30 seconds long – "it lasted from the point when [the officer] provided defendant's identifying information to dispatch until the point when dispatch responded." Again, case precedent "stands for the proposition that an officer may make [inquiries into unrelated matters] *during* an unavoidable lull."

The parties did not "dispute that this case involves a traffic stop" and the Court of Appeals analyzed it as a traffic stop. Beaverton's 90-degree street-crossing law that defendant was stopped for is under its traffic code, but this case has nothing to do with a "motorist."

State v Morfin-Estrada, 251 Or App 158 (7/11/12) (Duncan, Armstrong, Haselton) (Multnomah) Officer was working the graveyard shift in a gang-saturated area of east Portland. Violence, new gangs, graffiti tagging, and retaliatory action for turf-invasion had been a problem. Just after midnight one summer night, officers saw defendant and another man cross against the traffic light, a class D infraction, and stopped them. Officer said they had just crossed against the light and asked what they were doing out so late. Defendant pointed out new graffiti, said they were "neighborhood patrol," and had come out in response to the new graffiti. The other man had a gang tattoo. Officer asked them both what gang they were in, and they said the Paso Robles Boys. The PR had a lot of graffiti tags in Gresham. Defendant said they'd already been stopped that night and had no warrants. Officer asked for their gang names and real names, then wrote them down. Defendant gave his ID card, and officer wrote that information down. Another officer arrived and confirmed that defendant and the other man had no warrants. Officer asked defendant and the other man if he could search them for guns. That request occurred 10 minutes into the encounter. The other man put his hands above his head and walked over and turned around. He had no weapons. Defendant was asked and answered that he had a dagger in his left pocket. Officer could see the hilt while defendant had his hands up. He was cited for carrying a concealed weapon. He moved to suppress. The officer testified that there was no "neighborhood patrol" in that area and he believed defendant had come out to retaliate against gang tagging on his turf. The trial court concluded that the officer suspected that defendant and the other man were armed and that suspicion was objectively reasonable, thus the evidence was not suppressed.

The Court of Appeals affirmed. First, defendant was stopped when the officer told defendant he had seen him cross the street unlawfully. Under *Ashbaugh* and other cases, "when an officer obtains identifying information from a person to run a warrant check, the officer has stopped the person." Also, "when an officer tells a person that the person has committed a violation or a crime, the officer has stopped the person." Here, officer basically told defendant and the other man that he'd seen them break the law by crossing against a light. Thus they would believe they were the subject of an investigation and were not free to go. Thus the trial court correctly concluded that the officer stopped defendant. That stop was supported by probable case as it must be under *State v Matthews*, 320 Or 398, 402 (1994) ("stop for traffic violation must be supported by probable cause" per ORS 810.410) and *State v Rodgers/Kirkeby*, 347 Or 610, 623 (2010) ("same under Article I, section 9").

Next, an officer cannot extend the stop by inquiring about unrelated matters unless the officer has reasonable suspicion that the person has engaged in criminal activity or that the person poses an immediate threat of serious physical injury to the officer or others nearby. In other words, during an "unavoidable lull" in the traffic-infraction investigation, the officer may question defendant about unrelated matters but the officer cannot create an avoidable lull by asking about unrelated matters rather than proceeding with the infraction. Here, the officer "extended the traffic stop by requesting consent to pat down defendant for weapons." That was unrelated to the stop and did not occur during an unavoidable lull. Thus the question is whether the officer's request to pat down defendant was supported by reasonable suspicion. (Presumably the Court of Appeals meant "supported by reasonable suspicion that defendant was carrying a weapon.). The court concluded that the officer "had objectively reasonable suspicion to request consent to search." That conclusion "is based on the evidence about gangs and tagging in general *together with* the evidence about defendant's particular activities, most notably, that, together with another gang member, he had been called to respond, and was responding to, a fresh tag by a rival gang." (Emphasis by court). This officer generally knew that rival gangs were fighting in the area, they marked their turf with graffiti, and if one gang marked in another gang's turf, it caused conflict. The officer also

testified that he knew many gang members carried weapons, their conflicts involved stabbing and shooting, and the officer personally had found weapons on gang members. In addition, specifically to defendant, the officer knew he was a gang member, that he had responded to a call about a "fresh tag" by another gang and was "on neighborhood patrol." That was sufficient to objectively believe that defendant's response to the call was to respond to the rival gang's tag, with a weapon. The court emphasized that this was "reasonable suspicion," not "probable cause to arrest."

Cf. State v Lamb, 249 Or App 335 (4/18/12) (Brewer, Ortega, Sercombe) (Clackamas) This case did not cite Article I, section 9. It held that the trial court correctly denied defendant's motion to suppress. An officer asked defendant if he had any weapons or anything that might poke or stick him occurred during the course of a lawful stop.

2. Non-Traffic Stops and Non-Premises

This section covers police-versus-citizen encounters that are do not begin as "traffic" stops. A person walking in an alley, in a parking lot, or on the road can be stopped for violating a traffic code provision, by jaywalking, for example. See the preceding sections on traffic stops for such activity.

(a). Public Parks

State v Ashbaugh, 349 Or 297 (2010) involved an interaction between two mountain-biking police officers and a middle-aged married couple sitting in a public park. Two officers approached them because they were middle-aged and in the 5-minute process of arresting the husband on an outstanding restraining order (against his wife), the officers obtained the wife's consent to search her purse, which contained a drug pipe. The court concluded that the wife had not been seized unlawfully because a reasonable person in her position would not have believed that her liberty or freedom had been intentionally and significantly restricted. It was not a traffic stop, but has been extended to traffic stops.

(b). Streets, Alleys, Parking Lots

A police officer may just engage a person who looks suspicious (but not "reasonably" suspicious") in "mere conversation." *State v Ashbaugh*, 349 Or 297 (2010). That would not be a "stop" under the Oregon Constitution. A person on foot may be stopped on the street, in a park, or in a parking lot, if the police officer can articulate reasonable suspicion that the person was engaged in criminal activity. *See, e.g.*, *State v Morfin-Estrada*, 251 Or App 158 (7/11/12) ("A stop must be supported by reasonable suspicion.").

Separate from traffic codes, Oregon statutes (ORS 131.605 through 131.615) address "stopping of persons." 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")).

> The statutory standard represents 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).
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> But no "stop" occurs if officers initiate "mere conversation" with a person on foot. *State v Kinkade*, 247 Or App 595 (2012).

State v Soto, 252 Or App 50 (8/29/12) (Armstrong, Haselton; with Duncan dissenting) (Multnomah) In a gang-saturated area, officers noticed that defendant was one of three men all wearing gang-affiliated clothing walking across an intersection. One of the three (not defendant) had told an officer earlier that he was in a gang. Two officers parked their patrol car, kept the overhead lights off, got out, and walked to the three men. One officer said, "Hi guys" and two men stopped. Defendant kept walking. An officer "briskly followed behind defendant and said to him, 'Hey there." Defendant kept walking. The officer kept following until he caught up with defendant. Officer said: "We were hoping to talk to you guys. Is that okay?" At that point, defendant stopped walking, nodded, and said, "yeah." The officer asked, "Would it be okay if we walked back to where your friends are?" Defendant said, "okay." The two began walking back the 30-foot distance to the rest of the group. The officer asked defendant what his name was and defendant told him. Officer asked if he had any weapons on him. Defendant nodded. Officer asked whether he was answering affirmatively. Defendant said, "yeah." The officer testified that he asked defendant because he was "being nosey in the hopes that he would get an opportunity to search and find a weapon." Officer ordered defendant to put his hands behind his head, asked where the weapon was, and felt defendant's pants pocket after defendant shook his leg. A handgun was in the pocket. Defendant was charged with unlawful possession of a firearm. The trial court denied his motion to dismiss.

The Court of Appeals affirmed with a two-judge majority. The court concluded that none of the officer's actions effected a "seizure" under *Ashbaugh*. The officer's questions, while being "questions that most people would not ordinarily ask another person," were not "significantly beyond that accepted in ordinary social intercourse," under *State v Holmes*, 311 Or 400, 410 (1991). First, the officers parked and got out of their patrol car, thereby "avoiding creating the impression that the officers were impeding the group's ability to continue walking in the direction" they'd been headed. The overhead lights were off, the officers did not a siren, and they did not yell but "chose a less intrusive and confrontational means, calling out to the men." Thus there was not "any show of authority." As for the officer persisting in following and calling out to defendant as defendant clearly was trying to walk away, the court stated: "defendant had not 'clearly' demonstrated that he did not want to talk to [the officer] by continuing to walk away." The officer's question, "We were hoping to talk to you guys. Is that okay?" is the "first definite indication that [the officer] wanted to talk with defendant" and defendant stopped then, "rather than continuing to walk away, which, in light of [the officer's] specific question, would have been a reaction consistent with the inference advanced by defendant that he did not want to talk" with the officer. Therefore, although defendant may have felt "inconvenienced or annoyed" by the officer persisting in following and calling out to him, the officer did not act beyond "what a

reasonable person in defendant's position would expect in normal social intercourse." As for the officer asking defendant to change direction and go back to the group, "a reasonable person in defendant's position would not have thought that [the officer] had restricted his or her freedom of movement by indicating that he or she was the subject of a criminal investigation." As for the officer asking for defendant's name, that, too, was not a seizure, because the officer "did not write down defendant's name, ask for some tangible form of identification, or otherwise indicate that he was going to run a warrants check. Rather, the purpose of [the officer's] question was merely to figure out to whom he was talking." As for the weapon, that was "asked in a conversational tone * * * and plainly did not effectuate a seizure." Thus no part of defendant's encounter restricted defendant's freedom of movement by a show of authority. Defendant was not seized until the officer had reasonable suspicion to believe that defendant unlawfully possessed a firearm.

Duncan dissented. The dissent would conclude that the officer stopped defendant no later than when he asked if defendant had any weapons. The dissent cited cases to show that an "officer's conduct may constitute a stop through a show of authority if the officer summons the individual away from a task or requires the individual to alter his course of conduct, or "if it would cause an individual to believe that he or she is not free to ignore the officer and go about his or her business." The dissent wrote: "although it is true that an officer is free to approach individuals on the street and question them, that is not all that happened here." The officer pursued and redirected defendant then asked him a question about particular criminal activity (carrying a weapon). These are not "generic inquiries."

State v Aronson, 251 Or App 568 (12/29/11) (Ortega, Wollheim, Sercombe) (Washington) At 2:00 a.m., police officer saw defendant's car parked in a shopping center. It pulled forward, hit the concrete curb, then backed out, driving 5 mph out and onto a street still going 5 mph, drove for 1-2 minutes, then pulled back at an angle into the parking space he'd just left. Officer stopped his car 1-3 carlengths behind defendant's, with no overhead lights but with his spotlight on to intentionally obscure defendant's view of the approaching officer. There is no evidence that the spotlight actually blocked defendant's view. Defendant appeared to be impaired and was arrested for DUII. He moved to suppress evidence on grounds that he'd been seized without reasonable suspicion. The trial court denied his motion to suppress.

The Court of Appeals affirmed: of the "three kinds of encounters between police and citizens," this is not one that constituted a "stop" where a reasonable person would not have felt free to leave. There is no evidence that the officer's actions were intended to prevent defendant from leaving, the officer's car did not block defendant's car, and there is no evidence that the spotlight actually blocked defendant's view.

State v Moats, 251 Or App 568 (8/08/12) (Brewer, Ortega, Sercombe) (Lane) Officers in the vice and narcotics unit were looking for drug activity in a shopping center. The property owner had filed a "no trespass" letter with the city that allowed police to tell loiterers to leave or get arrested. Police would tell loiterers that and fill out a field interview with the person's info so that in the future they could be arrested for trespass. Four officers staked out the area in plain clothes. A woman drove to a closed coffee kiosk and sat there for 5 minutes until defendant drove up in a taxi and parked next to her. The woman got into the taxi, hugged and kissed defendant in the taxi, and appeared to exchange something. Two officers approached the taxi and showed their badges. Officer explained that their conduct seemed suspicious and was trespassing. The woman was clenching something in her hand. The officer asked her if she had drugs, she said no, he asked what was in her hand, and she dropped 4 items pretending to hold nothing. One item was drugs. Officer asked defendant to get out of the taxi.

Both the woman and defendant made incriminating statements. They moved to suppress and the trial court denied the motion.

The Court of Appeals affirmed, citing the *Ashbaugh* test [see above]. "Under that test, the lodestar for determining whether an officer has seized a defendant is whether the officer restricted the defendant's liberty or freedom of movement by a show of authority." Factors include: (1) content of officer's questions; (2) officer's manner or actions; (3) whether defendant knew he was the subject of a criminal investigation." Here, the officers had at least reasonable suspicion to detain defendant when the woman dropped the drugs. The court "focused on the period of time before that occurred," with this Raspberry Award-eligible metaphor:

> "That inquiry takes us on another partially charged voyage into a sea of factual cross-currents in the wake of *Ashbaugh*. The confluence of several facts suggest that, in the totality of the circumstances, there was no constitutionally significant seizure of defendant."

The factors the *Moats* court used to navigate through whether defendant was "seized" before the woman dropped the drugs: (1) officers' tone and manner (badges shown, surrounding people, number of officers); (2) officers' use of threats or physical force; (3) officers' use of flashing lights or drawn weapons; (4) officers' request for or retention of IDs; (5) officers' ordering people to physically do something.

Here, there were two officers approached in concert, but "there is no evidence that they physically blocked defendant's means of egress" and the second officer had no apparent interaction with defendant at all. *Ashbaugh* said that two officers alone does not provide a basis to conclude that a deputy's "manner or action" involved a "show of authority." Here, "the officers' concerted approach" and "separate interaction" did not effect a seizure. As for questions, "offensive" questions alone do not effect a seizure, per *Ashbaugh*. The officers' approach with badges was merely "introductory." In sum, until the woman dropped the bindles, defendant was not seized: "a reasonable person under the totality of the circumstances would not believe that" the officers significantly restricted, interfered with, or otherwise deprived defendant of his freedom.

State v Smith, 247 Or App (9/26/12) (Duncan, Armstrong, Haselton) (Marion) At 4:00 a.m., a police officer saw defendant drive around in an empty parking lot then park away from any designated spots. Defendant got out of the car and walked around to the car's rear door. A man got out and began arguing with defendant. The officer parked his car 1-2 car lengths from defendant and did not have his overhead lights on. He saw defendant "mouth a swear word" upon seeing the officer and the other man turned his back to the officer. Officer walked toward the men. Defendant's girlfriend got out of the car and asked the officer for help dealing with the intoxicated man that defendant was arguing with. Officer ordered defendant and girlfriend to stand while he dealt with the drunk guy. Another officer arrived with his overhead lights on, blocking the entrance/exit to the lot. That officer asked defendant and girlfriend for ID, took their IDs, then ran a warrants check. Defendant was aware that the officer was "processing his identification." There were no warrants. Another officer arrived and the drunk guy was arrested on an outstanding warrant. An officer then turned to defendant and noticed that defendant appeared drunk, so he "initiated a DUII investigation of defendant." Defendant had a .17 BAC and moved to suppress that evidence after he was charged with DUII. The issue is whether defendant was seized before the DUII investigation began. The trial court denied his motion to suppress.

The Court of Appeals reversed and remanded. First, the basics: "A stop is a type of seizure that must be supported by reasonable suspicion of criminal activity." (citing

State v Ashbaugh, 349 Or 297, 308-09 (2010). "When an officer takes and retains an individual's identification, the officer has stopped the person." (citing *State v Ayles*, 348 Or 622, 628 (2010)). "When an officer conducts a warrant check or other investigation that could result in the defendant's immediate citation or arrest, the officer has stopped the person." (citing *State v Hall*, 339 Or 7, 19 (2005)).

As to this case, defendant was stopped "no later than" when the officer obtained his driver's license and ran a warrant check on it – a person can't leave the scene without forfeiting his license and a reasonable person would not think s/he is free to leave while the officer runs the check. When the officer stopped defendant, the officer lacked reasonable suspicion that defendant was engaged in criminal activity: he testified that he "had no idea what was going on" when he asked for defendant's ID in the parking lot. Therefore, the stop was unlawful.

Still, to suppress based on an unlawful stop, the defendant must prove that there was a minimal link between the unlawful stop and the evidence. Defendant here met that burden because "the evidence was obtained during the unlawful police conduct," as *State v Rodgers/Kirkeby*, 347 Or 610, 629-30 (2010) requires. (here "very close in time). Then the burden shifts back to the state to show any of these requirements: (1) police inevitably would have discovered the evidence; (2) police obtained the evidence independently of their violation; or (3) the link between the police action and the evidence is so tenuous that the police violation is not the source of the evidence. In this case, the state did not even make an argument regarding "inevitable discovery, independent source, or attenuation."

State v Kinkade, 247 Or App 595 (01/05/12) (Schuman, Wollheim, Nakamoto) (Multnomah) Officer had observed defendant for about an hour and had no reasonable suspicion that defendant was engaged in any criminal activity. Officer "simply walked up to defendant on the street, asked if he could talk with him, and then asked if he could pat him down." Defendant consented. Officer asked defendant to lace his fingers behind his head. Defendant consented. Officer put his hand over defendant's hands. Drug items were found. Defendant made incriminating statements. The trial court denied his motion to suppress.

The Court of Appeals affirmed: Defendant made no effort to distinguish the questions and request for consent in *Ashbaugh* from his initial encounter with the officer, or to explain what further "show of authority" the officer made. Under *Ashbaugh*, a "stop" (a seizure) occurs if either (a) the officer "intentionally and significantly restricts, interferes with, or otherwise deprives" the person of his "liberty or freedom of movement" or (b) "a reasonable person under the totality of the circumstances would believe that (a) above occurred." *State v Ashbaugh*, 349 Or 297, 316 (2010). The questions here involved less of a show of authority than those in *Ashbaugh*, where officers recontacted defendant 5 minutes after arresting her husband in a park. The trial court found that the officer's tone was casual here and there were no threats.

State v Ellis, 252 Or App 382 (9/26/12) (Armstrong, Haselton, Duncan) (Multnomah) This is a state's appeal. The only issue is whether the stop was lawful. Officers were watching the Kenton neighborhood for "car prowls" and burglaries based on a "huge increases" in such crimes. At 3:00 am, several officers were present in undercover cars, marked cars, and an airplane with a FLIR daylight camera system (which shows heat-emitting objects as a lighter color than cool objects). One officer saw defendant with a backpack. He notified the officer in the plane that this may be someone to watch. The airplane officer located defendant then watched him with the FLIR system "wandering around, constantly looking around, reversing direction," then stop in the middle of the street next to a Dodge caravan. Defendant kept looking around, he got into the Dodge,

sat there for 3 minutes, then got out, crossed the street, and stood between 2 dumpsters for a minute, then he walked away. On-the-ground officers then stopped defendant, at the airplane officer's request. The FLIR system camera also had videoed part of this – beginning when defendant was standing at the Dodge, not while he was "wandering around, constantly looking around, reversing direction." An officer on the ground stopped defendant by pulling up less than 50 feet from him, turning on her overhead lights and spotlight, believing defendant had just committed a "car prowl." Defendant said he was just walking around and didn't live in the area. Officer took his name and date of birth and ran a warrants check. The ground officer who had extensive experience testified that she knew that people who are prolific prowlers tend to hide stuff they just stole in dumpsters, so officers don't find the stolen items on them, then they retrieve the items later. The dumpsters in this case did not reveal any items. Another officer kept talking to defendant who said he had 9 prior arrests but he'd changed, although he said he had a crowbar, screwdriver, and other tools in his pack, along with automotive keys hanging off his belt that he said he'd "found" although he did not know what they were for. Dispatch said the Dodge was stolen, defendant was arrested, he consented to a search, and more car-stealing evidence was uncovered.

Defendant moved to suppress. The trial court granted that motion because (1) there were possible lawful explanations for defendant's behavior and (2) evidence gathered after the stop showed that the reasonable-suspicion-of-criminal-activity standard was not met.

The Court of Appeals reversed. The trial court applied an incorrect legal framework to decide whether the ground officer had an objectively reasonable suspicion that defendant had engaged in criminal activity. The correct legal standard is: To be lawful, a stop must be justified by reasonable suspicion of criminal activity. To satisfy the reasonable suspicion requirement, the officer must subjectively believe that the person has committed a crime and that belief must be objectively reasonable. To be objectively reasonable, the officer must point to specific and articulable facts, interpreted in light of the existing circumstances and the officer's experience, that the person committed a crime. Training and experience are relevant but insufficient alone to justify a stop. A possibly innocent explanation does not negate reasonableness. (Numerous citations omitted).

The trial court erred under both of its bases for suppression. First, "possibly benign" explanations for behavior "does not mean that the behavior may not give rise to a reasonable suspicion of criminal conduct" as stated in *State v Hammonds/Deschler*, 155 Or App 622 (1998), *State v Mitchele*, 240 Or App 86 (2010), and *State v Nguyen*, 229 Or App 719 (2009). Second, the trial court's consideration of post-stop evidence is "irrelevant" information. "The relevant time period for determining whether an officer's suspicion of criminal behavior was objectively reasonable is the time the peace officer acts. ORS 131.605(6). Evidence acquired after a stop cannot be used to establish or negate reasonable suspicion for the stop." (Emphasis by court). Also the trial court failed to make any findings regarding defendant's behavior before the FLIR camera began recording. Reversed and remanded with instructions to apply the correct legal standard.

State v Musser, 2012 WL 5286188 (10/24/12) (Duncan, Haselton, Armstrong) (Lane) Around 10:00 pm, an officer was patrolling an alley behind the Springfield Value Village shopping center, which is two buildings, each occupied by several businesses. The back doors are open to the public. One business, Value Village, has an area where the publc can bring its donated items for resale at the Value Village. There are not gates or signs restricting access to the alley. A sign states: "No trespassing or loitering 11 PM – 7 AM." (The state introduced a photo of that sign at trial). Officer approached defendant

in the alley in his police car. She began to walk away. He said, "I need to talk to you" because he suspected she was trespassing. She turned and walked to the officer, who asked for her ID. She gave him a credit card with her picture and name on it. As she dug through her purse, the officer saw two pouches in her purse and asked if he could search the pouches. She consented, officer searched, then officer asked to search through her entire purse, and she consented. Officer found a makeup bag. Inside the makeup bag, officer found a baggie that tested positive for meth, and she was charged with meth possession. The trial court denied his motion to suppress.

The Court of Appeals reversed and remanded: the officer did not have reasonable suspicion to stop defendant for trespassing on the walkway because nothing about the walkway would cause a reasonable person to believe it was closed to the pubic when defendant was on it. Stated again: the officer "did not have reasonable suspicion to stop defendant for trespassing because there were no apparent restrictions on public access to the elevated walkway at the time defendant was on it and the walkway was physically distinct from the areas where there were restrictions."

(c). Hospitals

> 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).
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> Where probable cause exists to arrest for a crime involving the blood alcohol content of a suspect, a warrantless blood draw *at a hospital* is permissible under Article I, section 9, due to the "exigent circumstance" that is "the evanescent nature of a suspect's blood alcohol," except in "the rare case that a warrant could have been obtained and executed *significantly* faster" than the process used. *State v Machuca*, 347 Or 644, 657 (2010) (emphasis in original).
>
> See Exigent Circumstances: Destruction or Escape, *post*.

Cf. Mueller v Auker, 576 F3d 979 (9th Cir 9/10/12) This is a Fourth Amendment case originating in Idaho about 10 years ago. It is not an Oregon case. A "hysterical" mother apparently did not want her feverish, lethargic, abnormally behaving daughter to be tested for bacterial meningitis. On an ER doctor's advice that prompt administration of antibiotics and fluids was important lest the child risk serious harm or death, a police officer "seized" the child for medical treatment and confined the mother to a separate part of the ER while the child was treated. The parents sued police officers, doctors, the hospital, and others. The Ninth Circuit panel determined that the officers were entitled to qualified immunity. Over the parents' assertions that their recognized liberty interest in the care, custody, and control of their child was violated, see *Troxel v Granville*, 530 US 57 (2000). The Ninth Circuit set out the parameters of when the constitutional rights of the parents step aside; that is "in an emergency situation when the children are subject to immediate or apparent danger or harm." Besides that Fourteenth Amendment liberty interest, the Ninth Circuit also addressed the "Special Needs Doctrine" under the Fourth Amendment from *Vernonia School District v Acton*, 515 US 646, 653 (1995) and *Yin v California*, 95 F3d 864, 869 (9th Cir 1996). The Ninth Circuit here considered this situation to be a "special needs" case and concluded that the officers were entitled to qualified immunity regarding the parents' Fourth Amendment claim for "seizing" the child.

(d). Public Schools

See searches in Public School, under Exceptions to Warrant preference, *post*.

(e). Jails and Juvenile Detention

See Jails and Juvenile Detention, under Exceptions to Warrant preference, *post*.

(f). Computers, Phones, and Online Search Histories

Cf. *State v Bray*, 352 Or 24 (2012), under Victims' Rights, *post*.

See ***State v Tilden***, 2012 WL 5285134 (10/03/12) under Plain Error, *post*.

Cf. *Schlossberg v Solesbee*, 844 F Supp 2d 1165 (D Or 01/18/12)

(g). Airports

Cf. United States v Pariseau, 685 F3d 1129 (9th Cir (07/16/12)). This is not an Oregon case. Defendant boarded a plane in Alaska with more than 500 grams of meth strapped to his legs with Ace bandages. In Seattle, an officer told defendant that the officers would seek a search warrant, which may or may not be issued, and that he could refuse consent. Defendant said, "you may as well just search me now." District court denied his motion to suppress the drugs, and Ninth Circuit panel affirmed, due to defendant's consent to the search, which was not the result of threats.

3. Residences and Offices

(a). Houses and Rooms

(i). 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).

(ii). 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).

(b). Other Premises

Note: The state and federal constitutions list four things protected from unreasonable searches and seizures: "persons, houses, papers, and effects." They also protect other containers: sheds, trucks, offices, and the like. "[W]hether 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). "This 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 do not appear to differentiate "houses" from "premises" generally under Article I, section 9. For example, the Oregon Supreme Court recently addressed a search of a residence by using the word "premises": "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 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 (2012).

State v Mast, 250 Or App 605 n 6 (6/27/12) (Armstrong, Haselton, Sercombe) (Washington) 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 *See v City of Seattle*, 387 US 541, 543 (1967) (citing Fourth Amendment as being consistent with Article I, section 9, on this point).

(c). 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).

But: "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).

State v Unger, 252 Or App 478 (9/26/12) (Duncan, Armstrong, Haselton) (Marion) After receiving reports about drug activities at defendant's residence, four officers went to the residence for a "knock and talk." They wanted to talk and to obtain consent to search without a warrant. They went to the front door and no one answered. They went to another door, also on the front of the house, knocked, and received no answer. They walked to the back of the house, to a door on defendant's bedroom, and knocked. Defendant answered. Officers asked for permission to enter and defendant allowed the

entry. They asked him to show them around the house, which he did. An officer saw a torn piece of a baggie with white crystals and powder inside. A field test showed that the crystal was meth. An officer read and asked defendant to sign a "consent to search" card. Defendant asked to call his lawyer, gave "verbal consent" to look through the house, and called his attorney. The officer told defendant that his attorney wanted everyone out of the house. Officers told defendant that it was up to defendant to make that decision. Defendant called his attorney again, and again the attorney said he wanted everyone out of the house. Officers arrested defendant based on the field test of the crystal meth. Officers obtained a search warrant and executed on in the same day, leading to more drug-crime evidence. The trial court denied his motion to suppress.

The Court of Appeals reversed and remanded. Consent is an exception to the warrant requirement but it is invalid if it is the product of illegal police conduct. Here, the officers' entry into defendant's backyard violated defendant's Article I, section 9, rights because it was a search and not justified by an exception to the warrant requirement. In addition, the officers' entry into, and search of, defendant's house also violated Article I, section 9, because police illegally entered his backyard. "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."'" (Citations omitted). 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. (Citations omitted). Thus entries into backyards are considered to be trespasses and searches. Here, the officers trespassed when they entered defendant's backyard and that trespass violated defendant's Article I, section 9, rights.

Defendant's "consent" was the result of illegal police conduct. Defendant established the minimal factual connection between that conduct and the evidence. The state failed to then prove that his consent was either independent of that conduct, or only tenuously related to that conduct.

(d). Exigencies/Emergencies as Exceptions

(i). 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).

"[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)).

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

State v Shirk, 248 Or App 278 (02/23/12) (Ortega, Wollheim, Sercombe) (Hood River) (See Searches and Seizures – Probable Cause," *ante*, and "Exigent Circumstances", *post*). A police officer received information that defendant and her boyfriend were staying at a motel. The boyfriend had an outstanding arrest warrant. Officers went to the motel room, knocked on the door, and waited in the hall while defendant said she was getting dressed. When she opened the door, an officer asked if anyone else was in the room. Defendant said that her baby and the "baby's daddy" were on the bed.

The officer knew defendant had killed one of her babies a few years earlier by negligently smothering it on a bed while coming off a meth binge. The officer saw a baby and a man in his underwear on the bed. Officers entered the room, had the boyfriend put some pants on, took the boyfriend into custody, found a pipe with meth residue on it in boyfriend's pocket, and then asked defendant if there were any drugs in the room. She said no and that she didn't know the boyfriend had a meth pipe. Officer asked if there could be drugs in the room (since she said she didn't know the boyfriend had a meth pipe but he did have one). Defendant said it was possible that there was meth in the room. Officer asked if he could make sure the baby was ok and that there were no drugs in the room. Defendant ignored the baby-welfare questions and instead fixated on her boyfriend going to jail. Officer persisted about the baby's welfare. Defendant became agitated, tried to shut the door in the officers, and said she did not want to let them in the room. An officer grabbed her arm, pulled her across the hallway so she could not shut the door, pushed her against a wall, handcuffed her, and pushed her to the floor. Officer told her he had worked on the case involving her dead child and she yelled: "How dare you bring that up, I've paid my debt to society." Officers tried to "small talk" her and she eventually signed a "consent to search" form. No drugs were found but a knife and digital scale were under the bed or mattress. The entire encounter lasted 25 to 30 minutes.

Defendant had been on probation for killing her other baby: this case is a probation violation proceeding. No evidence in this record showed that any officer knew she was on probation. The trial court granted defendant's motion to suppress her statements because she had not received *Miranda* warnings, but denied her motion to suppress the evidence in the motel room because she consented and also because the search was permissible under the "emergency aid doctrine." The trial court extended her probation by 3 years.

The Court of Appeals reversed and remanded: defendant was unlawfully seized and interrogated, her consent was not attenuated, and the emergency aid doctrine did not justify the search. The state argued that the search was justified under the "emergency aid exception to the warrant requirement" because here there was no emergency. First, knowledge that a person in the same room as a child has previously killed a child negligently "is not enough to establish

the existence of an imminent threat to the child." Second, when defendant opened the motel room door, officers observed no signs that she or the man were "under the influence of drugs." Third, they saw the baby on the bed with a man in his underwear but "there is no indication" that the baby was in distress or in danger. Even if the officer "may have been upset" that defendant had another baby on her bed when he knew she had smothered her other baby on her bed after using meth, "there was no evidence that this baby was in immediate danger of being smothered by defendant while she was under the influence of methamphetamine, because there was no evidence that defendant was under the influence of methamphetamine." No "true emergency" existed here.

State v Wan, 251 Or App 74 (7/05/12) (Nakamoto, Schuman, Wollheim) (Multnomah) Apartment security manager called police in the middle of the night to report that a male and female had had an argument and then for four hours a woman had been loudly crying. Police officers knocked on the door, the male (defendant) partly opened the door but refused to allow entry to check on the female's welfare. The defendant finally opened the door a bit more and officers saw a female in a fetal position facing away from them. She looked "either hurt or something else was going on with her." Defendant was very clear that the officers were not permitted to enter and asked them to leave. Officers began to enter, defendant began to push the door closed, officers forced the door open. Officers tried to control defendant's arms, he twisted away, and officers told him to stop resisting. Defendant raised his arms and made a fist, then one officer punched him in the face. Defendant's girlfriend stood up and started yelling. Taser pointed at defendant, an officer ordered him to the ground, where he was arrested. The girlfriend was not physically injured. Defendant was charged with interference with a police officer and resisting arrest. He moved to suppress evidence from the officers' warrantless entry into his apartment. He testified that he did not understand English, that he was from Taiwan and had just moved to Portland to study English at PSU with his girlfriend, and that the officers had actually beat him up unjustifiably. The trial court denied the motion under the emergency aid doctrine.

The Court of Appeals affirmed on the emergency aid exception to the warrant requirement. 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. Here, four hours of loud crying, and a woman lying in a fetal position, gave the officers an objectively reasonable belief that warrantless entry was necessary to assist a person who was seriously injured.

The Court of Appeals footnoted that the trial court had concluded that the officers had met the statutory "community caretaking" standards (ORS 133.033) for warrantless entry. But the Court of Appeals "reach[ed] the constitutional issue [rather than that statutory issue] because a warrantless entry in compliance with ORS 133.033 is not necessarily a permissible one under the Oregon Constitution" under State v Salisbury, 223 Or App 516, 523 (2008) ("even if the state is able to satisfy the requirements of ORS 133.033, it must also satisfy the requirements of the emergency aid doctrine.").

State v Lorenzo, 252 Or App 263 (9/12/12) (Ortega, Brewer, Sercombe) (Washington) A woman called the police one morning to say that her ex-boyfriend was outside her apartment trying to hang himself with a noose and that he owned a gun. He lived in the same apartment complex with a roommate. The roommate is the defendant in this case. Police arrived, handcuffed the ex-boyfriend, removed the noose, and went to defendant's apartment to make sure he was not hurt or killed by the "suicidal" ex-boyfriend. They knocked several times and no one responded. The ex-girlfriend called him twice and he did not answer the phone. The ex-girlfriend told police that defendant's door was right inside the front door of the apartment. The police opened the front door to defendant's apartment, with their feet outside the apartment, and knocked on defendant's bedroom door, saying "Jeff, are you okay?" About 10 seconds later,

defendant opened his door, and he appeared to have just awakened. He said he was okay. The officer immediately asked to enter the apartment to talk. Defendant consented. The officer smelled marijuana and immediately asked defendant for ID. While defendant retrieved his ID, the officer saw marijuana in his bedroom, asked defendant if he was selling. Defendant said no. The officer then asked for and received consent to search. The officer never told defendant that he was free to refuse the officer's request to enter or request to search. The officer found a notebook with drug records, digital scales, more marijuana, and a gun. The officer read defendant his *Miranda* rights, and defendant made incriminating statements. He moved to suppress all evidence from the time the officer had reached into his apartment's front door, uninvited, and knocked on his bedroom door. The state contended that the emergency aid exception to the warrant requirement applied (and alternatively that the evidence was not obtained by exploitation of the officer's initial conduct). The trial court concluded that the emergency aid exception justified the warrantless entry and denied his motion to suppress.

The Court of Appeals reversed and remanded. Under Article I, section 9, and *State v Baker*, 350 Or 641, 647 (2011), the state has the burden to prove that the warrantless entry and search of the premises fell within one of the few specifically established exceptions to the warrant requirement. 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." Here, no articulable facts justified a warrantless entry. The ex-boyfriend was in handcuffs. The police had "no specific information indicating that [the ex-boyfriend] was suicidal because he had hurt someone, that defendant had been injured, or any other facts that would otherwise suggest that defendant was in some kind of danger."

As to defendant's consent to allow the officer to enter, the Court of Appeals concluded that defendant's consent resulted from an exploitation of unlawful police conduct and the evidence was the product of that illegality. After a defendant shows a minimal connection between his the unlawful police conduct and his consent, then the state has the burden to prove that defendant's consent was independent of, or only tenuously related to, the unlawful police conduct, under *State v Hall*, 339 Or 7, 21 (2005). Here, that minimal connection has been established: the officer was able to contact defendant, and get his consent, only by the officer's warrantless entry into the apartment. That is the minimal connection. The state contended that the evidence should not be suppressed because either (1) the consent was independent of the illegality or (2) the link between the illegality and consent is tenuous. The Court of Appeals concluded that the state failed to prove either. "It was only by means of the unlawful entry into the apartment that the officer was in a position to speak with defendant, to ask to enter the apartment, observe marijuana, and ask for consent to search." Placement of the officer's feet does not matter. The officer did not inform defendant that he was free to refuse entry or refuse to consent, and the officer entered the apartment uninvited. Reversed and remanded.

State v Groom, 249 Or App 118 (3/28/12) (Schuman, Wollheim, Nakamoto) (Marion) An officer ran a DMV check on a car he was following and saw that the owner had an outstanding warrant. The car turned, the officer had to turn back to look for it, and he saw that it was parked with two women beside it. Officer asked the women for their ID. One woman denied having any ID, then gave a false name, then admitted she owned the car. Officer arrested her, put her in the patrol car, asked for consent to search the car, then radioed for a drug dog to be sent out because she refused to consent. Officer then noticed that a man was in the back seat. He was on post-prison supervision. He got out, was patted down, and then officers found a plastic baggie on the ground with meth residue. Then officer advised defendant of her Miranda rights and told her the drug dog was on his way. She then said she had been driving and there were drugs inside. The drug dog arrived and alerted to the door of the vehicle. The drug dog went inside the car and alerted at defendant's purse. Drugs and drug evidence was in the purse. This case went up and down the appellate courts based on the mobile auto exception.

On remand, the Court of Appeals reversed and remanded. (The Court of Appeals did not mention Article I, section 9, in this opinion). The court concluded that the mobile auto exception did not apply. And although the state did not raise the "exigent circumstances" exception at trial, the court here rejected that theory. "Police may conduct a warrantless search based on probable cause when exigent circumstances exist. 'Exigent circumstances include, among other things, situations in which immediate action is necessary to prevent the disappearance, dissipation, or destruction of evidence.' *State v Meharry*, 342 Or 173, 177 (2006)." This record is insufficient to form a basis for exigent circumstances, and had the state raised that exception at trial, the record could have been developed. No other exceptions apply thus the search was unconstitutional.

E. Warrants

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

1. Probable Cause

"'Probable cause' has the same meaning throughout [state and federal] constitutional and statutory requirements." *State v Marsing*, 244 Or App 556, 558 n 2 (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 and courts "consider the entire contents of the affidavit" supporting the warrant application, excised if appropriate. *State v Fronterhouse*, 239 Or App 194 (2010).

"Staleness" 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).

2. Scope

(i). 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.").

(ii). Fourth Amendment: 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*, 333 US 85 (1979).

F. Exceptions to Warrant Requirement

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

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

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

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

1. Probable Cause to Arrest

"A warrantless arrest is appropriate if a police officer has probable cause to believe that a person has committed a felony. ORS 133.310(1)(a)." *State v Pollack*, 337 Or 618, 622-23 (2004); *State v Rayburn*, 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.

State v Ayvazov, 246 Or App 641 (11/23/11) (Schuman, Wollheim, Nakamoto) (Multnomah), review denied 276 P3d 1123 (2012) Officers received a report that a man driving a green Honda Accord was chasing a woman on foot in a particular neighborhood. Officer saw a green Honda parked in a driveway, with plates that ran through as a stolen car, and with people in the Honda. Officers pulled into the driveway with their lights on, and waited until more officers arrived. Officer drew his weapon, ordered the occupants to get out with hands up and walk backwards toward the officer. The female driver and male passenger (defendant) cooperated. Officer handcuffed them. They saw that the Honda had no stereo and its ignition had been severely damaged, and its VIN came back as a stolen car. Officers interviewed the driver and defendant after issuing *Miranda* warnings. Defendant made incriminating statements and was arrested for unlawful use of a motor vehicle and other crimes. He moved to suppress his statements and evidence because officers lacked probable cause to arrest him. The trial court granted his motion: he was unlawfully arrested without probable cause. The state appealed.

The Court of Appeals reversed and remanded: defendant's arrest was justified by probable cause. "The probable cause that is necessary to justify an arrest is a significantly less rigorous

standard that the 'proof beyond a reasonable doubt' that is necessary to justify a conviction,'" per *State v Rayburn*, 246 Or App 486 (2011). Probable cause has a subjective and an objective requirement. Objective probable cause is determined by the facts known to the officer at the time of the arrest. Here, the facts were that when officers encountered defendant, they knew that a green Honda with the license plate that defendant was in had been stolen, and had just been seen near the arrest site. They also knew that it was driven by a man who was trying to run down a woman. From those facts, it was objectively reasonable for officers to believe that the car they saw was stolen and that defendant had recently been seen driving it. That does not prove beyond a reasonable doubt that defendant knew the car was stolen, but it establishes probable cause.

2. Search Incident to Lawful Arrest

A search incident to arrest is one of the few specifically established exceptions to the warrant requirement. *State v Hite*, 198 Or App 1, 6 (2005). "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). 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.' *Id*." *State v Groom*, 249 Or App 118 (2012). The "search must be reasonable in time, space, scope, and intensity." *Ibid*. (citing *State v Owens*, 302 Or 196, 205 (1986)).

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).

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

State v Groom, 249 Or App 118 (3/28/12) (Schuman, Wollheim, Nakamoto) (Marion) An officer ran a DMV check on a car he was following and saw that the owner had an outstanding warrant. The car turned, the officer had to turn back to look for it, and he saw that it was parked with two women beside it. Officer asked the women for their ID. One woman denied having any ID, then gave a false name, then admitted she owned the car. Officer arrested her, put her in the patrol car, asked for consent to search the car, then radioed for a dog to be sent out because she refused to consent. Officer then noticed that a man was in the back seat. He was on post-prison supervision. He got out, was patted down, and then officers found a plastic baggie on the ground with meth residue. Then officer advised defendant of her *Miranda* rights and told her the dog was on his way. She then said she had been driving and there were drugs inside. The dog arrived and alerted to the door of the vehicle. The dog went inside the car and alerted at defendant's purse. Drugs and drug evidence was in the purse. This case went up and down the appellate courts based on the mobile auto exception.

The Court of Appeals reversed and remanded. The mobile auto exception does not apply here. The state argued that the search was permissible as a search incident to arrest. But that exception is not met either. Officers searched defendant's car about an hour after he was

arrested. Officers had made no effort to obtain a warrant during that time. That "is an unreasonable amount of time and not within the permissible time frame." Also the car was not within defendant's reach when the search occurred. That "took place beyond the permissible space."

Cf. Schlossberg v Solesbee, 844 F Supp 2d 1165 (D Or 01/18/12) This is a Fourth Amendment case. See video at issue at http://www.youtube.com/watch?v=rVyt4e5SNeM. Eugene Police Sergeant Solesbee noticed that a young man was offering brochures to people outside the federal courthouse. The man (plaintiff) had his camera on. Officer ordered him to leave, got into an argument with plaintiff, noticed that the camera was on, and apparently "took plaintiff to the ground" after saying "gimme that, that's evidence," and the camera stopped. Officer arrested plaintiff, handcuffed him, placed him in a police cruiser, and viewed the camera recording without getting a warrant. Judge Coffin wrote: "This case joins the growing stockpile of cases around the country which force courts to consider the warrantless police search of personal electronic devices incident to arrest." Judge Coffin noted that searches incident to arrest under the Fourth Amendment need not necessarily be conducted at the moment of arrest or even after arrest. The searches may extend to an arrestee's personal effects. Judge Coffin classified cameras not as "closed containers." Personal digital cameras cannot be searched after 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. In this case, plaintiff established that Officer Solesbee violated his Fourth Amendment rights by reviewing the contents of his camera without first obtaining a warrant. Qualified immunity as a defense will turn on the jury's factual determination of whether Officer Solesbee lawfully arrested plaintiff. If plaintiff was lawfully arrested, Solesbee is shielded from damages based on qualified immunity. If not, he is not shielded.

3. Exigent Circumstances

(a). Entry into Premises

(i). Fourth Amendment

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 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)).

"[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. * * * . . [1] 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.' * * * . . [2] Police officers may enter premises without a warrant when they are in **hot pursuit** of a fleeing suspect." [3] 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 (4/26/12).

But in January 2011, in *Kentucky v King*, 131 S Ct 1849 (2011), the United States Supreme Court had summarized "the exigent circumstances rule." The US Supreme Court further noted that *King* is not the first case to recite "exigent circumstances" jurisprudence. The *King* Court cited, for example, *Brigham City v Stuart*, 547 US 398, 403 (2006), in which it had listed its cases on exigent circumstances. In January 2012, in *Ryburn v Huff*, 132 S Ct 987 (2012), the United States Supreme Court issued a per curiam opinion again emphasizing its case law on exigencies and emergencies justifying warrantless entries to houses.

(ii). Oregon Constitution

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

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

"[A]n emergency aid exception to the Article I, section 9, warrant requirement is justified when police officer have an objectively reasonable belief, based on articulable facts, that a warrantless entry is necessary to either render immediate aid to persons, or to assists person who have suffered, or who are imminently threatened with suffering, serious physical injury or harm." *State v Baker*, 350 Or App 641, 649 (2011) (referring to it as the "so-called emergency aid exception"). "[I]t does not matter whether the need to render immediate aid is triggered by a human source or a condition idiopathic to the person needing aid." (Note: the Court stated that this is an "objective" test but it recited the two officers' subjective beliefs that an emergency existed in concluding that the test had been met.).

***State v Shirk*,** 248 Or App 278 (02/23/12) (Ortega, Wollheim, Sercombe) (Hood River) Officers arrived at a motel room to arrest a man on an outstanding warrant. That man's female companion (defendant) was with him in the hotel room when officers knocked on the door. Defendant came to the door and officers could see the man, in his underwear, with a baby on the bed. Defendant said that was her baby and the man was the "baby's daddy." Officers arrested the man, who had put on his pants, patted him down, and found a meth pipe in his pants pocket. Officers knew that defendant earlier had killed her baby by smothering it accidentally on a bed after a meth binge

when she was involved with this same man. No evidence in this record showed that any officer knew she was on probation. Officers became concerned about this baby on the bed with this same man, especially given the meth pipe he'd had in his pants pocket. Officers asked defendant if there could be meth in the room, if the baby was all right. They wanted to look around the room for meth, they said. When questioned, defendant admitted that she had used meth a week earlier, but kept fixating on the fact that her man was going to jail, and not focusing on the potential for meth with her baby in her room.

Defendant refused to let the officers in, and tried to shut the door on them. As a result of her refusal to consent, officers forcibly dragged her into the hallway, handcuffed her, and put her in a seated position on the hallway floor. After that, she consented to a room search. A knife and digital scale were under the mattress and bed. She was never given *Miranda* warnings. She was charged with having violated a condition of her probation by endangering the welfare of a minor.

Defendant moved to dismiss the motel-room evidence. The trial court denied the motion to dismiss the drug items but granted her motion to dismiss her statement about using meth. Defendant then was found to have violated her probation and three years were tacked on to her probation as a consequence.

The Court of Appeals reversed and remanded: defendant was illegally seized. The state argued on appeal that officers had "probable cause to believe she had violated her probation" and thus they legally seized her. The Court of Appeals disagreed, reasoning as follows: Defendant was illegally seized because no officer testified that anyone was investigating her for endangering the welfare of the baby, and no officer testified that anyone knew she was on probation. Officers testified that: (1) they were merely temporarily detaining defendant while arresting the man; (2) she was not the subject of a criminal investigation; and (3) no officer "evinced a belief that she had committed a crime." Therefore, no officer met the first part of the "probable cause" analysis: no officer had a subjective belief that a crime had been committed. As to consent, defendant's "consent" did "not purge the taint of the prior illegality." (See "Consent," *post*).

Finally, the state argued that the search was justified under the "emergency aid exception to the warrant requirement" because here there was no emergency. First, knowledge that a person in the same room as a child has previously killed a child negligently "is not enough to establish the existence of an imminent threat to the child." Second, when defendant opened the motel room door, officers observed no signs that she or the man were "under the influence of drugs." Third, they saw the baby on the bed with a man in his underwear but "there is no indication" that the baby was in distress or in danger. Even if the officer "may have been upset" that defendant had another baby on her bed when he knew she had smothered her other baby on her bed after using meth, "there was no evidence that this baby was in immediate danger of being smothered by defendant while she was under the influence of methamphetamine, because there was no evidence that defendant was under the influence of methamphetamine." No "true emergency" existed here.

(b). Exigent Circumstances – Other than in Homes

(i). Exigent Circumstances: 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).

"Emergency Aid" exception to the warrant requirement in Article I, section 9, may exist if (1) police have reasonable grounds to believe there is an emergency and an immediate need for their assistance to protect life; (2) the emergency is a true emergency – a good-faith belief is not enough; (3) search is not primarily motivated by intent to arrest or seize evidence; and (4) officer reasonably suspects the area to be searched is associated with the emergency and by making the entry, the officer will discover something to alleviate the emergency. *State v Follett*, 115 Or App 672, 680 (1992), *rev den* 317 Or 163 (1993).

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).

(ii). Exigent Circumstances: Destruction or Damage

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).

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). But the state need not prove that destruction of blood-alcohol evidence is imminent: "the evanescent nature of a suspect's blood alcohol content is an exigent circumstance that will ordinarily permit a warrantless blood draw," or a warrantless breath test, when an officer has probable cause to believe a suspect has been drunk driving. *State v Machuca*, 347 Or 644, 657 (2010) (blood draw); *State v Allen*, 234 Or App 363 (2010) (breath test); *State v McMullen*, 250 Or App 208 (2012) (urine test).

Note: Other states, such as Texas, have a "no refusal" blood-draw policy where magistrate judges are on stand-by at police stations to issue search warrants to draw blood, if the suspect refuses to give a breath sample. If the warrant is granted, nurses are ready and draw blood. "Police are empowered to strap a suspect to a chair, if necessary, to obtain a blood sample." *Texas Hones Tack on Drunk Driving*, WALL STREET JOURNAL, page A5, Dec. 12, 2011.

State v McMullen, 250 Or App 208 (5/31/12) (Schuman, Wollheim, Nakamoto) (Washington) Defendant was arrested for DUII at 12:00, arrived at the police station at 1:15, initially refused to give a urine sample, then at 2:00 consented to give a urine sample. The sample showed Ecstasy, cocaine, morphine, and Oxycodone in her urine. She moved to suppress that evidence. The state's evidence showed that in Washington County, it takes an average of 5 hours to obtain a warrant (sometimes 2 days) and that cocaine can become undetectable in urine in 2 hours but remains on average detectable in urine for 6 hours, all depending on numerous factors. The trial court concluded that the police could have obtained a warrant for defendant's urine sample (this decision was before *State v Machuca*, 347 Or 644 (2010).

The Court of Appeals reversed: "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 Fuller, 2012 WL 3985724 (9/12/12) (Brewer, Armstrong, Duncan) (Yamhill) After a crash at about 5:34 p.m., the investigating officer developed probable cause to arrest defendant for driving under the influence of drugs or alcohol. At 6:47 p.m., the officer took defendant into custody for DUII. Defendant consented to and took a Breathalyzer test at 8:00 p.m., which resulted in a 0.0% blood-alcohol content. The officer called in a Drug Recognition Expert, who conducted the 12-step protocol and concluded that defendant had been using a central nervous system depressant and a narcotic. At about 9:50 p.m., defendant consented to give a urine sample, which tested positive for Oxycodone (which defendant had admitted using). The trial court granted defendant's motion to suppress his urine-test results because there was "no exigency" under *State v Machuca*, 347 Or 644, 657 (2010) because by the time the urine sample was requested, the officers could have obtained a warrant, and also, the officers failed to identify the specific drug they thought defendant had taken (drugs dissipate at different rates).

The Court of Appeals reversed and remanded: this case is similar to *State v McMullen*, 250 Or App 208 (2012), "where we held that evidence of the transformation of controlled substances in a person's urine established an exigency justifying the warrantless seizure of the defendant's urine." In *McMullen*, as here, the defendant argued that by the time the urine test was taken, the police could have sought and received a warrant, and also because some drugs probably had dissipated, the exigency was gone. The court, there as here, disagreed: "it is immaterial that the officers did not identify specific, rapidly dissipating controlled substances that they expected to find in defendant's urine." Instead, it "is sufficient that the officers had probable cause to believe that evidence of a controlled substance would be found in defendant's urine and that evidence was adduced at the suppression hearing establishing that certain controlled substances are of a 'evanescent nature.'"

State v Walker, 251 Or App 651 (8/08/12) (per curiam) (Ortega, Haselton, Sercombe) (Curry) The trial court correctly denied defendant's motion to suppress the analysis of his urine sample, per *State v McMullen*, 250 Or App 208 (2012): If "police have probable cause to believe that evidence of a controlled substance will be in a suspect's urine, the exigency exception justifies a warrantless seizure and search of the suspect's urine in most cases."

(iii). Exigent Circumstances: 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).

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).

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."

(a). Closed Containers

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

(i) Inventories
(ii) Searches incident to arrest for officer safety or to preserve evidence
(iii) 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)).

(b). Patdowns

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

(c). "Protective Sweeps of a House" (now an "Officer Safety Search")

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 not an exception to the warrant requirement; rather a protective sweep can be justified under the Oregon Supreme Court's "standards for an officer safety search." *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).

(d). Use of Force – Fourth Amendment

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

5. Consent

A search must be conducted pursuant to a search warrant or must fit within a recognized exception to the warrant requirement under Article I, section 9. 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). Merely failing to oppose officers' efforts to search does not establish consent. *State v Mast*, 250 Or App 605 (2012).

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

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

Suppression as Remedy: "[U]nlawful police conduct * * * provides a basis for suppression of evidence seized during a search performed with the consent of that individual in one of two ways: (1) the unlawful police conduct affected the supposed voluntariness of the individual's consent; or (2) the consent actually derived from, or was obtained through 'exploitation' of the prior violation of the individual's constitutional rights." *State v Ashbaugh,* 349 Or 297 (2010) (citing *State v Rodriguez*, 317 Or 27, 38-40 (1993)); *State v Hall*, 339 Or 1 (2005).

State v Moore, 247 Or App 39 (12/14/11) (Haselton, Armstrong, Duncan) (Tillamook) ***review allowed***, 352 Or 25 (5/03/12) (See also "Stare Decisis," *ante*) Officer witnessed a traffic accident that injured defendant and killed the other driver. Officer went to the hospital and 1-2 hours later officer talked with defendant after defendant had received pain medications and determined that he had probable cause to believe defendant was driving under the influence. Defendant consented to a blood and urine test after officer recited statutory implied consent warnings to him. He was indicted for criminally negligent homicide. He moved to suppress on several grounds (no probable cause and exigent circumstances, and no voluntary consent). The trial court suppressed the evidence (no proof of exigent circumstances and no voluntary consent). The Court of Appeals affirmed solely because there was no voluntary consent under *State v Machuca*,

231 Or App 232 (2009), *rev'd on other grounds*, 347 Or 644 (2010). "A consent to search obtained in that fashion is coerced by the fear of adverse consequences and is ineffective to excuse the requirement to obtain a search warrant."

State v Kurokawa-Lasciak, 249 Or App 435 (4/25/12) (Schuman, Ortega, Sercombe) (Douglas) This case is on remand from the Oregon Supreme Court to determine third-party consent to a search (on remand, the mobile automobile exception is not at issue). Defendant refused to allow police to search his rental van. He was arrested for theft. He gave the keys to his rental van to his girlfriend with instructions to "check on the dog, lock it up, and don't go anywhere, just wait." Girlfriend knew she was not on the rental agreement and was not insured to drive. Rather than try to obtain a warrant, officers asked for the girlfriend's consent to search defendant's van. She refused and said she felt "badgered" to consent. Officers persuaded her finally to give consent to search his van. A lot of hashish, marijuana, scales, and $48K cash were inside the van. Defendant moved to suppress. The state argued that officers properly searched the van under the automobile exception and under third-party consent. The Supreme Court issued its decision on the mobile auto exception in a separate case in 2011 (state had not met the requirements for the mobile auto exception). This present issue involves the third-party consent exception, which the Supreme Court did not address but is the issue on remand. The trial court had granted defendant's motion to suppress as to consent, because the girlfriend lacked authority. The trial court had granted defendant's motion to suppress.

The Court of Appeals affirmed. "The general rule governing third-party consent has not changed significantly since 1983" in Fourth Amendment case, *State v Carsey*, 295 Or 32, 44 (1983). The Court of Appeals subsequently "adopted the same rule under Article I, section 9, holding that 'common 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."' *State v Will*, 131 Or App 498, 504 (1994)). "The state has the burden of proving by a preponderance of the evidence that the consenting person has the requisite authority. *City of Portland v Paulson*, 98 Or App 328, 330 (1989)." 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." In this case, the issue is whether defendant and the girlfriend "had an understanding" that the girlfriend "had common access to and control of the van" when she gave the officer consent to search it. The evidence in this case establishes "without difficulty" that "the access and control did not encompass consent to search." Defendant told the girlfriend to lock the van, take care of the dog, and just wait. She knew she did not have authority to consent and only did so when badgered by the officer. The search of the van was not lawful. Suppression was proper. Affirmed.

State v Mast, 250 Or App 605 (6/27/12) (Armstrong, Haselton, Sercombe) (Washington) A judgment creditor sent a writ of execution to the sheriff with instructions to get defendant's personal property at his business office. Without giving defendant or his office any notice, the creditor's attorney, a sheriff's supervisor, 5 sheriff's deputies, and movers all went to the office. The deputies entered the office during business hours through the main entrance. There was a reception area and a receptionist. In the reception area, the supervisory sheriff gave defendant a copy of the writ, then several deputies proceeded past the reception area and cubicles to defendant's private office, which had a door, and began seizing his personal property. No one asked for defendant's consent. A deputy found a locked Sentry safe in defendant's desk and opened them with defendant's keys they'd taken. Inside were stock certificates and "psilocybin mushrooms." Defendant also made incriminating

statements. He was charged with possession of a controlled substance. He moved to suppress. The state countered that the officers entered pursuant to the administrative exception to the warrant requirement. The trial court denied the motion to suppress.

The Court of Appeals reversed and remanded because this was a "search" and the administrative search exception was not met, see *post*. The court footnoted that defendant did not consent to the search either: here "defendant merely failed to oppose the deputies' efforts to search," and that is insufficient to establish "consent" to the search.

State v Pickle, 2012 WL 5286199 (10/24/12) (Hadlock, Schuman, Nakamoto) (Josephine) Officer responded to a two-vehicle crash in a pub parking lot. A small car was entangled with defendant's large Ford Excursion. Neither of the drivers appeared intoxicated and no one was hurt. Officer was relaxed, nonchalant, and low key, asked the drivers, "Let's see if we can get these apart now." When defendant got into his Excursion, the officer smelled an overwhelming "very very strong" odor of green marijuana that would be produced from a substantial amount of marijuana. Officer got the vehicles separated by directing the drivers, and defendant got out of the Excursion without prompting. The other driver adamantly denied having or smoking any marijuana. The odor was coming from defendant's Excursion. Officer asked defendant if had marijuana, and defendant retrieved two marijuana buds from his ashtray and granted consent to search the front of the Excursion. Officer found "only a tin" but nothing that would produce such an overwhelming odor. Officer asked to search thae back of the Excursion which had a hatch. Defendant held the hatch open until another officer relieved him and held the hatch open. Defendant said he had 60 pounds of marijuana, specifically the "Purple Urple" and "Velvet Elvis" varieties. The officer found 60.5 pounds, labeled by variety. The process took 25-30 minutes, no one drew a weapon or handcuffs, no one made threats or promises, and the conversation was "cordial" and "too relaxed." Defendant moved to suppress: he did not consent to anything, he merely acquiesced, and this was not a valid mobile auto search. The trial court found the officer's version of events to be credible and denied the motion on grounds that defendant voluntarily consented and the search was justified under the auto exception.

The Court of Appeals on the consent exception without reaching the mobile auto exception. The trial court's findings that defendant consented by conduct are supported in the record. 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 circumstances such as these. This is different than 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 Shirk*,** 248 Or App 278 (02/23/12) (Ortega, Wollheim, Sercombe) (Hood River) Officers arrived at a motel room to arrest a man on an outstanding warrant. That man's female companion (defendant) was with him in the hotel room when officers knocked on the door. Defendant came to the door and officers could see the man, in his underwear, with a baby on the bed. Defendant said that was her baby and the man was the "baby's daddy." Officers arrested the man, who had put on his pants, patted him down, and found a meth pipe in his pants pocket. Officers knew that defendant earlier had killed her baby by smothering it accidentally on a bed after a meth binge when she was involved with this same man. No evidence in this record showed that any officer knew she was on probation. Officers became concerned about this baby on the bed with this same man, especially given the meth pipe he'd had in his pants pocket. Officers asked defendant if there could be meth in the room, if the baby was all right.

They wanted to look around the room for meth, they said. When questioned, defendant admitted that she had used meth a week earlier, but kept fixating on the fact that her man was going to jail, and not focusing on the potential for meth with her baby in her room.

Defendant refused to let the officers in, and tried to shut the door on them. As a result of her refusal to consent, officers forcibly dragged her into the hallway, handcuffed her, and put her in a seated position on the hallway floor. After that, she consented to a room search. A knife and digital scale were under the mattress and bed. She was never given *Miranda* warnings. She was charged with having violated a condition of her probation by endangering the welfare of a minor.

Defendant moved to dismiss the motel-room evidence. The trial court denied the motion to dismiss the drug items but granted her motion to dismiss her statement about using meth. Defendant then was found to have violated her probation and three years were tacked on to her probation as a consequence.

The Court of Appeals reversed and remanded: defendant was illegally seized. The state argued on appeal that officers had "probable cause to believe she had violated her probation" and thus they legally seized her. The Court of Appeals disagreed, reasoning as follows: Defendant was illegally seized because no officer testified that anyone was investigating her for endangering the welfare of the baby, and no officer testified that anyone knew she was on probation. Officers testified that: (1) they were merely temporarily detaining defendant while arresting the man; (2) she was not the subject of a criminal investigation; and (3) no officer "evinced a belief that she had committed a crime." Therefore, no officer met the first part of the "probable cause" analysis: no officer had a subjective belief that a crime had been committed.

The state agreed that defendant was unlawfully interrogated, thus the issue is whether her consent to search the motel room "was tainted by the illegal detention followed by the illegal interrogation." The burden is on defendant to establish a "minimal factual nexus—that is, at a minimum, the existence of a 'but for relationship—between the evidence sought to be suppressed and the prior unlawful police conduct." The burden shifts to the state, if defendant makes that showing, and the state must show that the evidence is admissible, by showing either that (1) the evidence inevitably would have been discovered or (2) it was obtained independently of the prior illegality or (3) the illegality has such a tenuous factual link to the evidence that the illegality cannot be the source of the evidence. Here, defendant's consent was obtained while the illegality was ongoing, thus defendant met her burden. The state then failed to meet its burden under the totality of the circumstances because *Miranda* warnings were not given, defendant was seized because she was trying to prevent officers from entering her motel room – she was refusing to consent to a search and as a result officers handcuffed her and gave no indication that they would unhandcuff her unless/until she "consented" to the search. Her "consent" did "not purge the taint of the prior illegality."

6. Inventories

(a). Oregon Constitution

This is a type of administrative search.

The inventory situation most commonly arises when police impound an auto or when the person is booked into custody. *State v Taylor*, 250 Or App 90

(5/16/12). Police departments may 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).

Under Article I, section 9, police may inventory the contents of a lawfully impounded vehicle or the personal effects of a person being taken into custody if a valid statute, ordinance, or policy authorizes them to do so, and the inventory is designed and systematically administered to involve no exercise of discretion by the officer conducting the inventory. *State v Atkinson*, 298 Or 1 (1984). The state has the burden of proving the lawfulness of an inventory. *State v Tucker*, 330 Or 85, 89 (2000).

"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).

State v Hanna, 248 Or App 608 (3/14/12) (Haselton, Armstrong, Duncan) (Lane) An officer watched defendant put possibly-stolen items into the "tonneau" of his pickup (tonneau = a securely attached, locked, hard covering over the bed of a pickup truck). Officer followed him until he committed a traffic violation, pulled him over into a private gas station, and found that defendant had no driver's license and was a sex offender who had had failed to register as a sex offender. Defendant refused to give consent to search the pickup. He was taken to jail. The illegally-parked pickup was towed and inventoried under the Eugene Police Department's policy for tows and impounds. That policy allowed for searches of a vehicle's "trunk" and "external vehicle container attached to the vehicle." The locked tonneau area of the pickup truck's bed was searched because police believed it to be either a "trunk" or an "external vehicle container." Police found a small case/bag that contained a glass pipe with meth residue and keys. Police used the keys to unlock the tonneau cover and found a shotgun. Defendant moved to suppress all the evidence (the glass meth pipe from the bag and the shotgun from the tonneau cover). The trial court denied defendant's motion to suppress.

The Court of Appeals reversed after an "unsatisfying" resort to "the obligatory reference to the dictionary." The "inventory policy did not authorize examination of the area under the tonneau cover." That is because, "[b]luntly: Cars have trucks, and pickups don't; pickups have beds, and cars don't." "Trunk is simply trunk." That is the word of the inventory policy here. As for the policy that allowed for examination of "any external vehicle container(s) attached to the vehicle," this is not a car-top container as the inventory policy implies. "Rather, the cover by itself is just that – a cover." The tonneau cover does not render the pickup bed an "external" container. The trial court erred in denying defendant's motion to suppress to the extent that the motion to suppress pertained to items in the covered pickup bed.

State v Taylor, 250 Or App 90 (5/16/12) (Sercombe, Ortega, Edmonds SJ) (Umatilla) Defendant was arrested for domestic assault, the officer handcuffed him, searched his

pockets, and found a cigarette box. Officer handed that box to another officer who opened it and found meth. Defendant admitted it was meth. He was charged with possession of a controlled substance and he moved to suppress the meth. The state argued that the cigarette-box search was justified as a valid "search incident to arrest" or would have been inevitably discovered during an inventory at the jail. The Umatilla County Jail inventory policy "is silent regarding closed containers." But it states that property "shall be searched to ensure no weapons, drugs, or contraband items are brought" into the jail and that items from an "arrestee's pockets * * * shall be removed, inventoried, searched, and documented." The trial court denied defendant's motion to suppress under the inevitable-discovery doctrine.

The Court of Appeals reversed and remanded: "The policy is not, in fact, limited to opening only those containers that are objectively likely to contain contraband. * * * Instead, the policy requires an officer to search property that he or she 'deem[s] appropriate,' without regard to whether that search will further the security of the facility." The policy "gives wide latitude" to an officer "to decide which closed containers to look inside and what degree of scrutiny to apply to any given piece of property." "That grant of discretion is improper and renders the policy invalid." In addition, "the policy is defective because it contains no complete and meaningful limitation on the scope of the inventory. It effectively authorizes a search of all property, including any closed container, regardless of what the container is objectively likely to hold."

State v Rowell, 251 Or App 463 (8/01/12) (Schuman, Wollheim, Nakamoto) (Multnomah) Defendant was in the back seat of a car pulled over for traffic infractions. The car was going to be impounded. Defendant became defensive when Portland Police officers asked for his ID. Officers told him he may be a witness to a crime so they needed his statement. Officers had defendant sit on the curb. The officer testified that the purpose of that detention was to obtain statements from witnesses, not to charge defendant with an offense. The driver was removed, handcuffed, searched for weapons, and put into the patrol car. The vehicle was inventoried. Several containers, including a laptop, were in the trunk. No one claimed ownership of the laptop Defendant particularly said none of the items were his. Then defendant said they belonged to his friend Mickey, but he didn't really know Mickey. The officer believed he needed to determine ownership of the bag. The inventory policy at issue states that the officer will inventory the personal property in possession "of a person taken into police custody" and officers will inventory personal property of such persons "prior to placing such person into a holding room or a police vehicle." Officer opened the bag and found a stolen computer, defendant's checks, and more evidence leading, after a second stop and a search of his residence, to indictments in three cases for over 200 separate counts of forgery and identity theft. He moved to suppress and the trial court denied the motion.

The Court of Appeals reversed and remanded. "Police may conduct a search to inventory property if (1) the property is lawfully impounded and (2) the inventory is conducted pursuant to a properly authorized administrative program that (3) precludes the exercise of discretion by the law enforcement person conducting it. *State v Atkinson*, 298 Or 1, 9-10 (2008)." If in conducting the inventory, the police "deviated from the established policy" then "the inventory should be deemed invalid. *Id*." Here the lawfulness of the impound is not at issue but rather the officers' implementation of the policy. The policy at issue here states that the officer will inventory the personal property in possession "of a person taken into police custody" and officers will inventory personal property of such persons "prior to placing such person into a holding room or a police vehicle." Here, when the inventory occurred, "defendant was not actually or constructively restrained" under the policy (which cross-references to

the Oregon statute defining "arrests"). The "Portland inventory policy did not authorize searching the laptop bag on the ground that was in defendant's possession." Opening the laptop bag also violated the Portland inventory policy because the policy requires the inventory to occur before the person is placed in the patrol car. The inventory exception has not been met here. The search of the laptop bag was not justified by any warrant exceptions the state had offered, see Ownership of Lost Property Exception, *post*, thus the search violated defendant's Article I, section 9, rights.

State v Cordova, 250 Or App 397 (6/13/12) (Haselton, Armstrong, Duncan) (Marion) An officer saw defendant make two unsignaled turns while driving. The officer put on his overhead lights, then with his spotlight shining, saw defendant lean over in the seat while driving 20-25 miles per hour. For just under a mile, defendant kept driving past places that he could have pulled over. When he pulled over, a records check was run, and he was taken into custody. Under the applicable Marion County Sheriff's Office General Order, the officer arranged for the car to be towed. That policy states: "All closed containers that could contain valuables shall be opened and checked for valuables. Closed containers include, but are not limited to: purses, wallets, fanny packs, backpacks, suitcases, tool chests, gun cases/covers, briefcases." A backpack on the front seat contained a laptop and small safe. The officer opened the safe with a key from under the driver's seat. The safe contained a handgun, scales, empty plastic baggies, and a dented can which was obviously a false container. The officer opened that can and found three baggies of meth plus a bag of a cutting agent. A loaded magazine was in the trunk. Charged with numerous offenses, he moved to suppress the "fruits of the inventory" on grounds that the policy was unconstitutionally overbroad, specifically in that he policy requires officers to open and inspect the contents of all closed containers that *could* contain valuables, regardless of size, rather than are *objectively likely* to contain valuables. That means that the policy requires officers to open and inspect the contents of every closed container. The officer testified on cross that "according to the policy, pretty much I can open just about anything." The trial court denied his motion to suppress.

The Court of Appeals reversed: The policy is invalid. The policy says officers are to open closed containers that "could contain" valuables. It does not say that officers are to open containers "designed to contain" or are "objectively likely to contain" valuables. "Language has meaning, and, given the constitutional implications of inventories vis-à-vis the protections of Article I, section 9, we have been scrupulously rigorous in our construction of the terms of inventory policies. * * * We will not rewrite this policy." In sum, opening the safe in defendant's backpack and inspecting its contents was not authorized by a valid inventory policy. The trial court erred in denying the motion to suppress.

State v Cruz-Renteria, 250 Or App 585 (6/27/12) (Haselton, Armstrong, Duncan) (Marion) Defendant was arrested after an officer found bags of meth on his person. A search of his person found scales and pipes. He was taken to jail where the intake deputy saw two lipstick-tube-sized "canister vials" hanging from his belt. They were weather-tight, half-inch-diameter tubes with screw-on lids. The deputy had never seen such a container and concluded that they could contain drugs or sharps. The deputy opened the vials, under the Marion County Sheriff's Office Policy, and found heroin. That policy provided for deputies to "open closed containers designed to typically carry identification, cash, valuables, medications or contraband." This policy did not include any illustrative examples of such items, as many other inventory policies do. Defendant moved to suppress the meth and the heroin. The trial court denied the motion because the vials were of a type that could contain contraband and the search was legal. The two lipstick-sized vials containing heroin are at issue on appeal.

The Court of Appeals reversed and remanded. The trial court erred in concluding that "the invasion of the canisters" was "pursuant to a lawful inventory and in denying the suppression of that evidence." The court noted that this is an unusual inventory case in two ways. First, the policy itself is different than *Cordova* and *Taylor* (discussed on preceding page). The policy in *Cordova* allowed for inspection of "all closed containers that could contain valuables" which was deemed unconstitutionally overbroad because any closed container could, regardless of objective likelihood, contain valuables, thus it required officers to open everything. The policy in *Taylor* required officers to search property that s/he deems appropriate, which was also deemed unconstitutionally overbroad because it gave officers too much discretion and also it had "no complete and meaningful" limit on the scope of the inventory, thus it allowed for a search of all closed containers. The policy in this case, in contrast, does not involve overbreadth or unlimited officer discretion. "Rather the issue is whether the canisters fell within the scope of the policy's mandate – viz., whether the canisters were 'closed containers designed to typically carry identification, cash, valuables, medications, or contraband."

Second, the container is different than most in inventory cases. These canister-vials are not "self-evidently" designed to hold things. The trial record is limited, so the court is unable to determine whether the vials were designed to hold anything, although they could contain things (but "could" is not dispositive here). State v Swanson, 187 Or App 477 (2003) is most analogous, because in that case as here, the containers are not in evidence, the deputy who did the inventory did not testify that the canisters were "designed to carry" valuables or contraband, but also there is no evidence that the canisters seemed like containers used to carry valuables. Most "strikingly" the deputy testified that he had never before seen such lipstick-tube-sized canisters. Thus "the record developed at the suppression hearing was inadequate to establish that the canisters at issue here were 'closed containers designed to typically carry identification, cash, valuables, medications or contraband." And even if the record could permit officers to make such inferences, that would "interject individual variability and impermissible discretion into the policy's application."

State v Penney, (10/17/12) (Ortega, Brewer, Sercombe) (Multnomah) Defendant was driving a car pulled over for traffic infractions in a gang-saturated area. He pulled over at an angle against the curb, impeding traffic. He produced two expired insurance cards. Officer asked several times to search the car for weapons; defendant declined. Officers decided to tow the vehicle because defendant was uninsured (rather than failing to carry proof of insurance which would *not* have required a tow). Officers did not call any insurance companies. Officers inventoried the car, found cocaine, and defendant made incriminating statements. The trial court denied his motion to suppress.

The Court of Appeals affirmed: "an inventory policy is not invalid because it fails to limit an officer's discretion regarding whether to release seized property to a third party or to take that property into custody." "[U]nlike the decision whether and in what manner to conduct an inventory, an officer may exercise discretion in determining whether to impound a vehicle. It follows that the Policy and Procedure is not invalid because it permits an officer to choose to cite a driver for failing to carry proof of insurance, in which case a tow is not required." Also, the inventory is not "unconstitutional as applied," as defendant argued because the officers were "motivated by a desire to search." Here, defendant parked at an angle to the curb, creating a traffic hazard, as the trial court had found, and the officers would have inventoried it regardless whether they cited him for driving uninsured or failure to carry proof of insurance. There is no need to remand to determine whether the officers would have impounded the car regardless of their suspicions because the trial court already found that the officers would have towed the car.

(b). Fourth Amendment

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

7. Other Statutorily Authorized Noncriminal Administrative 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).

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." *Juv Dep't of Clackamas County v M.A.D*., 348 Or 381, 389 (2010) (citing *State v Atkinson*, 298 Or 1, 8-10 (1984)).

State v Snow, 247 Or App 497 (12/29/11) (Sercombe, Ortega, Rosenblum) (Jackson) Defendant entered the Jackson County Circuit Court building with meth packets inside a cigarette package. The security officer opened the cigarette package before x-raying the package to look for weapons. The security officer opened the package pursuant to two written policies: a court administrative policy and the presiding judge's policy. The judge's policy permits "searches of an individual's person and carried item[s]" and requires that "any person" entering the courthouse must "submit to a search of their person and a search of their bags, briefcases, valises, and hand-carried items." Charged with possession and delivery of meth, defendant moved to suppress. The trial court found that under the court's policy, the officer could not open the cigarette package but under the judge's policy, the officer had authority to open the package. The trial court denied the motion to suppress.

The Court of Appeals reversed and remanded. Because defendant moved to suppress the evidence under Article I, section 9, it becomes the state's burden to show that the search was lawful. An "administrative search – a search performed for purposes other than criminal law enforcement – does not run afoul of the constitution if it is conducted under '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 [is] carried out pursuant to a "properly authorized administrative program, designed and systematically administered" to control the discretion of non-supervisory officers.'" (Quoting *Nelson v Lane County*, 304 Or 97, 104 (1987) and *State v Atkinson*, 298 Or 1, 9 (1984) and *Weber v Oakridge School Dist.*, 184 Or App 415, 431-34 (2002), *rev den* 335 Or 422 (2003)). To be "reasonable" under Article I, section 9, the search must be conducted for purposes other than law enforcement. Second, it must be conducted under a policy issued by a politically accountable lawmaking body. Third, it must limit the discretion of those conducting the search. Fourth, the scope of the search must be reasonable for its purpose. Fifth, the person performing the search must be acting within the policy boundaries.

Here, the third criteria is not met: the judge's policy did not limit the discretion of the searcher. The purpose of that requirement is to protect against arbitrariness and to ensure that no one is singled out for special attention. The judge's policy here granted wide latitude to an officer to decide who to search and the scope. It did not require that everyone's containers be searched, nor did it specify how intrusive the search may be. "Instead, the policy would permit a security officer searching for weapons to subject one person to a metal detector and x-ray examination, while subjecting another to a full strip search." That policy fails to limit the officers' discretion. The policy was unlawful.

State v Mast, 250 Or App 605 (6/27/12) (Armstrong, Haselton, Sercombe) (Washington) A judgment creditor sent a writ of execution to the sheriff with instructions to get defendant's personal property at his business office. Without giving defendant or his office any notice, the creditor's attorney, a sheriff's supervisor, five sheriff's deputies, and movers all went to the office. The deputies entered the office during business hours through the main entrance. There was a reception area and a receptionist. In the reception area, the supervisory sheriff gave defendant a copy of the writ, then several deputies proceeded past the reception area and cubicles to defendant's private office, which had a door, and began seizing his personal property. No one asked for defendant's consent. A deputy found a locked Sentry safe in defendant's desk and opened them with defendant's keys they'd taken. Inside were stock certificates and "psilocybin mushrooms." Defendant also made incriminating statements. He was charged with possession of a controlled substance. He moved to suppress. The state countered that the officers entered pursuant to the administrative exception to the warrant requirement. The trial court denied the motion to suppress.

The Court of Appeals reversed and remanded: This was a "search." 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, as opposed to the government official whose conduct is being challenged, would have felt free to ender 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. Here, "the predicate issue" is "whether defendant had a protected privacy interest in his personal office – that is, whether a member of the public who is complying with social norms would have felt free to enter defendant's office without permission." This office was open to the public during business hours, "the public nature" of the business's reception area "did not extend to defendant's personal office." That is so because of the layout of the office, with a receptionist to greet and "intercept" visitors. Defendant's personal office was at the far end of the main office and had a door, which were "additional barriers to entry." In light of those "cues" people would

not have felt free to venture past the reception area without permission. Therefore defendant had a protected privacy interest in his personal office. This conclusion under Article I, section 9, is consistent with Fourth Amendment law, where 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 *See v City of Seattle*, 387 US 541, 543 (1967).

The court then concluded that the "administrative search exception" to the warrant requirement in Article I, section 9, did not apply to this search. Because the search was undertaken pursuant to a writ of execution, rather than to enforce criminal laws, this is assessed under the "administrative search exception." 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). Here despite the sheriff's expansive statutory authority to seize personal property, "the writ of execution statutes do not grant the sheriff unfettered authority to enter enclosed places to find or reach personal property." ORS 18.887 provides that a sheriff may forcibly enter a structure "only pursuant to an order issued by the court under this section." The legislative history of that statute led the court here to conclude, in a 90-word sentence and in an opinion using the word "*viz*." five times, that if the property is concealed, the sheriff seeking to enter a structure or enclosure under a writ of execution "forcibly enters" it if the sheriff "lacks consent to enter the enclosure." Deputies here did not have defendant's consent or a court order allowing them to enter defendant's office, so their "forcible entry into the office was not permitted by ORS 18.887." The court footnoted there was no consent because here defendant "merely failed to oppose the deputies' efforts to search – not that defendant consented to the search."

8. Abandonment

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

(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).

State v Rowell, 251 Or App 463, 475 (8/01/12) (Schuman, Wollheim, Nakamoto) (Multnomah) Defendant claimed that he was watching a bag for a friend. That fact does not establish that he voluntarily relinquished his personal property interest in the bag. The trial court erred in denying his motion to suppress evidence contained in the bag on an abandonment exception.

(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).

Cf. United States v Harrison, 689 F3d 301 (3d Cir 8/07/12) Philadelphia police officers saw a dirt bike, that had been stolen, in the backyard of a house that was within 1000 feet of a school. They walked to the front yard, saw that the front door was open, and they saw candlelight through a boarded-up first-floor window. They thought the house was abandoned and walked in the front door without announcing anything. Officers saw

a man sitting in a recliner chair, with a gun, scales, pills, and a "substance." That man (defendant) ran into the basement. Officers followed him and arrested him. They began to prepare a search warrant. The officers testified that they had been at the premises before: the front door was always open, garbage was all over the front, windows were boarded up, and remained in that condition over months. One officer had been in the house several times in the past months to kick people out: drug users and dealers were hanging out and going in and out of the house all day long "all summer." He testified that the house "smelled like urine," with crack and heroin bags "all over the place," with people sleeping there, and "feces in the tub and toilet" because there was no water. It was uninhabitable, but the owner apparently had been collecting rent money from someone for that place. The district court denied defendant's motion to dismiss, concluding that although the house was not abandoned, the police had acted reasonably based on the appearance of the property and their knowledge of the history of it.

The Third Circuit panel affirmed in a detailed opinion. As a basic principle: "Before the government may cross the threshold of a home without a warrant, 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 per this court, although this court may be incorrect in so stating, given the good-faith exception to the exclusionary rule).

Here, the outside of the house had garbage all around, the lawn was overgrown, windows were boarded up or exposed, the front door was left open. Nevertheless, this Third Circuit panel concluded that it would be 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." But here the police knew more: they knew that this 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 months. That together is sufficient to form probative evidence of abandonment for Fourth Amendment purposes.

9. Mobile Automobiles

(a). Article I, section 9

"The automobile exception is one of 'the few specifically established and carefully delineated exceptions to the warrant requirement' of Article I, section 9." *State v Kurokawa-Lasciak*, 351 Or 179 (2011) (quotations omitted). Automobiles may be searched and seized without a warrant, under Article I, section 9, if the automobile is mobile when police stop it and have probable cause to believe that the auto contains crime evidence. *State v Brown*, 301 Or 268, 274 (1986) (creating the automobile exception as a subset of the exigent circumstances exception).

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

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

State v Jones, (10/24/12) (per curiam) (Armstrong, Brewer, Duncan) (Curry) Defendant was stopped for a traffic violation and the officer searched his pants pocket that had marijuana in it. The trial court concluded that the automobile exception justified that search and denied his motion to suppress. The Court of Appeals reversed and remanded (with the state's concession), citing to *State v Brown*, 301 Or 268 (1986) and *State v Foster*, 350 Or 161 (2011). The automobile exception has not been extended to "a search of a defendant's person while the defendant is standing outside the car."

State v Wiggins, 247 Or App 490 (12/29/11), *rev den* 352 Or 33 (2012) (Sercombe, Brewer, Ortega) (Douglas) Police received a report of an altercation during which someone said he was going to get a gun and would return. Defendant's car left that scene. Police found defendant's car 15 minutes later when it was heading back toward the scene. The officer stopped defendant, who pulled in to a friend's private driveway. Defendant admitted that he'd been involved in the altercation but denied threatening anyone. He did not consent to a search of his car. He was arrested for a parole violation and taken to jail. Officers left the scene. He had left his car keys with the friends with instructions for them to call his girlfriend to get the car. His car was unattended for 25 minutes, locked, with a window down. No one accessed the car for those 25 minutes. Officers believed there was a gun in the car, so they guarded it while they sought a warrant. Before they received a warrant, the girlfriend arrived and demanded to take the car. Officers then searched the car and found a loaded gun with ammunition. Defendant was charged with possession of a firearm. The trial court suppressed the gun and ammo. The state appealed. The Court of Appeals concluded that the mobile automobile exception allowed for the warrantless search of the car. Then the Oregon Supreme Court issued *State v Kurokawa-Lasciak*, 351 Or 179 (2011) which reaffirmed that the mobile auto exception did not apply merely because an auto is capable of being mobile, and the defendant moved for reconsideration in this case on grounds that the mobile auto exception does not apply.

The Court of Appeals affirmed. The Supreme Court has not addressed the point where a "mobile" car, stopped the police, ceases to be mobile. But defendant's care here was mobile when stopped and that "exigency persisted at the time of the search despite the intervening break in contact with the vehicle and the lapse of time." The car continued to be the subject of an ongoing investigation and nothing made the car immobile (it was not impounded, not disabled, and nothing prevented it from being driven away). "The Supreme Court has made clear that the automobile exception has only two requirements: (1) the vehicle must be mobile at the time that it is first encountered by police and (2) probable cause must exist for the search of the vehicle." Former opinion modified and adhered to as modified.

State v Groom, 249 Or App 118 (3/28/12) (Schuman, Wollheim, Nakamoto) (Marion) An officer ran a DMV check on a car he was following and saw that the owner had an outstanding warrant. The car turned, the officer had to turn back to look for it, and he saw that it was parked with two women beside it. Officer asked the women for their ID. One woman denied having any ID, then gave a false name, then admitted she owned the car. Officer arrested her, put her in the patrol car, asked for consent to search the car, then radioed for a drug dog to be sent out because she refused to consent. Officer then noticed that a man was in the back seat. He was on post-prison supervision. He got out, was patted down, and then officers found a plastic baggie on the ground with meth residue. Then officer advised defendant of her *Miranda* rights and told her the drug dog was on his way. She then said she had been driving and there were drugs inside. The drug dog arrived and alerted to the door of the vehicle. The drug dog went inside the car and alerted at defendant's purse. Drugs and drug evidence was in the

purse. This case went up and down the appellate courts based on the mobile auto exception and *Kurokawa-Lasciak*.

The Court of Appeals reversed and remanded. The mobile auto exception is not met here. When the officer first encountered defendant's car, it was moving, but the encounter was not "in connection with a crime" but instead the officer was "merely randomly 'running' license plates." "The nexus of the crime arose only later, after he learned that the car's registered owner had an outstanding arrest warrant, defendant gave the officer a false name, a passenger dropped a meth bindle, and the drug dog alerted outside the car. Thus the search was not lawful under the auto exception. (Nor was it lawful under any other exception the state had argued).

(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).

10. Public School Searches for Illegal Drugs

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).

(a). Random urine testing for drugs: administrative searches

(i). Oregon Constitution

No individualized suspicion at all required if criteria are met. 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, 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 not for a noncriminal administrative purpose.

(ii). Fourth Amendment

"Special needs" inhere in the public school context. "Fourth Amendment rights * * * are different in public schools than elsewhere; the [Fourth Amendment] 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary

responsibility for children." *Vernonia School Dist. v Acton*, 515 US 646, 656 (1995). Suspicionless drug testing of student athletes does not violate the Fourth Amendment – students' privacy interest is limited where the state is responsible for maintaining discipline. *Id*.

A school district's policy, requiring all middle and high school students to consent to urinalysis testing for drugs to participate in any extracurricular activity is a reasonable means of furthering the school district's important interest in preventing an deterring drug use in school children and does not violate the Fourth Amendment. *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.

(b). Nonrandom student-searches

(i). Fourth Amendment

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

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

(ii). Article I, section 9

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

11. Jails and Juvenile Detention

Fourth Amendment

i. Adults

Bell v Wolfish, 441 US 520 (1979) held that a mandatory, routine strip search policy applied to prisoners after every contact visit with a person from outside the institution, without individualized suspicion, was facially constitutional. Where "the scope, manner, and justification for San Francisco's strip search policy was not meaningfully different from the scope, manner, and justification for the strip search policy in *Bell*," Ninth Circuit concluded that a policy requiring strip searching (including visual body-cavity searching) every arrestee *without* individualized reasonable suspicion as part of the jail booking process, provided the searches are no more intrusive than those in *Bell* and are not conducted in an abusive manner, does not violate the arrestees' rights. *Bull v City and County of San Francisco*, 595 F3d 964 (9th Cir 2010).

Florence v Board of Chosen Freeholders (4/02/12) (Kennedy with concurrences and with Breyer, Ginsburg, Sotomayor, and Kagan dissenting) 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 hiding drugs or weapons, or harboring lice, scabies, viruses, or infectious wounds, or have gang tattoos. 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. Such strip search/visual inspection policies are reasonable because arrestees have been found to conceal "knives, scissors, razor blades, glass shards" and money, cigarettes, clothing, "a lighter, tobacco, tattoo needles" in their body cavities, and "taped under [a]scrotum:" "2 dime gas of weed, 1 pack of rolling papers, 20 matches, and 5 sleeping pills". When people are booked into jails, police do not necessarily have a criminal history, and people booked on minor offenses can be quite dangerous, such as Tim McVeigh (pulled over for a traffic infraction). Even people booked for very minor offenses may be required to undergo this booking procedure. In sum: "Jails are often crowded, unsanitary, and dangerous places."

This case, and the policies at issue in it, do 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).

12. "Probation Search"

A statute (ORS 137.545(2)) allows a police officer to arrest a probationer without a warrant for 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 violating a probation condition (ie. a defendant's probation conditions do not prohibit alcohol consumption but he is stopped for consuming alcohol), "[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 Steinke*, 88 Or App 626, 629 (1987).

A statute (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. An 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).

Cf. United States v Bolivar, 670 F3d 1091 (9th Cir 02/29/12) (Graber, Tashima, Rawlinson) Police had a "probation-violation warrant" for defendant's roommate. As part of her probation, the roommate had consented to a search of her property. Police arrested the roommate and searched the shared apartment. They found a backpack hanging in a closet, opened it, and found a .12 gauge sawed-off shotgun with a 10" barrel. The roommate said it was defendant's. Defendant was indicted for being a felon in possession of a firearm. He moved to suppress the backpack (not the apartment) search under the Fourth Amendment. The district court denied the motion to suppress.

The Ninth Circuit panel affirmed. The 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." "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. The higher level of certainty concerning the home itself is consistent with longstanding and recent Supreme Court precedent," see *Kyllo v United States*, 533 US 27, 33 (2001). The court here reiterated that distinction a third time (to enter a probationer's residence requires probable cause, but to search an item within the probationer's residence requires only reasonable suspicion).

13. Lawful Vantage Point – Not a "Search"

"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).

14. Ownership of Lost Property

State v Rowell, 251 Or App 463 (8/01/12) (Schuman, Wollheim, Nakamoto) (Multnomah) Defendant was in the back seat of a car pulled over for traffic infractions. The car was going to be impounded. Defendant became defensive when Portland Police officers asked for his ID. Officers told him he may be a witness to a crime so they needed his statement. Officers had defendant sit on the curb. The officer testified that the purpose of that detention was to obtain statements from witnesses, not to charge defendant with an offense. The driver was removed, handcuffed, searched for weapons, and put into the patrol car. The vehicle was inventoried. Several containers, including a laptop, were in the trunk. No one claimed ownership of the laptop, defendant particularly said none of the items were his, then he said they belonged to his friend Mickey, then he said he didn't really know Mickey. The officer believed he needed to determine ownership of the bag. The inventory policy at issue states that the officer will inventory the personal property in possession "of a person taken into police custody" and officers will inventory personal property of such persons "prior to placing such person into a holding room or a police vehicle." Officer opened the bag and found a stolen computer, defendant's checks, and more evidence leading, after a second stop and a search of his residence, to indictments in three cases for over 200 separate counts of forgery and identity theft. He moved to suppress and the trial court denied the motion.

The Court of Appeals reversed and remanded. First, the inventory did not follow the Portland Police's inventory policy, thus it was an invalid inventory, see Inventories, *ante*. The state argued that "opening the bag and extracting the computer were permissible under an exception to the warrant requirement that authorizes law enforcement officers to ascertain the owner of lost property." There is one case under that exception: *State v Pidcock*, 306 Or 335, 340 (1988), *cert denied*, 489 US 1011 (1989). The court disagreed: that "only case involving *lost*, as opposed to *abandoned* property" does not apply here. Officers had no suspicion that the bag was lost. They thought it contained stolen items. "Neither *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."

The search was not lawful. But under *State v Tanner*, 304 Or 312, 315-16 (1987) the courts must separately consider whether the evidence must be suppressed. "Evidence must be suppressed only if the unlawful search violated the rights of the person seeking suppression," per *Tanner*. Defendant here contended that as asserted guardian of the bag, he has a bailee's interest in it, per *State v Hoover*, 219 Or 288, 296 (1959). The state contends that a thief can have no protected property interest in stolen property. The court noted that Tanner "definitively refuted" the state's argument in *Tanner*. Moreover, the officers here did not know the property was stolen when they searched the bag. Finally defendant did not "abandon" the bag: he said he was watching it for Mikey. That does not equal "abandonment" under Article I, section 9.

G. Suppression as Remedy and Exceptions

(i). Burden-shifting basics under Article I, section 9

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).

If the state's action did violate Article I, section 9, then the defendant must establish a minimal connection between the evidence and the illegal state action ("but for" the illegal state action, the evidence would not have been obtained). *State v Hall*, 339 Or 1, 25 (2005); *State v Smith*, 247 Or App 624 (2012). If the evidence was obtained during the illegal state action, that minimal connection is met. *State v Rodgers/Kirkeby*, 347 Or 610, 629-30 (2010).

If the defendant has shown that minimal connection, to avoid suppression, then the state must establish either that (1) the police inevitably would have obtained the evidence lawfully; (2) the state obtained the evidence independently of its illegal conduct; or (3) the illegal conduct was not the source of the evidence because it had such a tenuous link. *Hall*, 339 Or at 25.

If a "search was not lawful" under Article I, section 9, suppression of that evidence is a separate inquiry. "Evidence must be suppressed only if the unlawful search violated the rights of the person seeking suppression." *State v Tanner*, 304 Or 312, 315-16 (1987); *State v Rowell*, 251 Or App 463, 473 (2012). The issue may be "not whether the police violated section 9 * * * but whether the police violated defendant's section 9 rights." *Tanner*; *Rowell*.

(ii). General Fourth Amendment Tenets

"The criminal is to go free because the constable has blundered." *People v Defore*, 242 NY 13, 21-22 (1926) (Cardozo, J.). "The thought is that in appropriating the results [of a federal officer's trespass], he ratifies the means." *Id*. at 22.

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 Brandeis).

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

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

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

(iii). Article I, section 9

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

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

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

(a). Inevitable Discovery as Exception to Suppression

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

(b). Attenuation as Exception to Suppression

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

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

(iv). Fourth Amendment's Good-Faith Exception to Exclusion:

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

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).

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

"Where the search at issue is conducted in accordance with a municipal 'policy' or 'custom,' Fourth Amendment precedents may also be challenged, without the obstacle of the good-faith exception or qualified immunity, in civil suits against municipalities. See 42 USC §1983; *Los Angeles County v Humphries*, 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).

United States v Pineda-Moreno, 688 F3d 1087 (9th Cir 8/06/12) DEA agents suspected defendant operated a marijuana farm in "the back country of southern Oregon." He bought lots of fertilizer, deer repellent and a sprayer, he made large "food buys," visited irrigation supply stores, all consistent with a grow operation in a remote area. He lived in a singlewide mobile home known for drug activity. They followed him visually in his Jeep Grand Cherokee and noticed that his mobile home did not appear to have any deer problems or irrigation needs. DEA followed him on public roads visually for some time until someone in the Jeep noticed them and began driving furtively. Seven times, DEA agents then attached mobile tracking devices to the underside of defendant's Jeep. Sometimes they did so when the Jeep was on a public street at the mobile home park, sometimes it was in his private driveway, once it was in a public parking lot. DEA agents tracked the Jeep using cell towers or satellites. By monitoring the Jeep, the DEA learned that it traveled to two grow sites on 4 occasions. On September 12, DEA agents arrested defendant, searched his mobile home, and found garbage bags of marijuana. The district court denied his motion to suppress the evidence and the 9th Circuit panel affirmed. After *United States v Jones*, 132 S Ct 945

(2012), the US Supreme Court granted defendant's petition for certiorari, vacated the 9th Circuit's opinion, and remanded.

On remand, the 9th Circuit panel affirmed under the "good faith reliance" exception to the exclusionary rule. The panel did not resolve whether the DEA was authorized to enter defendant's driveway "because, even without the evidence obtained from the driveway-attached tracking devices, the government had amassed enough other evidence, in good faith reliance on binding precedent, to justify the September 12 stop of [defendant's] Jeep." The trackers attached in public places showed 4 trips to grow sites, plus all the pre-tracker evidence (fertilizer, deer repellent, hand sprayer, irrigation equipment, "the large food buys," etc) was consistent with a suspected grow operation. "In short, the agents' conduct in attaching the tracking devices in public areas and monitoring them was authorized by then-binding circuit precedent." Suppression is not warranted here because "the agents objectively relied on then-existing binding precedent." Affirmed.

V. SELF-INCRIMINATION

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

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

"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) (on the Sixth Amendment).

A. Right to Remain Silent: *Miranda*

1. Federal Constitution

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

"Any police interview of an individual suspected of a crime has 'coercive aspects to it.' *Oregon v Mathiason*, 429 US 492, 495 (1977) (per curiam). Only those interrogations that occur while a suspect is in police custody, however, 'heighte[n] the risk' that statements obtained are not the product of the suspect's free choice. *Dickerson v United States*, 530 US 428, 435 (2000)." *J.D.B. v North Carolina*, 131 S Ct 2394 (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).

2. Oregon Constitution

"'*Miranda* warnings' are those warnings 'required to effectuate the protections afforded by Article I, section 12,' so named for the United States Supreme Court's decision, *Miranda v Arizona*, 384 US 436 (1966)." *State v Bielskies*, 241

> Or App 17, 19 n 1 *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). "Compelling" circumstances are determined by four factors in the encounter: (1) location; (2) length; (3) pressure on defendant; and (4) defendant's ability to terminate the encounter. *Id*. at 640-41; *State v Shaff*, 343 Or 639, 645 (2007) (same).
>
> Under Article I, section 12, the state has the burden to prove, by a preponderance of the evidence, that any admissions or confessions by a defendant were made voluntarily. *State v Stevens*, 311 Or 119, 135-37 (1991).
>
> Article I, section 12, does not prohibit police from attempting to obtain incriminating information from a suspect at a time that he is not in custody or in compelling circumstances, even if he has invoked his right against self-incrimination and even if the police use subterfuge in obtaining statements from the suspect. *State v Davis*, 350 Or 440 (2011).
>
> Violations of this constitutional right result in exclusion of the statements "to restore the defendant to the position that he or she would have been in if police had not violated that constitutional right." It does not matter if statements are obtained through "actual coercion" or through "police interrogation" in the absence of *Miranda*-like warnings.

State v Fivecoats, 251 Or App 761 (8/22/12) (Schuman, Wollheim, Nakamoto) (Multnomah) A man's pistol-gripped shotgun was stolen through the open window of his parked van. He identified defendant in a photo as a man he'd seen when he parked the van. A witness reported to police that defendant had stolen the gun. A surveillance video of the area showed a man walk to the van, reach quickly inside the open window, remove the shotgun, and walk away. The man in the video had a "twitchy walk" and "jerky movements." Defendant was arrested for Theft I, being a felon in possession of a firearm, and unlawful entry into a motor vehicle. At his jury trial, defendant asked the judge to let him walk in front of the jury – from the counsel table to the bench and back -- so jurors could compare *his* gait to the twitchy thief in the video. He'd had a broken neck/back, so he had an unusual gait, and wanted "them to see how he walks as compared to the person that's on the video." The court agreed to permit that. But then defendant invoked his right against self-incrimination under Article I, section 12, and "the Fifth Amendment." The court then ruled that "the walk would be testimony" so he could "walk in front of the jury" only if he "took the stand," but he could not "have it both ways." All witnesses for the state and defense testified that defendant had "jerky movements" and that he walked with a limp, "like one leg's shorter than the other." He was convicted on all counts (apparently by a nonunanimous jury vote).

The Court of Appeals reversed: "demonstrating a walk is not testimonial" under *State v Fish*, 321 Or 48 (1995) and *State v Langan*, 301 Or 1, 5 (1986). Thus "demonstrating his walk would not have implicated his state and federal constitutional rights against self-incrimination." The Court of Appeals wrote:

> "The right against compelled self-incrimination applies 'to any kind of judicial or nonjudicial procedure in the course of which the state seeks to compel

testimony that may be used against the witness in a criminal prosecution." (Emphasis added here).

In this case, the Court of Appeals acknowledged that "the state did not seek to compel defendant to walk for the jury." Therefore the court's "inquiry is not whether defendant's right against compelled self-incrimination by the state applies." Instead, the Court of Appeals wrote, it "must determine whether the evidence that defendant sought to introduce was 'testimonial'" so that if defendant walked in front of the jury, he "would have waived his right against self-incrimination and been subject to cross-examination."

The Court of Appeals stated that "'testimonial' 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," citing *State v Tiner*, 340 Or 551, 561-62 (2006), *cert denied*, 549 US 1169 (2007). The court then string-cited cases where the state compelled defendant to display or perform for police or jurors, and courts concluded that such performance was not testimonial or violative of due process (although nothing in this case is about due process). Those performances that the Court of Appeals recited were: photographing tattoos, handwriting, standing in court, blood sample admission, field sobriety tests, and wearing a stocking mask. The Court of Appeals here stated: "Because walking is physical evidence concerning a person's appearance or physical condition and does not communicate beliefs, knowledge, or state of mind, we conclude that it is not testimonial." This error was not harmless under Article VII (Amended), section 3: "it is not our prerogative on review for harmlessness to weigh the evidence."

Notes: (1) Should the Article I, section 12, waiver analysis be the same regardless if the defendant insists on performing for the jury? (2) Is a defendant actively performing to the jury different from a defendant having his tattoos photographed? (3) If such physical performances are "not testimonial," can the state require defendants to perform for the jury? (4) Should it matter if the performance is requested to determine probable cause to arrest or to charge a person (ie. FSTs, blood/urine samples, handwriting samples) as opposed to determining culpability by the trier of fact?

State v Jarnagin, 351 Or 703 (4/26/12) (Kistler; De Muniz concurring/dissenting) (Yamhill) This is a state's appeal from a pretrial order in a murder case. See www.oregonlive.com/news/index.ssf/2009/07/7monthold_newberg_girl_dies_ca.html. Defendant was questioned at several places without being advised of his *Miranda* rights. The trial court suppressed statements defendant made at his home the day after he was questioned at a police station and hospital. The Oregon Supreme Court affirmed that ruling. The trial court also suppressed statements he made before and after a polygraph text. The Oregon Supreme Court reversed – thus allowed the admission of -- statements he made before and after the polygraph test.

Defendant was alone with his girlfriend's infant and her other child. He called 911 after the baby stopped breathing. The baby was taken to the hospital by ambulance. Police spoke with defendant in the driveway of his home. Defendant agreed to go to the police station for an interview. At the police station, officers told him he absolutely was not under arrest, he could leave anytime, and he confirmed that. He spoke to police about what had happened with the baby in detail. Then police said something was not making sense, he was not under arrest, was not a bad guy, but something was being left out. Defendant added more to his story. Defendant kept talking and officers kept telling him he was not under arrest. Later that same day police spoke again with defendant and the girlfriend at OHSU. Officers explained that the baby had multiple old

pelvic and rib fractures plus today's skull fractures, split liver, damaged spleen, and cardiac arrest and seizure. Something was not adding up with defendant's story. Officers asked him to take a polygraph, and he agreed. He said maybe he hugged the baby too hard. Officers asked him to reenact the events with the baby while they videotaped him. The next day at the police station he agreed to it and reenacted his story for 7.5 minutes. Defendant then took a polygraph later that day at the police station. He joked around. He was given written *Miranda* warnings and articulated that he understood and consented. After the officers told him 2 answers were registering as deceptive, he said he had become frustrated with the baby and flung her against the wall against the bathtub spigot and she fell into the water where he left her for awhile while he tended to other matters. The baby died. Defendant moved to suppress all statements during that two-day period.

The trial court suppressed: (1) defendant's statements at the police station after the police told him his story was not making sense; (2) all statements defendant made to police at the hospital; (3) the re-enactment video at the police station; and (4) his statements made after the polygraph exam (but not his statements made immediately before the polygraph exam) at the police station.

The state did not appeal the rulings that the officers violated Article I, section 12, when they questioned him without Miranda warnings (1) at the police station the first day and (2) at the hospital the first day. The state appealed only the rulings that the video reenactment and after the polygraph exam had violated his Article I, section 12 rights. Defendant appealed, contending that his pre-polygraph statements were the product of earlier violations.

The Oregon Supreme Court held that "it is difficult to see how the video reenactment was not the product of the undisputed *Miranda* violation the night before." No advice of *Miranda* rights had been given. The trial court properly suppressed that video.

As to the polygraph situation, before making the statements before and after the polygraph exam, defendant received, read, and signed a consent form with his *Miranda* rights. The issue is when will/will not "belated Miranda warnings" be effective. The Court here recited at length *State v Vondehn*, and concluded that because "defendant made clear that he appreciated the rights that *Miranda* confers," it concluded "that the advice of rights was effective to ensure a knowing and voluntary waiver of defendant's right to remain silent and also to remedy any taint from the *Miranda* violations the preceding day." The Miranda warnings were effective "to purge the taint of the prior violation and ensure a knowing and voluntary waiver of defendant's right to remain silent." His subsequent statements were admissible unless actually coerced, which they were not. Article I, section 12, does not require the pre- or post-polygraphs statements be suppressed.

State v Doser, 251 Or App 418 (7/25/12) (Sercombe, Ortega, Brewer) (Multnomah) Defendant tried to cash a check at a bank. The situation looked suspicious – the signature on the check differed from the account holder's signature - so the teller asked defendant to mark his thumbprint on the check and give his phone number, which defendant did. The teller called the person on the account, who said he never wrote the check. Defendant was arrested, given *Miranda* warnings, and he said that "Jennifer" had given him the check because she owed him money. Another officer again advised defendant of his *Miranda* rights and defendant said he understood. He made incriminating statements. He offered to show the officer his handwriting. He answered some questions and to others he said he wasn't a "rat" and that he "lived by the code of the convict." Defendant moved to suppress his statements to the officer as violating his

right to remain silent under Article I, section 12. The trial court denied his motion to suppress.

The Court of Appeals affirmed. "Under Article I, section 12, when a suspect in police custody unequivocally invokes the right to remain silent, police must cease interrogation of that suspect." But when a "suspect makes an equivocal or ambiguous invocation of the right to remain silent, police must ask clarifying questions to determine whether the suspect intended to invoke that right before resuming the interrogation." (Citations omitted). The requirement to clarify an ambiguous invocation may not be necessary if the suspect initiates further substantive conversation about the investigation before the officer has clarified the suspect's intent. The test to determine equivocal/ambiguous invocation is: under the totality of the circumstances at and before the time the statement was made would "a reasonable officer in the circumstances * * * have understood that defendant was invoking his rights." That is a question of law. Here, the court concluded that no statements were ambiguous. He said he would tell the officer everything, discussed the similarities between his handwriting and that on the check, offered to produce handwriting samples, and talked about his altered ID card. "Defendant's choice to speak did not imply a desire to remain silent."

State v Hatfield, 246 Or App 736 (12/07/11) (Sercombe, Ortega, Rosenblum SJ) (Marion) Defendant was arrested in his home and moved into his kitchen where the officer read him his *Miranda* rights. Defendant said he understood. The officer asked to search defendant and his car, defendant consented, and officer found marijuana and over $900 in his pants pocket. Officers then told him he had the right to deny consent to a search of his house but if he did, the officers would apply for a search warrant. Defendant told the officers he wanted to call an attorney before consenting. Defendant did not call an attorney. Officers repeated that they would get a search warrant. Defendant "thought for a moment" then asked if he consented, would they allow him to remove the handcuffs, put away the dogs, smoke a cigarette? An officer agreed. Defendant asked if the officers would "tear apart his house." Officers said they would not ransack. Defendant consented. Under those agreed-upon circumstances, the officers searched and seized several items related to manufacture of marijuana within 1000 feet of a school. He moved to suppress on grounds that (1) his request for counsel was unequivocal and (2) any later request for consent violated his Article I, section 12 and Fifth Amendment rights, and other arguments. The trial court denied the motion to suppress.

The Court of Appeals affirmed. Defendant's statement that he wanted to talk to an attorney about whether to consent to a search of his residence was unequivocal and his "failure" to repeat his request did not make his initial request anything other than unequivocal. The question is whether "the subsequent request for consent to search" was a "forbidden interrogation." The analysis under Article I, section12, and the Fifth Amendment "is the same." (citing to an Oregon case adopting the federal standard). "Interrogation is 'police conduct that the police should know is reasonably likely to elicit an incriminating response.'" An "incriminating response" is any "response that the prosecution later may seek to introduce at trial." The Court of Appeals reiterated that it has "consistently held that a consent to search is not an incriminating statement under Article I, section 12." "Simply put, a consent to search is not an incriminating statement." Consent to a search "creates no likely inference of a belief that the result of the search will be incriminating. A refusal to consent to search also creates no such inference. An intrusive search invades the privacy of both the innocent and the guilty, and is not usually desired by either. A compelled choice to consent or not is not compelled testimony under Article I, section 12." Same under the Fifth Amendment. His consent also was voluntary under Article I, section 9 (no police coercion or threats so that his will was overborne).

3. Statute on Coerced Confessions Applies to Private and State Actors

State v Powell, 352 Or 210 (7/19/12) (Walters; Landau not participating) (Benton) This is a statutory case, not based on a constitutional provision. It is an interlocutory appeal after the trial court suppressed confessions defendant made to private investigators and a second set of statements he made to police officers. The issue is a statute that forbids using a defendant's confession against him if "it was made under the influence of fear produced by threats," see ORS 136.425(1).

Defendant is a FedEx employee was suspected of stealing packages. FedEx investigators questioned him and tape-recorded the conversations, threatening to go to the police and his wife if he did not talk to them. He talked. He took them to his garage where he'd stashed the stolen property. He wrote out a confession with the FedEx investigator standing there telling him some things to say. Then the investigators brought a police officer in who read him his *Miranda* rights. He again talked. He allowed the officer to search his home where more stolen property was found. He was charged with aggregated theft in the first degree. He moved to suppress both sets of statements and all physical evidence. The trial court found his confession to be involuntary and suppressed both sets of statements plus the physical evidence. The state appealed under ORS 138.060(1)(c). The Court of Appeals affirmed the suppression of the first set of statements but held that the second statements (to the police officer) should not have been suppressed because the police officer had issued *Miranda* warnings.

The Oregon Supreme Court affirmed the trial court's order of suppression in its entirety. 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 in nearly identical form as today's version. In 1881, the Oregon Supreme Court "noted that the pre-existing common-law rule on the subject clearly applied to inducements of both advantage and harm." The state here concedes that the statute applied to confessions to private persons as well as to state actors. A 1957 statutory amendment did not change that, and made the statute applicable to "all coerced confessions, regardless of to whom or in what circumstances they are made." In sum, the Court here declined to read the statute to pertain only to confessions induced by and made to state actors based on the text and case law. "ORS 136.425(1) continues to apply to confessions induced by and made to private parties." And as for the police officer's *Miranda* warnings, the "evidence supports the trial court's conclusion that the administration of *Miranda* warnings in this case did not dispel the coercive effect of the prior inducements."

B. 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).

C. Polygraph Testing – Fifth Amendment

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).

Note that 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).

D. Right to Counsel

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

1. During Arrest

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).

2. During Investigations

(a). General Tenets

The Article I, section 11, "right to an attorney is specific to the criminal episode in which the accused is charged. The prohibitions placed on the state's contact with a

represented defendant do not extend to the investigation of factually unrelated criminal episodes." *State v Sparklin*, 296 Or 85, 95 (1983); *State v Potter*, 245 Or App 1 (2011) (so noting).

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).

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) (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).

(b). History

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." *State v Davis*, 350 Or 440 (2011).

VI. ACCUSATORY INSTRUMENTS

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

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

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

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

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

The primary function of an indictment is to provide notice to a defendant as to what crime he is being prosecuted for. An indictment pleaded in the language of the relevant statute ordinarily is sufficient to withstand a demurrer. When an indictment completely lacks language regarding an essential element of a crime, as in *State v Burnett*, 185 Or App 409, 415 (2002), then the indictment is insufficient. *State v Anderson*, 233 Or App 475, *rev den* 348 Or 414 (2010).

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

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).

VII. 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

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)).

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).

"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: 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 "Right to Jury Trial," *ante*).

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).

VIII. DELAYS

A. Pre-indictment Delay

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

B. Speedy Trial

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

Speedy trial claims under Article I, section 10, are guided by considering (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 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).

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).

State v Lewis, 249 Or App 480 (4/25/12) (Nakamoto, Schuman, Wollheim) (Multnomah) A jury convicted defendant of attempted assault with a firearm in Oregon. Just after the jury convicted him, but before sentencing, the state of Oregon sent him to Washington state for sentencing on separate crimes. He completed his Washington sentence and 20 years later, Oregon sentenced him. By the time Oregon sentenced him, his trial transcript was lost. He moved for reversal and dismissal with on a statutory ground (ORS 135.775) and constitutional speedy trial and due process violations. The trial court denied those motions.

The Court of Appeals affirmed. Oregon's constitutional justice-without-delay provision extends to sentencing. Article I, section 10, 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." Here, the delay is neither tactical nor improperly motivated and defendant contributed to the delay, thus "the delay does not shock the judicial conscience." As for the reasons for the delay, Oregon "simply could not force Washington to return defendant to Oregon for sentencing" and "defendant actively and knowingly opposed the state's detainer for his return to Oregon for years." 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. The "hampering" element is at issue because here the court reporter died and had only kept records for 10 years. Also the trial judge and the defense attorney have died. The prosecutor only vaguely recalls the case. But the court here found that defendant hampered his own ability because he "had an opportunity to obtain a copy of the transcript himself, even as a self-represented prisoner." In short, no Article I, section 10, violation. The court did not address his Sixth Amendment claim because he did not timely raise it. Finally regarding due process, the court noted that the "United States Supreme Court has not expressly decided whether constitutional speedy trial rights apply to sentencing." But the court here concluded that defendant failed to assert that right, regardless of the test the US Supreme Court may apply. The due process claim fails.

C. Statutory speedy trial cases

ORS 135.747 provides for statutory speedy trial rights.

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'."

State v Glushko/Little, 351 Or 297 (11/10/11)
State v Petersen, 251 Or App 87 (7/05/12)
State v McFarland, 247 Or App 481 (12/29/11)
State v O'Dell, 249 Or App 250 (4/04/12)
State v Gonzales-Sanchez, 251 Or App 118 (7/11/12)
State v Stephens, 252 Or App 400 (9/26/12)
State v Turner, 252 Or App 415 (9/26/12)
State v Danford, 250 Or App 636 (6/27/12)
State v Hernandez-Lopez, 251 Or App 546 (8/08/12)
State v Benner, 2012 WL 5286187 (10/24/12) (error to conclude that inmate had waived his 90-day speedy trial right)
State v Garner, 2012 WL 5286191 (10/24/12) (defendant was "brought to trial" under ORS 135.747 even though the trial ended in a mistrial; the trial court erred in dismissing on statutory speedy trial grounds)

IX. TRIAL

A. Criminal

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

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

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).

1. Venue

"Article I, section 11, of the Oregon Constitution guarantees a criminal defendant the right to a trial 'in the county in which the offense shall have been committed.' This venue requirement is a material allegation of the indictment that must be proven beyond a reasonable doubt." *State v Turner*, 235 Or App 462 (2010) (quoting *State v Cervantes*, 319 Or 121, 123 (1994)). See also ORS 131.305(1) (venue is proper in the county in which the offense is committed, with exceptions).

State v Thompson, 251 Or App 595 (8/08/12) (Sercombe, Ortega, Brewer) (Multnomah) defendant, a sex offender, was required by ORS 181.599 to register his

new address within 10 days after he moved out of a Multnomah County treatment facility. He did not register. He was arrested 21 days later and lodged in a Multnomah County jail. Defendant was charged in Multnomah County with failure to report as a sex offender. But "the state presented no direct evidence of where defendant was located at the expiration of that 10-day period" and "that is the moment that the crime is committed." Failing to report as a sex offender "is not an ongoing crime." The state failed to establish venue. Conviction reversed. (NOTE: The facts of this case occurred in early 2009. The sex offender reporting statutes in ORS chapter 181were amended in 2009 and 2011. This case involves the 2007 version of those statutes.).

2. Compulsory Process

State v West, (5/31/12) (Schuman, Wollheim, Nakamoto) (Multnomah) Officers arrested defendant on suspicion of DUII, he took a breath test on an Intoxilyzer 8000, and it registered a blood alcohol content of .11%. Through discovery including a subpoena, his attorney sought information about the Intoxilyzer 8000 (source codes, schematic diagrams, sales contracts, Oregon State Police studies, all reports, tests, results and memos of any kind used by the legislature, OSP, or any governmental agency). The state objected as overbroad, the source codes are excluded from discovery under ORS 135.855, and the state had already produced everything it needed to produce under ORS 135.815. Defense counsel stated to the court that he had spent 30 minutes trying to obtain the information from public sources. The trial court declined to order the discovery. A jury convicted defendant. On appeal, he conceded that he had obtained all the discovery he was entitled to under ORS 135.815 and what he sought was outside the scope of discovery statutes. But he sought the materials under the compulsory process clauses of the state and federal constitutions.

The Court of Appeals affirmed. "The right to compulsory process under Article I, section 11, of the Oregon Constitution parallels federal Sixth Amendment jurisprudence." (Citations omitted). The "analysis of the two is the same." (Citations omitted. "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." Here, the court cited generally to *Brady v Maryland*, 373 US 83, 87 (1963), which is not a Sixth Amendment case but instead a due process case. The "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." Here, defendant has not made a sufficient showing of materiality or favorability. Therefore the court concluded that he was not entitled to the materials under either constitution, either through discovery or subpoena.

See State v Faust, 251 Or App 58 (7/05/12) (Nakamoto, Schuman, Wollheim), under *Brady* Violations, *post*.

3. Jury

(a). Right to Jury Trial

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.

State v Fuller, 252 Or App 391 (9/26/12), *petition for review* due 10/31/12 (Armstrong, Haselton, Duncan) (Multnomah) All misdemeanors can be charged as violations if the prosecutor so elects before defendant's first appearance (except two specific crimes), see ORS 161.566(4). If the state elects to drop the misdemeanor to a violation, then by statute, the case is tried without a jury and the state's burden of proof is dropped to a preponderance of the evidence, see ORS 153.076. The legislature has authority to do this "alternative approach," but if dropping a misdemeanor to a violation still "has characteristics that do not sufficiently distinguish it from a criminal prosecution, then the alternative approach will be considered to subject people to criminal prosecution" and the violation requires a right to a jury trial and proof beyond a reasonable doubt, see *Brown v Multnomah County District Court*, 280 Or 95, 100-02 (1977) and Article I, section 11, of the Oregon Constitution.

Here, defendant was arrested for two theft crimes (attempted first-degree theft and third-degree theft), briefly incarcerated, and arraigned. At arraignment the prosecution elected to prosecute the charges as violations. Defendant moved to have a jury trial and to require the state to prove guilt beyond a reasonable doubt. The trial court denied the motion and imposed a $300 fine for each conviction.

The Court of Appeals reversed and remanded, applying the five factors from *Brown* to determine if a jury and proof beyond a reasonable doubt is required: type of offense, nature of penalty, collateral consequences of conviction, significance of conviction to community, and pretrial procedures for the offense. (Despite case law and statutory changes between *Brown* and this case, the current statute now is that "misdemeanors are tried as misdemeanors rather than violations unless the state elects otherwise."). Going over the five *Brown* factors, (1) our society has long considered theft a crime, (2) the legislature's penalty for theft as a misdemeanor and violation are considered and "the penalty factor weighs in favor of treating the prosecution of attempted first-degree theft, but not third-degree theft, as criminal," (3 and 4) defendant concedes that the collateral consequences for a violation are not indicative of criminal prosecution, (5) the pretrial practices for the misdemeanor and violation are the same: "all trappings of a criminal prosecution." The Court of Appeals concluded: "In light of the legislature's decision to reverse the default principle for the prosecution of misdemeanors, *viz*., to prosecute them as misdemeanors rather than violations unless the state elects otherwise, and the effect of that decision on our assessment of the Brown factors, we conclude that prosecuting and convicting defendant of third-degree theft and attempted first-degree theft as violations pursuant to ORS 161.566 retains too many characteristics of a criminal prosecution to deny defendant the protections of a jury trial and an evidentiary standard of proof of the offenses beyond a reasonable doubt."

(b). Jury 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

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

> The "privileges and immunities of citizens of the United States do not necessarily include all the rights protected by the first eight amendments to the Federal Constitution against the powers of the Federal government." *Maxwell v Dow*, 176 US 581, 597-98 (1900) (thus States "should have the right to decide for themselves * * * whether there shall be a jury of twelve or a lesser number, and whether the verdict must be unanimous or not.").
>
> The Sixth Amendment, through the Fourteenth, does not require a unanimous jury verdict in state courts, although the Sixth Amendment requires unanimity in federal jury trials. *Apodaca v Oregon*, 406 US 404 (1972). "The origins of the unanimity rule are shrouded in obscurity, although it was only in the latter half of the 14th century that it became settled that a verdict had to be unanimous." *Id*. at 407 & n 2 (1972).

State v Curnutte, 250 Or App 379 (6/06/12) (per curiam) (Armstrong, Haselton, Duncan) (Jackson) Defendant appealed the trial court's instruction that the jury could reach a nonunanimous verdict, and in accepting the jury's nonunanimous verdict. The Court of Appeals rejected those arguments without discussion, 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).

State v Ferguson, 247 Or App 747 (02/01/12) (Ortega, Brewer, Sercombe) (Washington) Defendant appealed from his rape conviction; the Court of Appeals reversed and remanded based on improper vouching evidence. As to defendant's claim of plain error for the trial court's instruction the jury that it could convict him based on a nonunanimous verdict, the Court of Appeals rejected those arguments without discussion, 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).

State v Frey, 248 Or App 1 (02/08/12) (Haselton, Brewer, Armstrong) (Marion) Defendant was indicted for intentionally attempting to enter a dwelling "with the intent to commit the crime of Unlawful Use of a Weapon, Menacing, Assault and Murder therein." The jury was instructed, in part, that the law requires it to find that defendant had "then intent to commit the crime of unlawful use of a weapon, menacing, assault, or murder therein." After the court had the jury begin deliberating, defendant under ORCP 59H excepted to that jury instruction due to the court's use of the word "or" and that the state should "at least elect one or that there be a requirement that ten or more [jurors] agree on what the crime is" that defendant allegedly committed, citing *State v Boots*, 308 Or 371 (1989) *cert den* 510 US 1`013 (1993) and *State v Sparks*, 336 Or 298 (2004). The trial court noted the exception. The jury convicted defendant.

The Court of Appeals reversed and remanded: "The jury concurrence requirement derives from the Oregon Constitution, statute, and case law. Article I, section 11, of the Oregon Constitution provides, in part, 'In all criminal prosecutions * * * in the circuit court ten members of the jury may render a verdict of guilty or not guilty.' In addition, 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.' In *Boots*, the Supreme Court held that jury must agree on all of the material facts leading to a conviction * * * * *. A jury concurrence instruction (or 'Boots instruction') prevents juror confusion and ensures that the jurors agree upon the specific factual predicates for the conviction." "The test for 'whether a Boots instruction is required is whether the law or the indictment has made the fact at issue "essential to the crime charged."'" Under case precedent, the specific crime that defendant intended to commit upon entry is "essential to the crime

charged" and accordingly "the jury must concur on the specific crime that defendant intended to commit when defendant attempted the unlawful entry." In this case, the indictment does not charge alternative crimes (in such cases, the jury concurrence on lesser-included offenses is implicit even without a *Boots* instruction).

(c). Number of Jurors

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

That is so even though "there can be no doubt" that the Sixth Amendment was intended to be composed of twelve jurors and that the Seventh Amendment was intended to require unanimity of those twelve jurors: the States may make and enforce their own laws as long as they do not conflict with the Fourteenth Amendment. The right to as 12-person jury is not a privilege or immunity of national citizenship, thus the Seventh Amendment does not preclude the States from enacting laws as to the number of jurors necessary to compose a petit jury in a noncapital criminal case. *Maxwell v Dow*, 176 US 581 (1900).

(d). 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. As explained in *State v Baker*, 328 Or 355 (1999), Article I, section 11, "grants to only one person the power to defeat a defendant's choice to be tried by the court sitting without a jury – the trial judge." *State v Wilson*, 240 Or App 708 (2011).

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); *State v Webster*, 239 Or App 538 (2010).

"[A]s the *Barber* opinion explains, this particular species of error is one that is apparent on the face of the record and, because of the unique specificity of Article I, section 11, this court has no discretion to ignore the error, once it is called to our attention. *Barber*, 343 Or at 528-30." *State v Bailey*, 240 Or App 801 (2011).

State v Mortnesen, 250 Or App 560 (6/20/12) (per curiam) (Schuman, Wollheim, Nakamoto) (Lane) The trial court accepted defendant's waiver of a jury-trial right when she showed "confusion at trial about her surroundings and was not tracking the court's waiver discussion." Defendant was found guilty but for insanity and place under the Psychiatric Security Review Board's jurisdiction. She appealed as to the validity of the waiver. The state conceded the error and agreed that the trial court should have ordered a competency evaluation under ORS 161.360. The Court of Appeals reversed and remanded.

(e). Juror Anonymity

"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." *State v Sundberg*, 349 Or 608 (2011).

"[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 factors to be considered in deciding when it is appropriate to withhold juror names from a criminal defendant:

"(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)).

(f). 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 Carey's *The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857* (1926). *State v Johnson*, 238 Or App 672 (2010).

> "[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).

State v Decamp, 252 Or App 177 (8/29/12) (per curiam) Armstrong, Brewer, Duncan) (Deschutes) The "trial court plainly erred" by calculating defendant's sentences on 6 counts of second-degree sex abuse (for sexual intercourse with victims aged 16 or 17) as a seriousness score of "7" rather than a "6," per *State v Simonsen*, 243 Or App 535 (2011). As determined in *Simonsen*, which is the same issue as in this case, a seriousness score of "7" for sex with 16 or 17 year olds violates Article I, section 16, because third-degree rape with even younger children has a lower seriousness score, resulting in a shorter presumptive sentence for more serious conduct. "Moreover, the state has no interest in sustaining a constitutionally infirm sentence." Reversed and remanded for resentencing.

(g). Fair Trial

State v Wall, 252 Or App 435 (9/26/12) (Brewer, Armstrong, Duncan) (Douglas) Defendant was an inmate in the county jail (she had 13 prior felony convictions) awaiting trial for DUII and reckless endangerment. Thus when she appeared in court, a jail deputy brought her in with a leg restraint under her pantleg. She moved to have the leg restraint removed for her jury trial. The court held a hearing. She testified that she "felt like a criminal" wearing the leg restraint and she felt she could not communicate with her attorney while wearing a leg restraint. She said the restraint made her pants bulge at her ankle, knee, and thigh. She wore a dress over the pants to cover it. The deputy testified that she was a "medium inmate" but did not know why she was so classified. The trial court denied her motion because "it's not visible" and the "jury would be in the first row" and she could take the stand before the jury arrived so her possibly altered gait would not be noticed.

The Court of Appeals reversed. First, it wrote: "[P]hysically restraining a defendant implicates Article I, section 11, of the Oregon Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *State v Merrell*, 170 Or App 400, 403, 12 P3d 556 (2000), *rev den*, 331 Or 674 (2001). Because the pertinent analysis under Oregon law is similar to the analysis under the federal constitution, we do not separately address defendant's due process argument." The Court of Appeals footnoted that under Oregon Supreme Court precedent, "unlike the Due Process Clause, Article I, section 11, does not generally guarantee a 'fair trial' but, rather, guarantees a trial by an impartial jury." (Citing *State v Amini*, 331 Or 384, 394-5 (2000). The Court of Appeals decided that *Amini* did not call into question its conclusion that "challenges to physical restraints imposed on a defendant are similarly analyzed under Oregon law and the Due Process Clause."

Collapsing due process and state fair trial analysis together rather than separating them, the Court of Appeals reasoned that in addition to avoiding jury prejudice, "the right to stand trial without restraints also ensures that defendants may face the court 'with the appearance, dignity and self-respect of a free and innocent [person].'" (citing *State v Kessler*, 57 Or App 469, 472 (1982). "A trial judge has 'the discretion to order the shackling of a defendant if there is evidence of an immediate and serious risk of dangerous or disruptive behavior.' *State v Moore*, 45 Or App 837, 839-40 (1980)." In making that risk assessment, the judge must make an independent determination that restraint is justified. Whether the restraint is visible or not is irrelevant: "regardless of the circumstance, the state must adduce evidence that would permit the court to find that the defendant poses an immediate or serious risk of committing dangerous or disruptive behavior, or that he or she poses a serious risk of escape, before the defendant may be restrained." Here, the court was not permitted to defer to the jail's classification as to the need for a restraint. The record is insufficient to establish that defendant met those standards justifying a restraint. Defendant pleaded guilty after her motion to have the leg restraint removed was denied. This error is not subject to harmless-error analysis because the court could not conclude that it was harmless.

State v Dalby, 251 Or App 674 (8/15/12) (Schuman, Wollheim, Nakamoto) (Multnomah) At defendant's trial, the prosecutor asked a question that he knew or should have known would result in this testimony from the officer on the stand:

> "[PROSECUTOR]: Officer, just to clarify, that's not the only reason you couldn't ask him questions, right?
>
> "A: Right. He invoked his right to speak with counsel."

Defendant moved for a mistrial, the trial court denied the motion, and defendant was convicted. The Court of Appeals affirmed because "the error, while egregious, did not likely have any effect on the verdict." The error is described as follows: "The state does not deny, nor could it, that the officers' statements were comments on defendant's exercise and invocation of his right to remain silent, as guaranteed by Article I, sections 11 and 12, of the Oregon Constitution. Nor does the state, nor could it, deny that it is error for a prosecutor to elicit such statements during the state's case-in-chief. *State v Alvord,* 118 Or App 111, 116 (1993)." The "constitutional error inherent in mentioning to a jury that a defendant exercised and invoked the right to remain silent is 'presumably' harmful, *State v Wederski,* 230 Or 57, 60, 368 1962)." Error in admitting evidence that a defendant exercised or invoked his constitutional right to silence or to counsel is prejudicial if the evidence comes "in a context whereupon inferences prejudicial to the defendant are likely to be drawn by the jury." Under the state constitutional standard of review, the Court of Appeals affirmed.

4. Right to Counsel

(a). During Trial

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).

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).

State v Langley, 351 Or 652 (3/29/12) (Durham for a 5-justice court that included De Muniz, Walters, Haselton, and Gillette SJ) (Marion) Defendant was convicted of aggravated murder and sentenced to death in 1989. His four death sentences have been remanded. See www.oregonlive.com/pacific-northwest-news/index.ssf/2012/03/state_supreme_court_overturns.html. After deliberating for 20 minutes in this fourth trial, the jury voted to sentence him to death. On automatic and direct review in the Supreme Court, the Court reversed and remanded for a new penalty-phase trial because the trial court erred by allowing him to proceed pro se without securing a valid waiver of his right to counsel.

The trial court observed that defendant refused to cooperate with seven court-appointed defense attorneys. Two trial judges recused themselves. The third judge, Ochoa, appointed a third-chair counsel so that defendant would have three appointed attorneys. Less than four months before trial, the first- and second-chair attorneys moved to withdraw, filing supporting affidavits *ex parte* under seal. At the hearing, the first- and second-chair attorneys had their own attorney, and defendant had his own an independent attorney. The trial court found that the appointed attorneys and defendant had "irreconcilable differences" not of defendant's making. The trial court asked for details, but the appointed attorneys would not give details. The state's attorneys offered to leave the room. The trial court did not act on that offer. Defendant then stated that the motions should be granted but he did not want to proceed *pro se*. Defendant refused to further explain why in open court but said he would do so ex parte under seal. The trial court refused that offer. Defendant produced an ex parte affidavit.

The court granted second-chair's motion to withdraw but denied first-chair's, finding "a pattern of manipulation on [defendant's] part to seek continuances." The trial court then gave defendant a choice: take the first- and third-chair appointed attorneys or represent himself with third-chair acting as an advisor. The appointed attorneys' attorney expressed concerns about the trial court's decision in that defendant needed adequate counsel. The trial court stated that "defendant's own conduct" may have created the "disadvantage." After a recess, defendant stated that he would not accept any choices. The trial court said that is further evidence of defendant's manipulation. The trial court ruled that defendant would proceed *pro se* with third-chair attorney as advisory counsel.

After voir dire had begun but before trial, the court relieved third-chair at defendant's request. Defendant proceeded pro se. He refused to participate in voir dire, present an opening statement, present a case, conduct cross, or make a closing argument. The jury found him death-eligible and the court entered judgment accordingly.

Legal standards: Defendant has a statutory (ORS 151.211 et seq) and constitutional rights to 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). A "trial court, in its discretion, may replace a defendant's appointed counsel with substitute counsel." "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. And a motion to withdraw, "standing alone" is not "an implied waiver of a defendant's motion to withdraw." Any "waiver of that right must originate with the defendant." Rulings on such motions are reviewed for abuse of discretion.

Here, immediately after ruling on the attorneys' motions to withdraw, "the court unilaterally confronted defendant with the choice of either (a) affirmatively accepting [second- and third-chair counsel] or (b) proceeding pro se either with or without the assistance of advisory counsel." Defendant said he did not want any choices and he did not want to represent himself. The Court here concluded: "The trial court erred in ruling that, by declining to make the described choice, defendant had requested to represent himself pro se. Defendant's refusal to make the choice proposed by the court did not constitute an express relinquishment of defendant's right to counsel. None of defendant's statements to the court expressed such a waiver." A "court considering a motion of counsel to withdraw must distinguish between problems in the attorney-client relationship engendered by the defendant's permissible (but usually foolish) decision to decline to cooperate and other problems, such as a bona fide conflict of interest, that prevent counsel from participating effectively in the attorney-client relationship." 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." Here, that waiver was not made because the trial court was confronted with "a mere showing that the defendant has engaged in past or present misconduct." Advance warning to defendant, for example, would have helped establish waiver. The trial court "scolded defendant" for earlier conduct but "did not refer to or otherwise base its decision on any prior warning to defendant." The trial court also should not have assumed that defendant was engaging in misconduct and manipulation without considering his side. In sum, the trial court erred "in requiring defendant to make the choice that the court described."

(b). Post-trial

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

5. Right to Self-Representation

Under Article I, section 11, and the Sixth Amendment, a criminal defendant has a right to be represented by counsel and to represent himself. *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)).

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

6. Right to be Heard

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).

7. Prosecutorial Comments

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

8. Confrontation

"**In all criminal prosecutions, the accused shall have the right * * * to meet the witnesses face to face * * *.**" -- Article I, section 11, Or Const

Generally: 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).

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).

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).

Forfeiture by misconduct: The forfeiture by misconduct exception to the hearsay rule (OEC 804(3)(f)–(g)) does not require the state to prove that the defendant engaged in wrongdoing "for the sole or primary purpose of causing a witness to be unavailable." Under *Giles v California*, 554 US 353 (2008) and *Crawford v Washington*, 541 US 36, 54 (2004), the only exceptions to the Sixth Amendment confrontation right are those "established at the time of the founding." And the "common-law doctrine of forfeiture by wrongdoing constitutes such a founding-era exception to the confrontation right," but "the defendant must have engaged in wrongful conduct intended to prevent the witness from testifying and, by such wrongful conduct, must have actually prevented such testimony." Defendant's sole intent need not have been to prevent the victim from testifying against him. In short, *Giles* does not require OEC 804(3)(g) to require that the sole purpose of a wrongdoer's act was to make the victim unavailable as a witness. *State v Supanchick*, 245 Or App 651 (2011) (the forfeiture-by-misconduct "exception is 'firmly rooted' and * * * admission of the victim's statements pursuant to the exception does not violate defendant's Article I, section 11, rights").

State v Copeland, 247 Or App 362 (12/29/11) (Haselton, Armstrong with Sercombe concurring) (Multnomah) Defendant's wife obtained a restraining order against him. A police officer certified, by proof of service, that he had personally served defendant with the restraining order. Defendant violated that order then was charged with violating that order. At trial the state offered the proof of service of the restraining order to prove the requisite knowledge, but the state did not call the police officer who served it. Defendant objected to the admission of that proof of service as violating his confrontation rights under the state and federal constitutions. The state argued that proof of service is a public record and thus is a hearsay exception. The trial court admitted the proof of service without stating the basis of the ruling and found defendant in contempt of court.

The Court of Appeals affirmed. Generally, "when the state seeks to present otherwise admissible hearsay statements in the declarant's absence, Article I, section 11, precludes the admission of that evidence unless that state establishes that (a) the declarant is unavailable to testify and (b) the statements bear 'adequate indica of reliability,' e.g., that the evidence 'falls within a firmly rooted hearsay exception' or has 'particularized guarantees of trustworthiness'," per *State v Campbell*, 299 Or 633, 648 (1985). But Article I, section 11, does not protect all hearsay, such as "historical exceptions." Public records fall within a "historical exception" to confrontation under case precedent. "Public and official records" are distinct from "documentary evidence to prove collateral matters." The court here concluded that "the submission of a public record to establish an essential – as opposed to 'collateral' – fact in a criminal proceeding falls within such a 'historical exception' to confrontation." Prior case law is "straightforward and unqualified" in that "the framers of the Oregon Constitution would have understood public and official records to have constituted an exception to the confrontation rights guarantee." Sercombe concurred "with misgivings" based on an uncertainty in case precedent.

9. Victims' Rights

(a). Rights

"(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;

(e) The right to have a copy of a transcript of any court proceeding in open court, if one is otherwise prepared;

(f) The right to be consulted, upon request, regarding plea negotiations involving any violent felony; and

(g) The right to be informed of these rights as soon as practicable." -- Article I, section 42(1), Or Const

State v Bray/J.B. v Turner, 352 Or 34 (6/07/12) (Landau with De Muniz concurring) (Deschutes) (This case has been addressed on The Today Show, http://today.msnbc.msn.com/id/26184891/#49356599.) Anaesthesiologist Dr. Thomas Bray

moved to Bend, taught anatomy at the local community college, strangled/had sex with a student, and forcibly sodomized, raped, beat up, and strangled a chemist he had just met on Match.com. The survivor escaped and Googled his name the term "rape" before she went to the hospital. Defendant was charged with multiple count sex offenses. The defense subpoenaed Google, Inc. for records showing "all internet activity and searches" of the survivor over a 5-week period that appears to be just before the rape until a month after the rape. Defendant's subpoena sought all of the survivor's Google searches, her email plus the IP addresses, web searches, results, and sites she viewed, and any/all of her email to or from anyone regarding Dr. Bray. Google, Inc. refused to comply with the subpoena under the federal Electronic Communications Privacy Act, 18 USC § 2702(a) (2006) [online at http://codes.lp.findlaw.com/uscode/18/I/121/2702]. Google refused to produce the information without the survivor's consent or a court order.

Defendant moved to compel the state to obtain the information from Google and give him copies, per 18 USC § 2703(d). The district attorney objected. The trial court ordered the state to seek the survivor's consent first. She refused to consent. Defendant then renewed his motion to require the state to obtain the information. The state objected under Article I, section 42(1)(c), of the Oregon Constitution [see text box on preceding page]. In December 2011, a trial judge ordered the state to obtain the Google information for defendant. On March 28, 2012, the prosecutor filed a claim under ORS 147.515(2)(a) (Claim of Violation of Victim's Rights) on behalf of the survivor asserting that the trial court's discovery order violated the survivor's Article I, section 42(1)(c) rights to refuse discovery and asked that the trial court vacate its order. On April 6, the trial court held a hearing and denied the claim, stating that it "has never ordered the victim to produce anything and so there is nothing that the Court has ordered that is inconsistent with her protections under [the Oregon Constitution]." Also on April 6, the trial court entered a document in the record entitled: "Court Minutes, Journal Entry and Order," stating that the court "denies the State's request as outlined in the Claim of Violation of Crime Victim's Rights." The trial court neglected to provide the survivor with a copy of its written order, as the statute requires. The statute requires a crime victim to file a notice of interlocutory appeal from the order within 7 days of the date the order is "issued." Timely filing is jurisdictional and may not be waived under the statute.

On April 27, the survivor filed a notice of interlocutory appeal in the Oregon Supreme Court. On May 14, the trial court entered an order expressing its reasons for its April 6 order. The AG and the prosecutor filed responses in the Oregon Supreme Court agreeing with the survivor's position. Defendant argued in the Supreme Court that the Supreme Court lacks jurisdiction to address the appeal because under ORS 147.537(8), the survivor was required to file the notice of appeal within 7 days of the challenged order, and that order may be "issued" in writing or orally on the record, per ORS 147.530(5), and in this case it was orally "issued" on April 6.

The Oregon Supreme Court agreed with defendant that it lacked jurisdiction because more than 7 days had elapsed between the oral order (April 6) and the appeal (April 27). The Court dismissed the interlocutory appeal: the survivor "had seven days after the trial court issued the order being appealed to file her notice of interlocutory appeal." The trial court issued its order orally on April 6, confirming that oral order with a "confirming written minute order." Under the statute, the "triggering event" is "*issuance"* not "entry" of the order. Under the express terms of the statute, the "order may be issued orally" as long as the court issues a "written order" that "indicates whether relief was granted or denied" as soon as practicable. "This is precisely what the court did in this case on April 6." While the "order failed to include findings or reasons," that is not relevant to whether and when the order "issued" under ORS 147.537(8)(a) for the triggering of the appeal. Also, although the trial court neglected to provide the survivor with a copy of it written order as the statute provides, "the statute provides that *issuance* of the order – not additional notice of issuance – is what triggers the seven-day deadline" in ORS 147.537(8)(a). The Oregon Supreme Court did not decide "whether issuance of the order, by itself, suffices to trigger the seven-day deadline or whether the issuance of the

confirming written order triggers the deadline. In this case, both events occurred on the same day.

De Muniz concurred: "When constitutional rights are too constrained by procedural limitations, they effectively may become valueless." "This is the fourth interlocutory appeal of an order involving crime victims' rights that this court has received since the voters adopted Article I, sections 42 and 43, of the Oregon Constitution in 1999. Of those four, three suffered from fatal jurisdictional defects and had to be dismissed." "[A]dditional legislative attention is necessary."

(b). Victim

> **"(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

State v Torres, 249 Or App 571 (5/02/12), *review denied* (9/13/12) (Brewer, Haselton, Gillette SJ) (Multnomah) A jury convicted defendant of 21 counts of being a felon in possession of firearms, based on his possession of 21 firearms in a basement, all at the same time and same place. The trial court merged the offenses into a single conviction. The state appealed. The Court of Appeals affirmed, footnoting Article I, section 44(3), which states that "the people of Oregon" are the victim if no other victim has been identified and concluding: "the public is a single collective 'victim' of a violation [of the felon in possession law] for purposes of merger." This case involved statutory interpretation only, not interpretation of Article I, section 44(3).

State v Curnutte, 250 Or App 379 (6/06/12) (per curiam) (Armstrong, Haselton, Duncan) (Jackson) The Court of Appeals reversed and remanded to the trial court to merge sentences, citing and reaffirming *State v Torres*, 249 Or App 571 on merger.

B. Civil Jury

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

> "**In all civil cases the right of Trial by Jury shall remain inviolate.**" -- Article I, section 17, Or Const

> "**In actions at law, where the value in controversy shall exceed $750, the right of trial by jury shall be preserved * * *.**" -- Article VII (Amended), section 3, Or Const

1. History and Interpretation

"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 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 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*, __ Or __ (9/20/12) (nature of relief decides this issue). 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*, __ Or __ (9/20/12).

The two civil jury trial provisions in the Oregon Constitution do not prohibit application of the cap on damages in claims for prenatal injuries. As to Article I, section 17, under *Christiansen v Providence Health System*, 210 Or App 290 (2006), *aff'd on other grounds*, 344 Or 445 (2008) and *Hughes v PeaceHealth*, 344 Or 142 (2008), a claim for prenatal injuries is not "of like nature to a negligence claim that existed in 1857." *Klutschkowski v Peacehealth et al*, 245 Or App 524 (2011). As for Article VII (Amended), section 3, a claim for prenatal injuries did not exist in 1857 when the Oregon Constitution was adopted, thus "Article VII (Amended), section 3, does not assist plaintiffs." *Id*.

M.K.F. v Miramontes, __ Or __ (9/20/12) (SC S058847) (Walters) Plaintiff filed a petition under ORS 30.866 for two things: (1) a stalking protective order and (2) compensatory money damages. She alleged that in addition to causing her reasonable apprehension regarding her safety defendant's stalking had cost her sick time, annual leave, lost wages, counseling expenses, and attorney fees. Defendant demanded a jury trial on her claim for damages. The trial court disagreed, heard the case without a jury, and entered a general judgment for compensatory damages for $42,347.78 plus a supplemental judgment for reasonable attorney fees. The Court of Appeals held that defendant did not have a statutory or a constitutional right to a jury trial.

The Supreme Court reversed: "the parties are entitled to a jury trial on the claim for money damages." (Note that the Court used the words "the parties" rather than "the defendant" who had asked for a jury. Plaintiff here argued (unsuccessfully) that defendant has no jury trial right.).

First, the civil stalking statute at ORS 30.866 does not grant a jury trial right. The Court then turned to two provisions of the Oregon Constitution: Article I, section 17, and Article VII (Amended), section 3. The Court did not separately analyze those two distinct provisions. It reviewed numerous prior cases and reasoned: "our cases do not support plaintiff's argument that newly created statutory claims that provide new remedies necessarily are not 'of like nature' to any claim known at common law and, for that reason, are not triable to a jury." Significantly, the parties and the Court agreed that if plaintiff had sought nothing but money under the statute, then her claim would have been "at law" and 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, the parties and the Court agreed that if plaintiff had sought 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.

The Court traced the history of relevant rules of civil procedure and numerous cases (not the Court of Appeals' cases, just Supreme Court cases, see footnote 7). It then explained: "Because Oregon has eliminated the procedural distinctions between law and equity, there is no longer any necessity for or benefit in perpetuating that system. * * * In sum, it is neither necessary nor advantageous * * * to decide the substantive question of whether a party is entitled to a jury trial based on whether a case is 'essentially' equitable in nature, or whether a court of equity would have had 'incidental' jurisdiction to decide a legal issue as an adjunct to deciding an equitable issue in 1857. Rather, 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. To reach a different conclusion would be to import into current practice procedures that may have been necessary at one time but that our legislature has long since abandoned. Instead, we conclude that 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.'"

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."

State v N.R.L., 249 Or App 321 (4/11/12) (Nakamoto, Schuman, Wollheim) (Washington) Youth committed acts that would be crimes (mischief and burglary) if he were an adult. He filed a motion to have a jury decide restitution. The juvenile court denied that motion and ordered him to pay a total of about $25,000 to the state on behalf of three business victims and about $89,000 to the state on behalf of Liberty Mutual.

The Court of Appeals affirmed, first citing *Lakin v Senco Products, Inc*., 329 Or 62 (1999), *on recons*, 329 Or 369 (1999) and *Molodyh v Truck Insurance Exchange*, 304 Or 290 (1987) and *Corneilson v Seabold*, 254 Or 401 (1969) for the idea that "a jury trial is guaranteed only in those classes of cases in which the right was customary at the time the constitution was adopted or in cases of like nature." The court wrote: "In Oregon, juvenile delinquency proceedings were created by statute, not by common law, and did not even exist when Article I, section 17, was adopted." The system legislatively set in 1959 exists today: the juvenile court system is separate from the adult system, and juvenile courts have exclusive jurisdiction over children under 18 years old, except for Measure 11 felonies for which children 15 to 17 (ORS 137.707 and 419C.005). "Because juvenile delinquency proceedings are *sui generis* and did not exist when Article I, section 17, was adopted in 1857, youths generally are not entitled to a jury trial in such proceedings." (Citing *State v Reynolds*, 317 Or 560 (1993)).

The youth in this case argued that restitution generally is "of like nature" to claims for civil conversion or trespass and that were tried to juries at the common law. The Court of Appeals reviewed cases involving restitution by adult criminal defendants and the statutory history of both the criminal and juvenile restitution statutes. The youth argued that the juvenile restitution statute is more of a civil recovery device than a penal purpose. This is an issue of first impression in Oregon appellate courts; that is, whether award of restitution in juvenile proceedings is civil or penal.

The Court of Appeals concluded that in adult crimes and juvenile delinquency cases, the purpose of restitution is not to compensate victims and the amount is limited. That limit "prevents the court from performing what is typically a jury function, assigning value to subjective noneconomic losses, e.g., pain and emotional suffering." The victim can bring a separate civil action against the youth to recover for pain and suffering, and for punitive damages, per ORS 419C.450(2).

In sum, although the juvenile restitution statute like the criminal restitution statute reflects a "blend of both civil and criminal law concepts," restitution in the juvenile system continues to serve a rehabilitative purpose "at least in some cases." The restitution is predominantly penal, not civil, and therefore Article I, section 17, does not provide a right of jury trial to the youth.

C. Open Courts: Public's Rights

> "**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

The Oregon Supreme Court has interpreted 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).

Cf. Oregonian Publishing Company, LLC v The Honorable Nan G. Waller and State of Oregon, 2012 WL 5286194 (10/24/12), discussed under Judicial Power, *ante*.

Doe v Corp of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints, 352 Or 77 (6/14/12) (Durham) Plaintiff was one of 6 boy scouts who sued

defendants Boy Scouts and the Church for sex abuse. See www.abajournal.com/news/article/boy_scouts/. The Boy Scouts produced unredacted "ineligible volunteer" files for the years 1965 to 1985, subject to a protective order. Plaintiff offered all 1,245 files that the Boy Scouts had produced into evidence at trial. Those files all went to the jury room. The jury awarded $1.4 million in compensatory damages plus $18 million in punitive damages. After trial the court entered another protective order, continuing the restrictions of its prior protective order.

After trial, plaintiffs moved to vacate the protective order so they could release the files to the public. Six news media entities had intervened earlier seeking the same release. The trial court ordered the release of *redacted* copies of the 1,247 files: the victims' names and the names of people who had reported the abuse were redacted. Also, the trial court stayed the order pending appellate review. The trial court concluded that Article I, section 10, of the Oregon Constitution required the release of the files, and that it had the discretion to do so.

The media filed a mandamus petition in the Oregon Supreme Court. The Boy Scouts opposed that petition and filed its own petition challenging the trial court's decision to vacate its earlier protective order. Those petitions were consolidated.

The Oregon Supreme Court dismissed the alternative writs, repeatedly making certain points:

-- "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." Article I, section 10, did not require the trial "court to dissolve its protective order concerning the list of names". The "open courts provision in Article I, section10, did not require the trial court, at the end of a trial, to order the release of exhibits that were subject to an earlier protective order."

-- Nothing in Article I, section 10, "*prohibits* the trial court from releasing the ineligible volunteer files to the public." Under ORCP 36 C, issuing and vacating a protective order are within the trial court's discretion.

-- "Open courts" applies to circuit courts. The "term 'court' in the Oregon Constitution refers to a legally established institution designed and authorized to administer justice," based on the word "court" in other parts of the constitution and based on two dictionaries "in wide use in 1859."

-- The framers wanted the 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). 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."

-- "The probable source for the open courts clause is Chapter 40 of the Magna Carta." (Citing to an Oregon Supreme Court case as authority). "Translated, Chapter 40 provides, 'To no one will we sell, to no one will we deny, or delay, right or justice.'" (Citing to the same case). Indiana adopted an open court's clause and "Oregon's open courts clause" is based on Indiana's. The Oregon Constitution rephrased Indiana's wording and "those changes in wording * * * carry meaning."

Therefore, it "it appears clear to us that the framers of the Oregon Constitution were concerned with access to Oregon courts by its citizens, as might be assumed based on the historical origins of the clause, and were concerned equally with combating secrecy in the administration of justice and fostering judicial accountability through public scrutiny of court proceedings. The open courts clause of the Oregon Constitution thus protects both a litigant's access to court to obtain legal redress and the right of members of the public to scrutinize the court's administration of justice by seeing and hearing the courts in operation."

-- "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."

-- 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."

--A court has discretion to limit the disclosure of exhibits at the close of trial. "The court had discretion to order, on good cause shown, the release of those documents subject to the redaction of names set out in the exhibits to protect victims of child sexual abuse and reporters of child sexual abuse from embarrassment, retaliation, or other harm." Among those circumstances is the need to protect those who have been victims of child sexual abuse and those who have reported suspected child sexual abuse to others." Here the trial court "reasonably exercised its discretion to prevent undue injury and embarrassment to innocent persons that likely would result from public disclosure of the names in the exhibits." "The court in this case properly exercised that authority."

-- The trial court did not err in deciding to stay its order releasing the documents pending appellate review. The "court did not violate Article I, section 10, by staying the effectiveness of its disclosure order pending appellate review."

X. PUNISHMENT

"**No person arrested, or confined in jail, shall be treated with unnecessary rigor.**" -- Article I, section 13, Or Const

* * * * *

"**Laws for the punishment of crime shall be founded on these principles: protection of society, personal responsibility, accountability for one's actions and reformation**." -- Article I, section 15, Or Const [amended 1996]

* * * * *

"**Excessive bail shall not be required, nor excessive fines imposed. Cruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense. In all criminal cases whatever, the jury shall have the right to determine the law, and the facts under the direction of the Court as to the law, and the right of new trial, as in civil cases.**" -- Article I, section 16, Or Const

A. Cruel and Unusual; Proportionality

"**Cruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense.**" - Article I, section 16, Or Const

"This court first articulated the test for determining whether a sentence violates the proportionality provision of Article I, section 16, in *Sustar v County Court of Marion County*, 101 Or 657 (1921)." *State v Wheeler*, 343 Or 652, 668 (2007).

"Since *Sustar*, this court often has used the 'shock the moral sense' standard to resolve a claim that a sentence does not meet the proportionality requirement." *State v Wheeler*, 343 Or 652, 668 (2007). "This court has used the test of whether the penalty was so disproportioned to the offense as to 'shock the moral sense of reasonable people' and ordinarily has deferred to legislative judgments in assigning penalties for particular crimes, requiring only that the legislature's judgments be reasonable." *Id*. at 676.

A punishment is constitutionally disproportionate if it "shocks the moral sense of all reasonable [persons]". Three factors to make that determination are: (1) comparison of the penalty to the crime; (2) comparison of other penalties imposed for other related crimes; and (3) defendant's criminal history. *State v Rodriguez/Buck*, 347 Or 46, 57-58 (2009).

In *Wheeler*, the proportionality test includes an assessment of whether the legislature's penalty is founded on an "arguably rational basis," out of respect for separation of powers. In *Rodriguez/Buck*, "the court appears to have abandoned the 'arguably rational basis' test described in *Wheeler*," replacing with a 3-factor test: (1) comparison of the severity of the penalty to the gravity of the crime; (2) comparison of the penalties for

other related crimes; and (3) the defendant's criminal history (and a court's consideration of a defendant's criminal history is not limited to the same or similar offenses). *State v Alwinger*, 231 Or App 11 (2009), a*dh'd to as modified on recons*., 236 Or App 240 (2010).

Criminal history is one factor in disproportionality analysis, but the lack of a history has never been sufficient to render an otherwise constitutional penalty disproportionate. *State v Shaw*, 233 Or App 427, *rev den* 348 Or 415 (2010).

"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).

State v Burge, 252 Or App 574 (9/26/12) (per curiam) (Ortega, Haselton, Sercombe) (Lane) Defendant was charged with 12 counts of second-degree sex abuse (some victims were 16 which would have allowed for a third-degree sex abuse charge). The trial court sentenced him with a crime seriousness score of "7." He did not preserve his claim of error but contended that the trial court plainly erred in assigning a score of "7."

The Court of Appeals reversed and remanded as to the sentencing score issue. Vertical proportionality is measured by the sentences that are available for the conduct, not by what the individual defendant actually receives. In *State v Simonson*, 243 Or App 535 (2011), the Court of Appeals held that using a crime seriousness score of "7" for second-degree sex abuse against children under 18 created a "vertical proportionality" infirmity under Article I, section16, of the Oregon Constitution, because the more serious crime of third-degree rape had a crime seriousness score of "6" and would thus result in a shorter presumptive sentence. The same conduct is at issue here as in *Simonson* – sex with victims under age 18.

The court exercised its discretion to correct the error because it is legal error, obvious error, the potential for a shorter prison term on remand, and "because the state has no interest in sustaining a constitutionally infirm sentence."

B. Consecutive Sentences; Judicial Factfinding

> "**No law shall limit a court's authority to sentence a criminal defendant consecutively for crimes against different victims.**" – Article I, section 44(1)(b), Or Const

C. Right to Allocution

A defendant has the right to allocution (right to be heard personally) during a hearing to modify a judgment, under Article I, section 11. *State v Isom*, 201 Or App 687, 694 (2005). The statutory and constitutional rights to speak at a sentence modification proceeding are not unqualified. An enforceable right extends to changes in a sentence that are "substantive" as opposed to "administrative." *State v Rickard*, 225 Or App 488, 491 (2009).

XI. REMEDY GUARANTEE

> "**[E]very man shall have remedy by due course of law for injury done him in his person, property, or reputation.**" -- Article I, section 10, Or Const

See David Schuman, *Oregon's Remedy Guarantee: Article I, section 10 of the Oregon Constitution*, 65 OR L REV 35 (1986).

"[I]n analyzing a claim under the remedy clause, the first question is whether the plaintiff has alleged an injury to one of the absolute rights that Article I, section 10 protects. Stated differently, when the drafters wrote the Oregon Constitution in 1857, did the common law of Oregon recognize a cause of action for the alleged injury? If the answer to that question is yes, and if the legislature has abolished the common-law cause of action for injury to rights that are protected by the remedy clause, then the second question is whether it has provided a constitutionally adequate substitute remedy for the common-law cause of action for that injury." *Smothers v Gresham Transfer, Inc.*, 332 Or 83, 124 (2001).

Oregon Supreme Court cases have left the federal courts and lower state courts "without a clear indication of how to resolve [a] dispute," over the adequacy of a capped remedy, but it distilled "certain factors that appear to bear on the adequacy of a capped remedy." Those factors are (1) the difference between the capped remedy and the common law remedy; (2) uncompensated out-of-pocket costs in a capped remedy; (3) whether the capped remedy supplants a common law cause of action; (4) whether the capped remedy is consistent with a narrow construction of sovereign immunity; and (5) the degree to which the capped remedy conforms to widespread social indicators regarding just compensation for injuries. *Ackerman v OHSU Medical Group, West, and OHSU*, 233 Or App 511 (2010); *see also Howell v Boyle*, 2011 WL 117624 (9th Cir 01/14/11) (certifying question under Article I, section 10, to the Oregon Supreme Court because that Court "has not provided a quantitative formula for determining when a remedy is so reduced as to render it constitutionally inadequate," citing "the *Ackerman* factors").

XII. HARMLESS VERSUS PREJUDICIAL 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

A. 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).
>
> That standard 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).

State v Klein, 352 Or 302 (8/02/12) (Balmer) The Supreme Court affirmed both lower courts' decisions in this murder trial involving a wiretap. The Court of Appeals had affirmed defendant's convictions despite the trial court's erroneous exclusion of a witness's testimony, because the error was not prejudicial. On review, defendant argued that the error was prejudicial (not harmless). The Court did not cite the Oregon Constitution but referred to *State v Davis* as to a "harmless error" aspect:

> "Whether the erroneous exclusion of evidence is harmless will depend 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, 34 (2003).

The Supreme Court reasoned: The Court of Appeals "understated the difference" between two witnesses' testimony: one witness's testimony "would have provided a different perspective and a different emphasis" than the other witness's testimony. "Nevertheless, because the jury heard the same facts -- the content of [one witness's] statements and that those statements were made in jail to a fellow inmate -- when [that witness] admitted making those statements on the stand, any error in excluding the evidence is unlikely to have affected the jury's verdict."

Tracy v Nooth, 252 Or App 163 (8/29/12) (Duncan, Armstrong, Haselton) (Malheur) Post-conviction court's denial of a petitioner's request for subpoenas of employment and investigation records regarding his case was erroneous and was not harmless. Reversed. "We may not reverse a judgment if the error was harmless. Or Const, Art VII (Amended), § 3."

B. Federal Constitutional Rights

> 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).

C. Statutory "harmless error"

"Harmless error" doctrine is set out in ORS 138.230: "After hearing the appeal, the court shall give judgment, without regard to * * * technical errors, defects or exceptions which do not affect the substantial rights of the parties."

D. Other cases on preservation, plain error, harmless error, and discretion

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*, 2012 WL 5285134 (10/03/12) (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*.

"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 (7/18/12). 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.

State v Tilden, 2012 WL 5285134 (10/03/12) (Schuman, Wollheim, Nakamoto) (Tillamook) Defendant opened links in email and viewed child pornography on the Internet. His web browser automatically cached the images onto his computer. When his browsing history was deleted (either automatically or by him deliberately), the images remained on the unallocated space of the hard drive. On a tip, police interviewed him at his house. He told them he "has a curiosity for nude children" and he "only looks at pornographic pictures of young children" and he had never downloaded or transmitted child porn. He released his computer to the police who used a file recovery software called a "Forensic Toolkit" or FTK. The child porn was on unallocated space of his hard drive.

He was charged with 101 counts of encouraging child sex abuse in the second degree based on each image. The state argued that he "possessed" and "controlled" each image by viewing it and saving it. There was no evidence that he did anything other than view it. The state's forensic expert testified that he could save it. Defendant objected on relevance and argued that there was no evidence that he did anything other than view it. The statute requires knowingly controlling the images. The parties agreed to a cautionary instruction the jury. The state, in closing, said inter alia, "The fact that [defendant] didn't [download and save] doesn't negate the fact that he had control over whether that happened." The jury convicted him of all counts, the court merged the verdicts, and defendant was sentenced to 90 days in jail plus 24 months' probation with "the sex offender package" from ORS 137.540(2).

The Court of Appeals reversed. Two cases, "both issued after defendant was convicted, leave no reasonable dispute as to the adequacy of the state's proof." In both cases, the court held that the act of viewing an image of child porn on a person's computer screen, which is cached into an unallocated space on the person's hard drive, is not "possessing or controlling" the image to convict a person of second-degree encouraging child sex abuse (where the person did not save or send the image). Plain error is evaluated under the law at the time the appeal is decided. When defendant was convicted in 2009, the law was against him: he would not have prevailed on a motion for a judgment of acquittal, and the record would not have developed differently: the prosecutor stated that the state did not intend to offer any evidence that defendant downloaded or saved any images.

State v Earls, 246 Or App 578 (11/16/11) (plain error not to merge guilty verdicts for 12 counts of negotiating a bad check with guilty verdicts for first and second degree theft)

State v Taylor, 247 Or App 339 (12/21/11) ("The proper [harmless-error] analysis is not whether 'this court, sitting as a factfinder, would regard the evidence of guilt as substantial and compelling[,]' but rather, how the error would influence the verdict. * * * We consider the nature of the error that occurred below and the context of that error. * * * We also consider the importance of the erroneously admitted evidence to the party's theory of the case. * * * If the error has no relationship to the jury's determination of its verdict, then there is little likelihood that the error affected the verdict.")

State v S.J.F., 247 Or App 321 (12/21/11) (en banc) (Duncan; Wollheim and Nakamoto dissenting) ("when determining whether a trial court's failure to provide an allegedly mentally ill person with the information required by ORS 426.100(1) is harmless, we focus on whether the appellant received all of the information from another source.")

State v Pekarek, 249 Or App 400 (4/18/12) (plain error to admit evidence that victim had been diagnosed as having been sexually abused, in the absence of physical evidence)

State v Lowell, 249 Or App 364 (4/18/12) (plain error to permit detectives to comment on credibility of both defendant and the child sex abuse victim)

State v Wirfs, 250 Or App 269 (5/31/12) (reversing and remanding because evidentiary error was not harmless because it pertained to a central fact issue)

State v Delaportilla, 250 Or 25 (5/16/12) (Article VII (Amended), section 3, does not permit an appellate court to enter judgment based on any combination of facts alleged in any of the counts of a multi-count indictment. "A court cannot convict on a charge for which the defendant was not indicted unless the conviction is for an offense that is a lesser-included offense 'within the offense charged' in the indictment.")

State v Bowen, 352 Or 109 (6/28/12) (no justification for delayed entry of corrected judgment but no prejudice to defendant)

State v Arreola, 250 Or App 496 (6/20/12) (plain error to admit expert medical diagnosis of sex abuse , despite curative instruction to jury, where two experts drew and testified to their conclusions based on victim's statements, in the absence of physical evidence)

State v Hollywood, 250 Or App 675 (6/27/12) (plain error to admit nurse's testimony about child sex abuse victim's credibility in the absence of physical evidence)

State v Sanchez-Jacobo, 250 Or App 621 (6/27/12) (declining to exercise discretion to correct unpreserved error (apparent on the record) that prosecutor, in closing, said "at this point in trial, the presumption of innocence will evaporate")

State v Vanorum, (6/27/12) (2-judge majority declined to review claim of error on a jury instruction "because defendant raised no exception to the jury instruction provided by the trial court, as required by ORCP 59 H." Dissent would conclude that the court erred and the error was prejudicial)

State v Edwards, 251 Or App 18 (7/05/12) (unpreserved error is not reviewable under ORCP 59 H(1), but failure to merge certain convictions is error apparent on the face of the record)

State v Morgan, 251 Or App 99 (7/11/12) (error to preclude defendant from cross-examining officers regarding National Highway Traffic Safety Administration's Field Sobriety Test Instructor's Manual; error not harmless because it went "directly to the heart" of defendant's trial theory that challenging "the FSTs upon which convictions in DUII cases so frequently hinge")

State v Graham, 251 Or App 217 (7/18/12) (where there is evidence in the record to support defendant's conviction, "any error is not plain" because the "matter is reasonably in dispute")

State v Birchard, 251 Or App 223 (7/18/12) (plain error for failure to merge two guilty verdicts; court exercised discretion because "the state does not have a compelling interest in salvaging multiple convictions when only one is lawful")

State v McCarthy, 251 Or App 231 (7/18/12) (plain error to admit nurse's testimony, in the absence of physical evidence, that victim had delayed reporting rape because she'd been groomed and she'd been afraid)

State v Hites-Clabaugh, 251 Or App 255 (7/18/12) (error was not harmless in this child sex abuse case because there were no eyewitnesses, no physical evidence, and the trial was just a "swearing match" between the victim and defendant)

State v Dalby, 251 Or App 674 (8/15/12) ("Error in admitting evidence that a defendant exercised or invoked his constitutional right to silence or to counsel is prejudicial if the evidence comes in a context whereupon inferences prejudicial to the defendant are likely to be drawn by the jury." Egregious error here was not prejudicial).

State v Colon, 251 Or App 714 (8/15/12) ("The court's decision in this case came down to a determination of credibility. The court accepted the complainant's testimony regarding the incident in question and rejected the testimony of defendant. It stated that it found the complainant's testimony believable and that her motive to lie was negligible. Under those circumstances, the court's exclusion of evidence regarding the complainant's character for untruthfulness was not harmless.")

State v Kaylor, 2012 WL 5285675 (10/17/12) (error not harmless)

State v Wood, 2012 WL 5286190 (10/24/12) ("An error is harmless only when there is little likelihood that it affected the verdict. *State v. Klein,* 352 Or 302, 314 (2012). In the absence of overwhelming evidence of guilt * * * [if] erroneously admitted hearsay evidence significantly reinforces the declarant's testimony at trial, the admission of those statements constitutes error requiring reversal of the defendant's conviction")

B.A. v Webb, 2012 WL 5286169 (10/24/12) (plain error, not harmless, for trial court to allow two experts to opine to the jury regarding the sex-abuse victim's credibility, despite defendant's failure to object, because the "vouching was egregious" and there were no eyewitnesses and no physical evidence, see *State v Middleton*, 294 Or 427 (1983) and *State v Milbradt*, 305 Or 621 (1988)))

XIII. EQUAL PRIVILEGES AND IMMUNITIES

> "**No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.**" -- Article I, section 20, Or Const

A. Generally

Article I, section 20, prohibits two types of unequal treatment: "first, to any citizen, and second, to any class of citizens." It "may be invoked by an individual who demands equality of treatment with other individuals as well as by one who demands equal privileges or immunities for a class to which he or she belongs." *State v Clark*, 291 Or 231, 237 (1981). For individual-based claims, the question is whether the state distributed a benefit or burden "without any coherent, systematic policy." *State v Freeland*, 295 Or 367, 375 (1983).

Article I, section 20, guarantees equal privileges to any citizen and to citizens who belong to a class, under *State v Clark*, 291 Or 231, 239, *cert denied* 454 US 1084 (1981). *State v Abbey*, 239 Or App 306 (2010) *rev den* 350 Or 423 (2011).

B. Class of One

To succeed on a true class-of-one claim under Article I, section 20, a defendant would have to show that (1) the class is a "true class" based on something other than identity based on a statute, (2) the class is based on "immutable traits" or those subjected to adverse social or political stereotyping or prejudice, and (3) the discrimination is based on stereotype or prejudice, not some rational basis. *State v Abbey*, 239 Or App 306 (2010) *rev den* 350 Or 423 (2011).

Class-of-one discrimination occurs when "the state distributes a benefit or burden in a standardless, ad hoc fashion, without any 'coherent, systematic policy," as described in *State v Freeland*, 295 Or 367 (1983). That prohibition on ad hoc distribution of burdens or benefits reaches inequality in the administration of laws both in delegated authority, and in legislative enactment. It constrains prosecutorial discretion. *State v Savastano*, 243 Or App 584 (6/22/11) *adhered to as clarified on reconsideration*, 2011 WL 5420823.

To prevail on a claim of ad hoc prosecutorial decisions, "the defendant has the burden of establishing the lack of criteria or if there are criteria, the lack of consistent enforcement," as in *City of Salem v Bruner*, 299 Or 262 (1985). *State v Savastano*, 243 Or App 584 (6/22/11) *adhered to as clarified on reconsideration*, 2011 WL 5420823.

XIV. TAKINGS

> "**Private property shall not be taken for public use . . . without just compensation.**" – Article I, section 18, Or Const

> "**No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.**" -- Fifth Amendment, US Const

A. Condemnation

1. Introduction

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). Although the government has the power to condemn and take private property (eminent domain), the Fifth Amendment prohibits the government from taking private property without just compensation, which is measured by the market value of the property on the date of the taking. *United States v 50 Acres of Land*, 469 US 24, 25-26 (1984). "The Fifth Amendment provides, 'nor shall private property be taken for public use, without just compensation.' There are two types of 'per se' takings: (1) permanent physical invasion of the property, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); and (2) a deprivation of all economically beneficial use of the property, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015-16 (1992)." *Laurel Park Community, LLC v City of Tumwater*, (9th 10/29/12).

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).

2. Valuation

Governmental units exercise that 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.

"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. *See State Highway Com. v. Stumbo*, 222 Or 62, 74-77 (1960); *State ex rel Dept. of Trans. v. Glenn*, 288 Or 17, 23 (1979); *Highway Com. v. Assembly of God*, 230 Or 167, 177 (1962)." *State v Lundberg*, 312 Or 568, 574 n 6 (1992).

"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. See *State v Mendez*, 308 Or 9, 19, 774 P2d 1082 (1989) (this court declined to consider a state constitutional claim because the party "failed to brief or argue any independent state constitutional theory")."

"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).

B. Regulatory takings and inverse condemnation

1. Fifth Amendment

Under the Fifth Amendment, a claim that land use laws violate the Fifth Amendment's "just compensation" clause, "must be assessed in order to determine if a regulatory taking has occurred," and that is done by assessing the "parcel as a whole." *Tahoe-Sierra Preservation Council, Inc. v Tahoe Reg. Plann. Agency*, 535 US 302, 331-32 (2002); *Coast Range Conifers v Board of Forestry*, 339 Or 136, 151-54 (2005); *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*, (9th Cir 10/29/12).

2. Oregon Constitution

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).

"[There 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." *Id*. 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 <u>all economically viable use</u> 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).

"To establish a taking by inverse condemnation, the plaintiff is <u>not</u> required to show that the governmental defendant deprived the plaintiff of <u>all use and enjoyment</u> of the property at issue." *Vokoun v City of Lake Oswego*, 335 Or 19, 26 (2002) (emphasis added).

"To establish a taking by inverse condemnation, the plaintiff is not required to show that the governmental defendant deprived the plaintiff of all use and enjoyment of the property at issue * * * A 'substantial interference' with the use and enjoyment of property is sufficient." *Dunn v City of Milwaukie*, 241 Or App 95 (2011) (emphasis added). If government, "in the process of performing some act for the benefit of the public, inflicts a substantial interference with the use and enjoyment of private property, that act can amount to a taking and give rise to a claim" for compensation, under *Morrison v Clackamas County*, 141 Or 564 (1933). To prevail, the property owner "must prove that the government intended to cause damage" and that damage was a "substantial interference with the owner's use and enjoyment of the property," under *Volkoun v City of Lake Oswego*, 335 Or 19 (2002) and *Hawkins v City of La Grande*, 315 Or 57 (1992). *Dunn*, 241 Or App 95 (2011).

> A "claim for inverse condemnation requires a showing that the governmental acts alleged to constitute a taking of private property were done with the intent to take the property for a public use." *Vokoun v City of Lake Oswego*, 335 Or 19, 27 (2002).

Brown v City of Medford, 251 Or App 42 (7/05/12) (Schuman, Wollheim, Nakamoto) (Jackson) Plaintiff sought to partition his lot into two lots, a north and a south, with both accessing the public road to the north. The city conditioned its approval of that partition on plaintiff dedicating 19 feet to expand an undeveloped for a public road on the south side for a previously approved subdivision expansion. The city justified its exaction that "if plaintiff's proposed land division was approved without the required dedication, it would prevent future connectivity with pedestrian traffic and interfere with other modes of transportation." The city stipulated to a judgment awarding plaintiff $15,000 plus attorney fees but reserved its right to appeal earlier adverse rulings. The city then exercised that appeal right. Plaintiff contended that the required dedication was an impermissible exaction: there was no public need for the southerly dedication and it had no nexus. The trial court ruled that the dedication condition was unconstitutional because plaintiff did not even take access from that south-side public way, and therefore "the city's exaction of that right of way lacked the requisite nexus to the impact of the proposed partition."

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). The "physical invasion" here is the dedication of 19 feet of plaintiff's property to the City for use as the public roadway. Three pretrial motions were appealed: a motion to dismiss, cross-motions for summary judgment, and a motion to determine the valuation date for calculating damages. The city also contended that the exaction claim was not justiciable (unripe) because the city had not actually acquired the property yet.

The Court of Appeals affirmed. As to ripeness: ORS 197.796 authorizes an applicant to accept a condition of approval and file a challenge to the condition. Thus plaintiff's claim is ripe.

The issue is "whether the exactions substantially advanced the same interests that land-use authorities asserted would allow them to deny the permit altogether," per *Lingle*. The city must, but has not, identified the code provisions or specific policies that would have allowed it to deny plaintiff's partition. Neither of the two lots plaintiff wanted to create would access the public way on the south. Nothing suggests that plaintiff's proposed partition would have any direct or indirect effect on the south road way. Nothing explains or supports the City's justification about "connectivity." In short: a nexus exists when the exaction substantially advances the same interests that the city authorities asserted would allow them to deny the permit altogether, see *Lingle*, 544 US at 547.

Damages for takings and under ORS 197.796 are determined as of the date of the injury. Plaintiff "was injured when the city rendered its final decision on that application – the tentative plan approval that imposed an unconstitutional exaction," see *First Lutheran Church v Los Angeles County*, 482 US 304, 320 n 10 (1987); *Hawkins v City of La Grande*, 315 Or 57, 67 (1992) (the taking relates back to the date of the beginning of the governmental conduct that is determined to be a taking). Affirmed.

"The constitutionally of an exaction of that nature does not depend on a 'physical invasion.' *See West Linn Corporate Park v City of West Linn*, 349 Or 58, 86 (2010)." Rather, the United States Supreme Court has emphasized that *Nollan* and *Dolan* were in a "special context" that were not "takings" but instead were analyzed as "unconstitutional conditions." The doctrine of

unconstitutional conditions "provides that 'the government may not require a person to give up a constitutional right – here 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."

Hall v State of Oregon, __ Or App __ (10/03/12) (Schuman, Wollheim, Nakamoto) (Linn) Plaintiffs own a 25-acre property with a fair market value of $4 million. The state repeatedly told the public and potential buyers of plaintiffs' property that the state was going to eliminate a highway interchange for safety reasons, which would render the property landlocked and reduce its value by about $3.4 million. Plaintiffs brought this inverse condemnation action. The trial was "contentious" with each side attempting to "impugn the motives of the other" without objection. Plaintiffs' complaint did not raise any issue of the state's motives. Plaintiff did not ask for (and thus there was no) jury instruction on the state's motives. Plaintiff's verdict form did not ask the jury to determine the state's motives or intent. The state moved for a directed verdict. The trial court denied that motion. The jury found that the property value had been reduced from $4 million to about $3.4 million. It and awarded plaintiffs "that amount" [presumably .6 as the sum of 4 minus 3.4] plus almost a half-million dollars of attorney fees and costs. ODOT appealed arguing that the state did not engage in a "taking" and raised other claims of error.

Describing, three times, plaintiffs' argument as "self-defeating," the Court of Appeals reversed and remanded. The parties agree that ordinarily a taking by inverse condemnation does not require a plaintiff to show that the government deprived it of "all" use and enjoyment of the property, but rather a "substantial interference" is sufficient, under *Vokoun v City of Lake Oswego*, 335 Or 19, 26 (2002). The parties also agree that when the interference "is legislation or some form of quasi-legislation (agency rules, zoning ordinances, etc.), a taking does not occur unless the enactment deprives the property owner of 'all substantial beneficial use of its property.' *Fifth Avenue Corp. v Washington Co*., 282 Or 591, 609 (1978)." The parties agree that the state's actions did not deprive plaintiff of all economically feasible use: it retained a value of $621,250.

Plaintiffs contend that the state intended to take its property based on a vendetta against one plaintiff, not with an intent to take the property for a public use. Plaintiffs "insist" that the state "was driven, not by an intent to improve safety, but by malice directed toward one of plaintiffs' then-owners." Plaintiffs argue that the question of the state's "motive was presented to the jury, and the jury found in favor of plaintiff's allegation." The Court of Appeals disagreed and stated that plaintiffs are not only "wrong" but also "self-defeating" even if it were right. They are wrong because they did not allege their motive-vendetta issue in their complaint, they did not request a jury instruction to that effect, and their jury verdict form did not ask for a determination of malicious intent or motive. *Ball v Gladden* does not permit an inference from the jury verdict "one way or another" regarding the state's intent. Plaintiffs' argument is self-defeating because to prevail in inverse condemnation, plaintiffs must prove that the state had the intent to "take the property for a public use" per *Vokoun* and earlier Oregon cases dating back to the first quarter of the twentieth century. "We therefore conclude that the court erred in not granting ODOT's motion for a directed verdict," even though the state's publicly announced plans regarding the property did lower the property value. A lowered value does not establish a compensable taking.

C. Inverse Condemnation: 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.

XV. RIGHT TO BEAR ARMS

"The people shall have the right to bear arms for the defence [sic] of themselves, and the State, but the Military shall be kept in strict subordination to the civil power . . ." -- Article I, section 27, Or Const

Article I, section 17, is derived almost verbatim from two sections of the Indiana Constitution of 1851. There are no reported debates on the article; it was adopted as drafted. *State v Christiansen*, 249 Or App 1 (2012) (Edmonds, dissenting) (citations omitted), *review allowed* (10/04/12).

"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)). However, statutes delineate crimes and exceptions for possession of firearms. *Ibid*.

State v Christian, 249 Or App 1 (3/21/12) (en banc) (Schuman; with Armstrong dissenting jointed by Brewer, Nakamoto, and Edmonds; and Edmonds dissenting joined by Brewer) (Marion) (***review allowed***, oral argument set for 3/11/13 at Lewis & Clark Law School). A Portland ordinance provides: "It is unlawful for any person to knowingly possess or carry a firearm, in or upon a public place, including while in a vehicle in a public place, recklessly having failed to remove all the ammunition from the firearm." (The ordinance also has 14 exceptions). Before trial, he filed a "demurrer/motion to dismiss" which means he chose to facially challenge the code provisions, regardless of how it was enforced or applied against him. Defendant argued that the ordinance defeats the purpose of the right to bear arms because a firearm cannot be used for self-defense unless it is loaded. The trial court denied that motion. Defendant was convicted under that code provision, and two related state laws. He did not appeal the state law convictions, only the conviction under the city code.

The Court of Appeals, in a 5-4 split, affirmed: The ordinance is not facially overbroad as interpreted. First the court set the legal standard for facial challenges to laws under Article I, section 27: "generally a facial challenge to a law will fail if the law can constitutionally be applied in any imaginable situation." But "in a facial challenge under Article I, section 27, a starkly different analysis applies: If we determine that legislation is significantly overbroad" then "we must declare the legislation to be unconstitutional." A law is overbroad if "in some significant number of circumstances, it punishes constitutionally protected activity." But still, "a statute that proscribes protected conduct only at its margins remains valid." The court noted that the overbreadth rule came from US Supreme Court First Amendment cases and is limited to First Amendment cases in federal law. But the Oregon Supreme Court imported First Amendment overbreadth analysis into Article I, section 27 analysis without explanation in *State v Blocker*, 291 Or 255, 261 (1981) and the Oregon Supreme Court cited *Blocker* authoritatively in *State v Hirsch/Friend*, 338 Or 622, 626-29 (2005).

The court interpreted the "prohibitory scope" of the ordinance as including "only a person who has knowingly carried a loaded firearm in a public place for some purpose other than defense of self or home from felonious attack, consciously disregarding the substantial risk that doing so will endanger the public safety." In other words: the ordinance "penalizes a person only if he or she consciously disregards a substantial risk that failing to unload a weapon that he or she will carry or has carried into a public place for some *unjustified* purpose." (Emphasis by court). Any possible lawful activities within that scope "are rare outliers" so "even if such occurrences were constitutionally protected, the statute would survive a facial challenge." Laws regulating

possession of concealed weapons and completely prohibiting discharging firearms in urban areas "were commonplace and well accepted when the Oregon Constitution was adopted."

The ordinance also does not, on its face, violate the Second Amendment, incorporated through the Fourteenth. The legal standard for facial challenges to laws under the Second Amendment is: "Under federal constitutional law * * * Frist Amendment overbreadth applies only to First Amendment cases; in Second Amendment cases, as in all other facial constitutional challenges outside of the First Amendment, the enactment will be declared unconstitutional only if it is unconstitutional in every conceivable application. *United States v Salerno*, 481 US 739, 745 (1987)." "Because we have established that the ordinance is constitutional in almost every situation, it follows a fortiori that it is constitutional in some situations. At the least, it could for example be applied constitutionally to a person who carries a recklessly not-unloaded firearm into a courtroom or school. *District of Columbia v Heller*, 554 US 570, 626 (2008)."

Neither party apparently asked the court to interpret the ordinance the way the court interpreted it. The court wrote that it "is obligated to correctly interpret laws even if the parties do not." (Citing *Stull v Hoke*, 326 Or 72, 77 (1977)).

Armstrong dissenting (with Brewer, Nakamoto, and Edmonds): "I have no doubt that a restriction that prohibits most people from openly carrying a loaded firearm in all places open to the public, as Portland's ordinance does, violates the Oregon guarantee" of the right to bear arms.

Edmonds dissenting (with Brewer): In a 45-page dissent, Judge Edmonds disagreed with the majority "because (1) the majority's interpretation is at odds with the interpretation advanced by the city; (2) the majority's interpretation is at odds with the rule of construction that legislative enactments are to be construed to express the intention of their drafters; (3) the majority's interpretation fails to inform an ordinary person what the circumstances are that will result in the person being in violation of the ordinance; and (4) the reach of the ordinance infringes on the right to self-defense guaranteed by Article I, section 27, because it prohibits the possession or carrying of a loaded firearm openly in all public places within the city. In sum, the majority's interpretation creates different elements for conviction under the ordinance than the parties understood at the time of trial of this case, and, as a result, defendant finds himself convicted of a crime he did not commit." The primary disagreement Judge Edmonds had with the majority "is that its interpretation affords a meaning to the ordinance that has not been advanced by the city." Also the dissent believed that the majority exceeded its power: "in considering the ordinance's constitutionality under Article I, section 27, this court does not have the authority to rewrite the ordinance so as to conform to its public policy expectations and thereby make it constitutional. To do so could violate the Separation of Powers Doctrine that distinguishes between the authority of the legislative branch and the judicial branch of government and could preempt the authority of a legislative body to create law in accordance with its own intentions."

XVI. SOVEREIGN IMMUNITY

> "**Provision may be made by general law, for bringing suit against the State, as to all liabilities originating after, or existing at the time of the adoption of this Constitution but no special act authorizeing [sic] such suit to be brought, or making compensation to any person claiming damages against the State, shall ever be passed."** -- Article IV, section 24, Or Const

Article IV, section 24, of the Oregon Constitution "protects the state, including its political subdivisions, from 'suit' unless the legislature provides a cause of action. The courts construe the immunity of the state in Art IV, sec 24, to include immunity for the political subdivisions of the state * * * . . The courts could not judicially abolish the unpopular and often harsh doctrine of governmental tort immunity. * * * . . In 1967, the Oregon legislature followed the modern trend and passed the Tort Claims Act, thus partially abolishing tort immunity for all public bodies." *Dowers Farms v Lake County*, 288 Or 669, 679-80 (1980).

"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 denied* 324 Or 394 (1996). *Doe v Lake Oswego School District*, 242 Or App 605 (2011).

XVII. IMPAIRMENT OF CONTRACTS

> "**No . . . law impairing the obligation of contracts shall ever be passed** . . . " -- Article I, section 21, Or Const

"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).

XVIII. UNITED STATES CONSTITUTION

A. Federalism

1. Due Process

"Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State. This is consistent with the premises and unique genius of our Constitution. Ours is a 'legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.' *US Term Limits, Inc. v Thornton*, 514 US 779, 838 (1995) (Kennedy, J., concurring)." *J. McIntyre Machinery, Ltd. v Nicastro*, 131 S Ct 2780, 2789 (2011).

2. Supremacy

The laws of the United States "**shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding**." -- Article VI, clause 2, US Const

The Supremacy Clause, on its face, makes federal law 'the supreme Law of the Land' even absent an express statement by Congress." *Pliva, Inc. v Mensing*, 131 S Ct 2567, 2579 (2011).

(i). Preemption

State laws that conflict with federal law are "without effect." *Altria Group, Inc. v. Good*, 129 S Ct 538 (2008) (quoting *Maryland v Louisiana*, 451 US 725, 746 (1981)).

In all preemption cases, particularly those where Congress has legislated in a field traditionally occupied by the States, preemption analysis begins with the assumption that the historic police powers of the States were not to be superseded by a federal act unless that was the clear and manifest purpose of Congress. *Wyeth v Levine*, 129 S Ct 1187 (2009).

The "purpose of Congress is the ultimate touchstone" in every preemption determination. *Altria Group, Inc. v Good*, 129 S Ct 538 (2008); *Wyeth v Levine*, 129 S Ct 1187 (2009). Congress may indicate preemptive intent through a statute's express language or through its structure and purpose. Preemptive intent may be inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field, or if there is an actual conflict between state and federal law. *Altria*. An actual conflict will exist either when it is impossible to comply with both state and federal law or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Wyeth*, 129 S Ct at 1196-1200 (quoting *Hines v Davidowitz*, 312 US 52, 67 (1941)).

The Supremacy Clause creates an independent right of action where a party alleges preemption of state law by federal law. See *Shaw v Delta Air Lines*, 463 US 85, 96 n 14 (1983) ("A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is preempted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.").

Arizona v United States, 132 S Ct 2492 (6/25/12) (Kennedy; with Scalia, Thomas, and Alito dissenting in part and concurring in part, with Kagan not participating) Arizona apprehends "hundreds of thousands of deportable aliens" each year. Unauthorized aliens constitute almost 6% of Arizona's population. In Arizona's most populated county, "these aliens are reported to be responsible for a disproportionate share of serious crime" (21.8% of felonies in Maricopa County). Crime is an "epidemic" and is associated with the influx of illegal migration across private land near the Mexican border.

In 2010, Arizona enacted comprehensive law called "Support our Law Enforcement and Safe Neighborhoods Act" to "discourage and deter the unlawful entry and presence of aliens" among other things. The United States filed suit seeking to enjoin the Arizona law as preempted. Four provisions of the Arizona law were at issue. The district court issued a preliminary injunction preventing all four provisions from taking effect. The Ninth Circuit affirmed. The United States Supreme Court affirmed in part and reversed in part and remanded. (Per Justice Scalia, dissenting: The opinion approves "virtually all of the Ninth Circuit's injunction against enforcement of the four challenged provisions of Arizona's law").

"Federalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect." Under the Supremacy Clause, "Congress has the power to preempt state law." (Citing *Gibbons v Ogden*, 9 Wheat. 1, 210-11 (1824) and *Crosby v Nat'l Foreign Trade Council*, 530 US 363, 372 (2000)). There are "at least" three ways that federal may or does preempt state law: (1) express preemption in an act; (2) States are precluded from regulating in fields that Congress has exclusive power to regulate in; or there is implied preemption where "Congress left no room for the States to supplement" Congressional acts or where the "federal interest" is "so dominant that the federal system will be assumed to preclude state laws; or (3) state law conflicts with federal law (either it is physically impossible to comply with both or where the state law "stands as an obstacle" to Congress's action).

The federal government's broad power over immigration and aliens rests in part on its constitutional power to "establish a uniform Rule of Naturalization" in Article I, section 8, clause 4, and on its inherent sovereign power to control foreign relations. *Toll v Moreno*, 458 US 1, 10 (1982). The Supremacy Clause gives Congress power to preempt state law. Part of Arizona's law at issue in this case intrudes on the field of alien registration, a field in which Congress left no room for the States to regulate; even complementary state regulation is impermissible whereas here the Congress intended to have complete federal regulation over the field. Also, Arizona's criminal penalties in its law stand as an obstacle to the federal regulation over aliens because a part of the Congress decided not to impose criminal penal penalties on certain aliens (unauthorized employees). Also, another part of Arizona's law creates an obstacle to federal law because it authorizes state and local officers to make warrantless arrests of certain aliens – it attempts to give state officers greater arrest authority over aliens which they could exercise without instruction from the federal government and this "is not the system Congress created."

(ii). Supremacy and Intergovernmental Immunity

The "states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government. *McCulloch v Maryland*, 17 US (4 Wheat) 316, 436 (1819). A state or local law is invalid (thus violating intergovernmental immunity) in either of two ways: "only if it regulates the United States directly or discriminates against the Federal Government or those with whom it deals." *North Dakota v United States*, 495 US 423, 435 (1990).

3. Necessary and Proper

In "determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." *United States v Comstock*, 130 S Ct 1949, 1956 (2010).

The "individual mandate [of the Patient Protection and Affordable Care Act] cannot be sustained under the Necessary and Proper Clause as an essential component of the insurance reforms." *National Fed. Of Independent Businesses v Sebelius*, 132 S Ct 2566, 2592 (6/28/12).

"As Chief Justice John Marshall famously wrote regarding the word 'necessary' in the 'necessary and proper' clause of the United States Constitution, 'we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable.' *McCulloch v. Maryland,* 4 Wheat. 316 (1819)." *State v Babson*, 249 Or App 278, 283 (2012).

4. Commerce Clause

> **"The Congress shall have Power To * * * regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . ."** -- Article I, section 8, US Const

There are three commerce clauses in Article I, section 8, of the US Constitution: Interstate, Indian, and Foreign.

"Early opinions of the Court suggest that the three subparts of the Commerce Clause should be interpreted similarly." *United States v Pendleton*, 658 F3d 299, 306 (3d Cir 2011) (quoting *Gibbons v Ogden*, 22 US 1, 194 (1824)); *see also United States v Seveloff*, 27 F Cas 1021, 1024 (D Or 1892) ("The power to regulate commerce is conferred upon the national government by the constitution (article I, §8), in the same language, and upon the same terms in the case of 'foreign nations,' the 'several states,' and the 'Indian tribes.'"). But despite *Gibbons*, "the three subclauses of Article I, section 8, clause 3 have acquired markedly different meanings over time." *Id*.

(i). The Interstate Commerce Clause

Article I, section 8, of the Constitution confers upon Congress only discrete enumerated governmental powers. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people. *Printz v United States*, 521 US 898, 919 (1997).

(ii). The Foreign Commerce Clause

A principal reason for assembling the Constitutional Convention of 1787 was "to require uniformity in [the United States'] commercial regulations * * * " *Gibbons v Ogden*, 22 US 1, 225 (1824) (Johnson, J., concurring, quoting the preamble of James Madison's draft resolution at the Virginia Ratifying Convention). The purpose of the Foreign Commerce Clause was to establish national uniformity over commerce with foreign nations. *Japan Line, Ltd. v County of Los Angeles*, 441 US 434, 448 (1979).

"Although the Constitution, Art. I, sec. 8, cl. 3, grants Congress power to regulate commerce 'with foreign Nations' and 'among the several States' in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be the greater." *Japan Line, Ltd. v County of Los Angeles*, 441 US 434, 448 (1979).

5. Tenth Amendment

> **"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."** -- Tenth Amendment, US Const

"If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." *New York v United States*, 505 US 144, 156 (1992).

The "federal system rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.' *Alden v Maine*, 527 US 706, 758 (1999)." "Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." Individuals' claims – not the Governmental departments' "have been the principal source of judicial decisions concerning separation of powers and checks and balances. " An individual may "challenge a law as enacted in contravention of constitutional principles of federalism. That claim need not depend on the vicarious assertion of a State's constitutional interests, even if a State's constitutional interests are also implicated." *Bond v United States*, 131 S Ct 2355 (2011).

B. Full Faith and Credit

> **"Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State."**
> -- Article IV, section 1, US Const

The Full Faith and Credit Clause requires (at most) that a state give effect to rights established between parties that arise from judgments, agreements, or statutes originating in other states. *State v Berringer*, 234 Or App 665, *rev denied* 348 Or 669 (2010).

C. Contracts Clause

> "**No State shall . . . pass any . . . Law impairing the Obligation of Contracts.**" Article I, section 10, clause 1, US Const

A court's task is "to reconcile the strictures of the Contract Clause with the essential attributes of sovereign power necessarily reserved by the states to safeguard the welfare of their citizens." *United States Trust Co. of New York v New Jersey*, 431 US 1, 20 (1977).

D. First Amendment

> "**Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.**" –US Const, amend I

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 Chicago*, 130 S Ct 3016, 3034 n 12 (2010) (so reciting).

2. Application to State actors

State action is subject to the Fourteenth Amendment but private conduct is not. State "action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" *Brentwood Academy v Tennessee Secondary School*, 531 US 288, 295 (2001). A "host of facts" can bear on whether action may be state action: when the state exercises its coercive power or significant encouragement; when a private actor is a willful participant in joint activity with the state; when an entity is controlled by the state or an agency; when an entity has been delegated a public function by the state; when an actor is entwined with governmental policies; or when the government is entwined in the entity's management or control. *Id*. at 296.

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). Examples of speech that is not protected by the First Amendment:

- **Legislator's vote**. 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).
- **Lewd, obscene, profane, libelous, and fighting words**. Those are categories of speech wholly outside the protections of the First Amendment. *Chaplinsky v. New Hampshire*, 315 US 568, 571-72 (1942); *Brown v Entertainment Merchants Ass'n*, 131 S Ct 2729 (2011) (obscenity, incitement, and fighting words "have never been thought to raise any Constitutional problem"); *United States v Stevens*, 130 S Ct 1577, 1584 (2010) (certain categories of speech fall outside First Amendment protection precisely *because of* their content: obscenity, defamation, fraud, incitement, and speech integral to criminal conduct).
- **Lying**. 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); *Gertz v Robert Welch, Inc*., 418 US 323, 340 (1974); and *R.A.V. v City of St. Paul*, 505 US 377, 391-92 (1992).
- **Child Pornography**. Pornography produced with real children is not protected by the First Amendment. *Ashcroft v Free Speech Coalition*, 535 US 234, 245-46 (2002).

4. Free Exercise and Free Speech

Johnson v Williams, 2011 WL 6778711 (D. Or 2011) (Hernandez) A prison inmate brought this section 1893 action after he was disciplined and fined $75 for sending mail with swastikas to an inmate at another prison. He argued that a swastika is no different than a Star of David. On the mail, he also drew skulls with swastikas, "Heil Hitler" by number "88," lightning bolts for Hitler's paramilitary group, and other white skinhead supremacist symbols. Prison officials explained the security threat that such expressions can cause in prisons and that such symbols on mail violated a specific rule. The trial court concluded that the inmate's First Amendment rights were not violated by the prison confiscating and disciplining the inmate for the swastika drawings based on the four factors in *Turner v Safley*, 482 US 78 (1987). The trial court explained that "even if the drawing contained only swastikas with skulls * * * such symbols are presently so closely related to the White supremacist movement that the drawing can be described as threatening to certain populations within the prison."

The inmate also contended that prison officials denied his right to free exercise of his religion. The inmate is a satanist. Specifically he wanted a copy of "The Satanic Bible" by Anton LaVey and other publications by the "Church of Satan." The prison considered it a threat to safety and moved for summary judgment. The court agreed with the inmates based on the uncontradicted declaration of prison staff and other courts' cases. A prison official explained what the "Satanic Bible" is:

> "A Satanist is advised by the Satanic bible to perform any act according to his desire. * * * The Satanist is encouraged to follow personal temptation even if the fulfillment of that temptation conflicts with authorities. Furthermore, the Satanist is informed that the authorities are wrong and have no right to restrain the Satanist's desire. This means it is sanctioned for the Satanist to steal someone else's property, take another person to fulfill personal lust, or destroy any person who has wronged the Satanist."

The Satanic Bible advocates, among other things: antagonism to anyone who believes differently than the satanist, defiance of authority, casting of spells and magic, "total disregard for the lives and well-being of others," and human sacrifice. Other courts addressing this free-exercise issue have recognized that the Satanic Bible advocates preying on the weak, vengeance, advocacy that the weak exist to serve the strong, bodily impulses are to be pursued, and mutilation and murder of anyone the satanist believes are enemies is acceptable.

The inmate here did not disagree with that characterization of the Satanic Bible. Based on the four *Turner* factors, the court here concluded that the prison's prohibition on the Satanic Bible is reasonably related to the prison's legitimate interests in security and safety. Summary judgment for the prison granted on all First Amendment claims.

Prison Legal News v Columbia County, 2012 WL 1936108 (D Or 5/29/12) (Simon) An Oregon prison has a policy restricting inmates' personal mail to "postcards only" for incoming and outgoing mail. Plaintiff is a newspaper publisher that sued on inmates' behalf seeking injunctive relief from that policy (and an earlier policy that the prison had changed) for First Amendment violations. The district court concluded that the publisher has standing and also has standing under the "overbreadth doctrine" which does not require a plaintiff to show that its own First Amendment rights are violated, but only its own injury-in-fact from the policy. As to the substance, publishers have a First Amendment right to communicate with prisoners by mail, and prisoners have a First Amendment right to receive that mail. A prison may regulate such mail if the regulation is "reasonably related to legitimate penological interests" under *Turner v Safley*, 482 US 78, 89 (1987). Applying the four Turner factors, the court here concluded that the plaintiff is likely to succeed on the merits with its free speech conclusion because "the postcard-only mail policy blocks one narrow avenue for the introduction of contraband – inside envelopes – at too great an expense of the First Amendment rights of inmates and their correspondents." The preliminary injunction is granted in part and denied in part.

OSU Student Alliance v Ray et al (6:09 cv-6269 AA) (9th Cir 10/12/12) (Tashima, Bea, with Ikuta dissenting) A conservative student group at OSU printed The students did not accept OSU funds to publish their newspaper, instead receiving "private donations." The students distributed their newspaper in 7 or 8 bins on the OSU campus. The bins were secured with bicycle locks. All disappeared. The student editors called the police. Police determined that OSU's Facilities Department had cut the locks, confiscated the bins and papers "like a thief in the night" and dumped them in a heap. The editors found the dump and broken bin(s). The OSU Facilities person said they were "catching up" on an unwritten policy prohibiting news bins from being placed anywhere except two designated places. The editor-in-chief complained to Ed Ray, the President of OSU, who said this was "news to him." Eventually the editor was told that the purpose of the policy was to keep the campus clean of "off-campus" publications. Editor said that the paper was written and published by OSU students, so it's not off-campus. Also, OSU did not apply its "cleaning" policy against other papers, such as the traditional student newspaper or USA Today, etc, which were distributed in bins all over campus. OSU officials told the editor that the conservative paper could be place in only two

designated places. After more emails, an OSU in-house attorney wrote that "there is no specific written policy . . . and none is required." The other student newspaper could put its publications around because it existed since 1896, the attorney said, and this other (conservative) newspaper is not entitled to the same bin locations as the traditional paper. The conservative paper attempted to draft an alternative policy, but OSU refused it. The in-house attorney wrote that the policy was constitutional, not arbitrary. Plaintiffs brought this section 1983 action for violations of free speech, equal protection, and due process, seeking injunctive and declaratory relief and damages. OSU then adopted a written policy on newspaper bins that now does not distinguish between the types of publications. The district court dismissed as moot the claims for equitable relief, and dismissed the damages claims, and denied leave to amend the complaint. Plaintiffs appealed only the dismissal of the damages claim and denial of leave to amend.

The Ninth Circuit panel reversed, having "little trouble finding constitutional violations." The lengthier issue is individual liability, who are senior University officials (Ed Ray, Mark McCambridge, Larry Roper, Vincent Martorello). (Only the First Amendment issue is addressed here).

Circulation of newspapers is expressive conducted that the First Amendment protects, City of Lakewood v Plain Dealer Publishing Co., 486 US 750, 760 (1988). If it is regulated, it must be through "established, content-neutral standards." There are four categories of fora for First Amendment analysis: public, designated public, and nonpublic, and "a fourth category, the limited public forum, which is a partially designated public forum." "OSU's campus is at least a designated public forum" based on an OAR. The panel then stated: "OSU campus is a public forum." The step then is to determine "the rule of *Plain Dealer*" which is that "restrictions on newspaper circulation in public fora are unconstitutional unless enforced according to established, content-neutral standards."

"The policy that OSU enforced against plaintiffs * * * was not merely unwritten" but it "was also unannounced and had no history of enforcement. It materialized like a bolt out of the blue to smite" the conservative paper's - but not the traditional paper's - newsbins "into the trash heap. The policy created no standards to cabin discretion through content or history of enforcement, and it set no fixed standard for a distinction" between the two papers. "The policy's enforcement against plaintiffs therefore violated the First Amendment." The in-house attorney's invocation of "on-campus" versus "off-campus" publications "have clear constitutional flaws" that "raise the ominous specter of viewpoint discrimination." The most obvious flaw is the timing: OSU "offered the explanations only after the confiscation, in an effort to justify the University's application of an unannounced and unenforced policy," thus the explanations "cannot be distinguished from *post hoc* rationalizations." This "'policy's' lack of established standards" – it "was not written or otherwise established by practice" – "meant that there were no standards" and "left [officials] with unbridled discretion." OSU, however, did "not cite Plain Dealer or make any argument about the policy's lack of standards. Instead, they defend the policy as a valid time, place, [and] manner restriction. But a speech restriction cannot satisfy the time, place, [and] manner test if the restriction does not contain clear standards. To identify just one problem, the time, place, and manner test requires content neutrality. * * * One cannot tell if OSU's unwritten policy was content-neutral because the policy did not disclose the basis on which it distinguished between publications. * * * OSU's standardless policy cannot qualify as a valid time, place, and manner restriction."

In sum, the complaint adequately pleaded a First Amendment violation (standardless policy and engaging in viewpoint discrimination). The complaint also stated equal

protection claims for differential treatment that trenched upon a fundamental right and a due process violation for confiscating property without notice "more like a 'thief in the night' than a 'conscientious public servant.'" Some of the claims against some of the individual defendants were dismissed (all as against Roper, due process as against Ray and McCambridge dismissed, but the First Amendment and Equal Protection claims against Martorello, Ray, and Cambridge remain).

5. Free Exercise: Ministerial Exception

Hosanna-Tabor Evangelical Lutheran Church and School v EEOC, 132 S Ct 694 (01/11/12) (Roberts for unanimous Court; Thomas concurring; Alito concurring with Kagan) This case is an employment discrimination suit on behalf of a minister, challenging her church's decision to fire her. The Court reasoned that society has an interest in enforcing discrimination statutes and religious groups have an interest in choosing who preaches, teaches, and carries out their mission. The Court concluded that when "a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way. The Court held "only that the ministerial exception bars such a suit." The Court expressed "no view on whether the exception bars other types of suits."

(Note the Court's interesting statement that "the First Amendment has struck the balance for us," as if the text of the First Amendment expressly says so, rather than US Supreme Court interpretations saying so.).

The Court referred back to 1215, "in the very first clause of Magna Carta," wherein King John agreed that the English church shall be free, and shall have its rights undiminished and its liberties unimpaired." That did not survive the reign on Henry VIII, who in 1534 made the English monarch the supreme head of the Church and gave him authority to appoint the Church's high officials. The Court cited the Puritans' "escape" to New England, where they "fled" to establish their own worship. The Southern colonists brought the Church of England with them. But "it was against this background that the First Amendment was adopted. Familiar with life under the established Church of England, the founding generation sought to foreclose the possibility of a national church." "The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."

This is the first case where the Court has recognized a "ministerial exception" grounded in the First Amendment, "that precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers." All federal Courts of Appeals have recognized it. By requiring a church to accept an unwanted minister, the Court would interfere with the internal governance of the church and infringe on the Free Exercise Clause that protects a religious group's right to shape its own faith and mission through its appointments.

The Court distinguished this case from *Employment Division of Oregon v Smith*, 494 US 872 (1990) (Oregon did not violate the Free Exercise Clause by denying state unemployment benefits to two Native Americans who had used peyote as sacrament when the prohibition is a valid and neutral law). A "church's selection of its ministers is unlike an individual's ingestion of peyote" because banning the use of drugs regulates "only outward physical acts." In contrast, this case involves "interference with an internal church decision that affects the faith and mission of the church itself."

E. 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 "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." *Id*. at 625-27.

The Second Amendment applies to the States and to local regulation of firearms. *McDonald v City of Chicago*, 130 S Ct 3020, 3026 (2010).

Professor Akhil Amar posits that in Article I, section 8, 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.

Cf. Hightower v City of Boston, 693 F3d 61 (1st Cir 8/30/12) A police officer applied for a Massachusetts concealed handgun license renewal but untruthfully wrote that she had no pending charges against her. Her license for the weapons permit was revoked because she was deemed unsuitable based on her misrepresentation. She sued in federal court alleging as-applied and facial Second Amendment claims, equal protection, due process, and other claims. The district court dismissed her case. The First Circuit affirmed. 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." This court cited Fourth Amendment precedent in declining to "reach the question of what standard of scrutiny applies here" and "how Heller applies to possession of firearms outside of the home" because "the whole matter is a 'vast terra incognita that courts should enter only upon necessity and only then by small degree.'" (Quoting *United States v Masciandaro*, 638 F3d 458, 475 (4th Cir 2011)). This court also rejected her argument that First Amendment overbreadth and prior restraint doctrines should be imported into Second Amendment analysis to support her facial attack on the Massachusetts concealed weapons licensing law.

United States v Henry, 668 F3d 637 (9th Cir 8/09/12) (Smith, Goodwin, Fletcher) (D. Alaska) The Ninth Circuit panel affirmed the district court's judgment of conviction against defendant for illegally possessing a homemade machine gun. Under *District of Columbia v Heller*, 554 US 570, 627 (2008), machine guns are "dangerous and unusual weapons" that the Second Amendment does not protect. The district court properly concluded that Congress does have power under the Commerce Clause to regulate possession of homemade machine guns – even those that have not entered interstate commerce – because they "can enter the interstate market and affect

supply and demand." (The Ninth Circuit becomes the ninth circuit to make that conclusion, with the First, Fourth, and D.C. Circuits apparently not having addressed the issue yet).

In this case, defendant was arraigned for discharging firearms while intoxicated. The state found a loaded .308-caliber assault rifle and an empty magazine under his bed. The state declined to prosecute him. Then the federal ATF examined that rifle, executed its own warrant, and discovered 20 guns, gun parts, and conversion manuals and machine gun conversion parts in his home. The Ninth Circuit panel here noted that *Heller* did not specify what weapons were "dangerous and unusual" so as to be unprotected by the Second Amendment, but since *Heller*, "every circuit court to address the issue has held that there is no Second Amendment right to possess a machine gun." The panel here cited sources tracing machine guns back to WWI, noting that a "modern machine gun can fire more than 1,000 rounds per minute, allowing a shooter to kill dozens of people within a matter of seconds." (The panel did not reference anything about the fire power of this particular defendant's machine gun). The panel stated: "Thus, we hold that the Second Amendment does not apply to machine guns."

F. Fourth Amendment

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

1. Application to the States

The rights in the Fourth Amendment apply to the states through the due process clause of the Fourteenth Amendment, see *Aguilar v Texas*, 378 US 108 (1964) (warrants); *Mapp v Ohio*, 367 US 643 (1961) (exclusionary rule); *Wolf v Colorado*, 338 US 25 (1949) (unreasonable searches and seizures). *McDonald v City of Chicago*, 130 S Ct 1316, 3034 n 12 (2010) (so stating).

2. Two Components

"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*, 131 S Ct 1849 (2011).

United States v Jones, 132 S Ct 945 (01/23/12) (Scalia for a unanimous court with concurring opinions) Based on visual and wiretap evidence, the government applied to the federal district court for a warrant authorizing the use of a GPS tracking device on defendant's Jeep. The court authorized a warrant but it was valid for only 10 days and it was only valid in the District of Columbia. On the 11th day in an entirely separate jurisdiction (Maryland), agents installed the GPS device on the Jeep on a public lot. The government concedes that noncompliance with the warrant and argues only that no warrant was required (the government did not argue that it could have been a "reasonable search"). The government tracked the Jeep for 28 days and replaced the battery once during that time on a public lot. The device shows the Jeep's location,

within 50 or 100 feet, and communicated that location by a cell phone to a government computer. It relayed over 2000 pages of data. Defendant was charged with numerous counts of distribution cocaine and cocaine base. He moved to suppress all the evidence from the GPS device. The district court granted the motion only to the extent that data was obtained while the Jeep was at defendant's house. When the Jeep was on public ways, it had no reasonable expectation of privacy, per the district court. Defendant eventually was convicted and he was sentenced to life in prison. The D.C. Circuit reversed the conviction on grounds that the warrantless GPS device violated the Fourth Amendment. The United States Supreme Court affirmed.

Held: "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'" "The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion 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). This 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." (Footnote 3 (emphasis in original)).

Florence v Board of Chosen Freeholders, 132 S Ct 1510 (4/02/12) (Kennedy with concurrences and with Breyer, Ginsburg, Sotomayor, and Kagan dissenting) 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 hiding drugs or weapons, or harboring lice, scabies, viruses, or infectious wounds, or have gang tattoos. 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. Such strip search/visual inspection policies are reasonable because arrestees have been found to conceal "knives, scissors, razor blades, glass shards" and money, cigarettes, clothing, "a lighter, tobacco, tattoo needles" in their body cavities, and "taped under [a]scrotum:" "2 dime gas of weed, 1 pack of rolling papers, 20 matches, and 5 sleeping pills". When people are booked into jails, police do not necessarily have a criminal history, and people booked on minor offenses can be quite dangerous, such as Tim McVeigh (pulled over for a traffic infraction). Even people booked for very minor offenses may be required to undergo this booking procedure. In sum: "Jails are often crowded, unsanitary, and dangerous places."

This case, and the policies at issue in it, do 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."

United States v Pineda-Moreno, 688 F3d 1087 (9th Cir 2012) On remand from the United States Supreme Court, evidence gathered from agents attaching a tracking device on defendant's vehicle in public places was gathered within existing circuit precedent, and evidence derived from a device attached to defendant's vehicle in his own driveway was cumulative.

Lavan v City of Los Angeles, 693 F3d 1022 (9th Cir 9/05/12) (Wardlaw, Reinhardt with Callahan dissenting) Nine homeless people living in Skid Row temporarily left their personal property on the public sidewalks while they ate, showered, and used

restrooms. City employees knew the people had not abandoned their property but seized and destroyed the plaintiffs' collapsible mobile shelters and carts and contents, which included electronics, birth certificates, personal ID, toiletries, medications, legal documents, bicycles, and the like. The City did not believe that the plaintiffs' possessions were abandoned and actually seized some items while plaintiffs implored the City employees not to destroy their belongings. The district court entered a temporary restraining order and a preliminary injunction against the City's seizures, thereby allowing the City to seize only property that was (1) abandoned, (2) presented an immediate threat to public health or safety (trash and hazardous debris), (3) evidence of a crime, or (4) contraband. Any property seized (except health hazards) had to be retained for at least 90 days.

The Ninth Circuit panel affirmed. "The City's only argument on appeal is that its seizure and destruction of Appellee's unabandoned property implicates neither the Fourth nor the Fourteenth Amendments." The City based "its entire theory" on the idea that the homeless "have no legitimate expectation of privacy in property left unattended on a public sidewalk" in violation of a city code provision. Here the panel recited black-letter Fourth Amendment law from *United States v Jacobsen*, 466 US 109, 113 (1984): "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." A person "need not show a reasonable expectation of privacy to enjoy the protection of the Fourth Amendment against seizures of their unabandoned property." (Emphasis in opinion). "Here, by seizing and destroying Appellees' unabandoned legal papers, shelters, and personal effects, the City meaningful interfered with Appellees' possessory interests in that property. No more is necessary to trigger the Fourth Amendment's reasonableness requirement." The City did not argue that its destruction of the personal property was reasonable. The district court properly balanced the invasion of property interests in the belongings against the City's reasons for taking the property. Even "if the seizure of the property would have been deemed reasonable had the City held it for return to its owner instead of immediately destroying it, the City's destruction of the property rendered the seizure unreasonable."

As for due process: the government must announce its intent and give property owners a chance to argue against the taking. "This simple rule holds regardless of whether the property in question is an Escalade or [a mobile shelter], a Cadillac or a cart. The City demonstrates that it completely misunderstands the role of due process by its contrary suggestion that homeless persons instantly and permanently lose any protected property interest in their possessions by leaving them momentarily unattended* * * . the City's suggestion would also allow it to seize and destroy cars parked in no-parking zones momentarily unattended."

3. Exceptions Under Fourth Amendment

Community Caretaking

An Oregon statute, ORS 133.033, allows officers to perform certain "community caretaking functions" under situations listed in the statute. That statute is limited by Article I, section 9. But there "is no community caretaking exception under the Oregon Constitution." *State v Bridewell*, 306 Or 231, 239-40 (1988); *State v Christenson*, 181 Or App 345 (2002).

State v ONeill, 251 Or App 424 (7/25/12) (Sercombe, Ortega, Brewer) Under the Fourth Amendment, there is a "community caretaking" exception to the warrant requirement. In this case, defendant was pulled over for a traffic infraction; he parked in a retail store parking lot in a high-crime area known for vehicle break-ins. Officer found

that defendant had a suspended license, the car was uninsured, and defendant was not the registered owner. Defendant called a friend to retrieve the car. Officer decided to impound and tow the car under the Clackamas County Code and did not even consider leaving the car in that parking lot due to the crime rate there. Officer inventoried the car, found "valuables," meth and needles, defendant took responsibility for it, the officer called the owner who said that defendant was the primary user of that car. Defendant's friend arrived to take the car, but the officer did not give the car to the friend because she was not the owner. Defendant was arrested.

Only the impoundment is at issue (not the inventory). Defendant move to suppress the evidence. The trial court denied that motion under the Fourth Amendment's "community caretaking" exception. The Court of Appeals affirmed, string-citing numerous federal appellate cases for the point that "impoundment may be justified by the need to protect the car from damage or theft." In the high-crime area known for break-ins, with valuable property in the car, "it was reasonable for the officer to impound the car."

G. Fifth Amendment

> "**No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation**." -- Fifth Amendment, US Const

Note: The Oregon Constitution does not have a due process clause. *State v Miller*, 327 Or 622, 635 n 10 (1998) (so noting).

1. Application to the states

Most of the rights in the Fifth Amendment apply to the States through the due process clause of the Fourteenth Amendment, see *Benton v Maryland*, 395 US 784 (1969) (double jeopardy); *Malloy v Hogan*, 378 US 1 (1964) (privilege against self-incrimination); *Chicago, B&Q R. Co. v Chicago*, 166 US 226 (1897) (just compensation). *McDonald v City of Chicago*, 130 S Ct 1316, 3034 n 12 (2010) (so reciting). The Fifth Amendment's grand-jury indictment requirement has not been fully incorporated to the states but the "governing decisions regarding the Grand Jury Clause of the Fifth Amendment * * * long predate[s] the era of selective incorporation." *McDonald*, 130 S Ct 1316, 3034-35 n 12 and 13 (so stating, without citing any cases).

2. Fifth Amendment Privilege Against Self-Incrimination

The Oregon Court of Appeals has collated the following Fifth Amendment protections against self-incrimination in *Redwine v Starboard LLC and Sawyer*, 240 Or App 673 (2011):

> —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).

H. Sixth Amendment

> "**In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.**" -- Sixth Amendment, US Const

1. Application to the States

Most, but not all, of the rights in the Sixth Amendment apply to the States through the due process clause of the Fourteenth Amendment: *Duncan v Louisiana*, 391 US 145 (1968) (trial by jury in criminal cases); *Washington v Texas*, 388 US 14 (1967) (compulsory process); *Klopfer v North Carolina*, 386 US 213 (1967) (speedy trial); *Pointer v Texas*, 380 US 400, 403 (1965) (right to confront adverse witnesses); *Gideon v Wainwright*, 372 US 335 (1963) (assistance of counsel); *In re Oliver*, 333 US 257 (1948) (right to a public trial). *McDonald v City of Chicago*, 130 S Ct 1316, 3034 n 12 (2010) (so reciting those cases).

2. Jury

A person charged with a serious offense has a fundamental right to a trial by jury. *Duncan v Louisiana*, 391 US 145, 157-58 (1968). That includes the right to trial by a jury that is drawn from a fair cross-section of the community. *Taylor v Louisiana*, 419 US 522, 530 (1975).

Although the Sixth Amendment requires a unanimous jury verdict in federal criminal trials, it does not require a unanimous jury verdict in state criminal trials, see *Apodaca v*

Oregon, 406 US 404 (1972) and *Johnson v Louisiana*, 406 US 356 (1972). *McDonald*, 130 S Ct at 3035 n 14 (so stating).

Oregon requires that jurors must be proficient in English or they do not qualify as jurors. That requirement does not violate the Sixth Amendment, the Due Process Clause, or the Equal Protection Clause. Likewise, Oregon's decision not to pay for interpreters for jurors does not violate the Sixth or Fourteenth Amendments. *State v Haugen*, 349 Or 174 (2010).

3. Cross-Examination

The Sixth Amendment protects defendant's opportunity to engage in effective cross-examination, which may not necessarily be defendant's desired cross-examination. *Delaware v Van Arsdall*, 475 US 673, 679 (1986).

4. Confrontation

The Confrontation Clause prohibits out-of-court statements that are "testimonial" unless the declarant is unavailable and defendant has had a prior opportunity to cross-examine the declarant about the statements. *Crawford v Washington*, 541 US 36, 53-54, 59, 68 (2004).

Sworn certificates: sworn certificates prepared by law enforcement to show the forensic results of seized substances are "testimonial." *Melendez-Diaz v Massachusetts*, 557 US 305 (2009). Therefore, a witness's testimony against a defendant is inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. *Melendez-Diaz* (quoting *Crawford v Washington*, 541 US 36, 54 (2004)).

Lab reports: That standard includes a lab report showing the results of a forensic analysis performed on a seized substance and a forensic lab report with a testimonial certification if it is made to prove a fact at a criminal trial, and if it is made through the in-court testimony of an analyst who neither signed the certification nor personally performed or observed the performance of the test reported in the certification. *Bullcoming v New Mexico*, 131 S Ct 2705 (2011).

Note: The *Melendez-Diaz* majority, 557 US 305, 129 S Ct at 2538-39 (citing *Palmer v Hoffman*, 318 US 109 (1943)), wrote that, in contrast with a clerk or custodian's certificate attesting to a fact, business and public records are generally admissible because (if) they were created for administrative purposes, rather than to establish some fact for a criminal trial; those are not testimonial under the Sixth Amendment. But the majority in *Bullcoming v New Mexico*, 131 S Ct 2705, 2714 n 6 (2011), did not agree on defining a "testimonial report" based on the primary purpose of its creation.

Williams v Illinois, 132 S Ct 2221 (6/18/12) (Alito for plurality, Kagan for dissent (Scalia, Ginsburg, Sotomayor joined)) In a bench trial for a violent rape, the survivor identified defendant as the attacker. Also, the state's lab expert testified that she ran a computer search of DNA materials and matched a DNA profile from an outside lab (Cellmark) to a DNA profile of defendant's blood from her (state) lab. At trial, the state expert testified that the outside lab was accredited and business records showed that the victim's swabs had been sent to & returned from that outside lab. The prosecutor did not ask what the outside lab did, but rather she asked her expert about the expert's own DNA testing and matching. The question was:

> "*Did you compare the semen that had been identified by [another state lab expert] from the vaginal swabs of [victim] to the male DNA profile that had been identified by [another state lab expert' from the blood of [defendant]?*"

The expert answered "yes there was" and again "yes" to the question whether there was a match of DNA. The outside lab report itself was neither admitted nor shown to the factfinder (a judge). Over defendant's objection that her testimony violated Confrontation Clause rights, the trial court admitted that expert scientific testimony and found defendant guilty. The state intermediate and supreme courts affirmed.

The US Supreme Court affirmed. An expert witness may state an opinion based on facts about the events even if the expert lacks first-hand knowledge of those facts, as a long tradition in English since at least 1807, and American courts at least since 1887, permits experts to testify as to "hypothetical questions." Also defendant's confrontation rights were not violated when the expert answered "yes" to the prosecutor's questions at trial about whether there was a DNA match between the DNA from the state's lab and the outside lab. The expert made no other reference to the outside lab report other than that it was accredited and she had sent forensic samples to it and it sent samples back.

This holding is "entirely consistent with *Bullcoming* and *Melendez-Diaz*. In those cases, the forensic reports were introduced into evidence, and there is no question that this was done for the purpose of proving the truth of what they asserted: in *Bullcoming* the defendant's blood alcohol level exceeded the legal limit and in *Melendez-Diaz* that the substance in question contained cocaine. Nothing comparable happened here. In this case, the Cellmark report was not introduced into evidence. An expert witness referred to the report not to prove the truth of the matter asserted in the report * * * but only to establish that the report contained a DNA profile that matched the DNA profile deduced from petitioner's blood." This report was not to be considered for its truth but only to see "whether it matched something else." Not all forensic reports fall into the same category. This outside lab report plainly was not prepared for the primary purpose of accusing a targeted individual or for use at trial. Rather, "its primary purpose was to catch a dangerous rapist who was still at large, not to obtain evidence for use against petitioner, who was neither in custody nor under suspicion at that time." In sum: "no Confrontation Clause violation."

State v Glass, 246 Or App 698 (12/07/11) (Brewer, Edmonds) (Multnomah) The state gave defendant timely statutory notice before trial that it intended to introduce a laboratory report to prove that the substance it seized from him was cocaine. Defendant did not object. That statute, ORS 475.245(2) provides:

> "If the defendant intends to object at trial to the admission of a certified copy of an analytical report as provided in subsection (4) of this section, not less than 15 days prior to trial the defendant shall file written notice of the objection with the court and serve a copy of the district attorney."

The statute also provides that a certified copy of an analytical report "shall be admitted as prima facie evidence of the results * * * unless the defendant has provided notice of an objection" under the statute. When the trial court admitted the lab report into evidence, defendant objected that his Sixth Amendment rights were violated, per *Melendez-Diaz v Massachusetts*, 557 US 305 (2009).

The Court of Appeals affirmed, block-quoting *Melendez-Diaz*:

> "In their simplest form, notice-and-demand statutes require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence

> at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial. * * * [T]hese statutes shift no burden whatever. The defendant *always* has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the *time* within which he must do so. States are free to adopt procedural rules governing objections." (Emphasis in *Melendez-Diaz*).

Here, "ORS 475.245 is precisely the type of notice-and-demand statute of which the Court explicitly approved in *Melendez-Diaz*."

State v Everett, 249 Or App 139 (3/28/12) (Nakamoto, Schuman, Wollheim) (Clackamas) Defendant attempted to run over a sheriff's deputy with his car. In this prosecution, a member of the "Outsiders Motorcycle Club" was called as a witness based on his role as a gang enforcer who "straightened out" rules violators. Defendant solicited the enforcer to murder the sheriff's deputy so she could not testify at his trial. The enforcer informed the sheriff's department about that solicitation and his statements were videotaped. Defendant was convicted of the charges, then the grand jury indicted him for soliciting the murder of the sheriff's deputy. The gang enforcer's name was listed on the grand jury indictment. Defendant decided to have the Outsiders "take care of their own" and "get rid" of the gang enforcer for "ratting him out," so he told another inmate to get him the grand jury indictment and the DVD. That other inmate was a police informant who told the sheriff's department. The state charged defendant with solicitation to commit murder of the gang enforcer, in addition to the charge for soliciting the murder of the sheriff's deputy he had tried to kill himself earlier. At trial, the gang enforcer testified about his prior assault convictions and that he was an enforcer, and that he had committed crimes as an enforcer, and he stated that he has cooperated with police and in so doing risks getting killed. The defense attorney asked him if he had ever killed anyone and he invoked the Fifth Amendment. The defense moved to strike all of his testimony on grounds that unless he could adequately cross-examine the gang enforcer, defendant's confrontation rights were violated. The trial court denied the motion and later denied his motion for a mistrial.

The Court of Appeals affirmed. "The Confrontation Clause guarantees only the 'opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" (Citations omitted). Here, the witness's trial testimony was not an out-of-court statement, so *Crawford* does not apply to it. Also, the witness was cross-examined about his direct testimony. Thus no abuse of discretion when trial court denied defendant's motion to strike the witness's testimony and his motion for a mistrial. Defendant did not argue his state confrontation rights on appeal.

5. Judicial Factfinding and Sentencing

"Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v New Jersey*, 530 US 466, 490 (2000). The "statutory maximum" for *Apprendi* is the maximum sentence a judge may impose solely on the facts in the jury verdict or as defendant admits. *Blakely v Washington*, 542 US 296, 303 (2004). This rule preserves the "historic jury function" to determine if the prosecution has proved each element of an offense beyond a reasonable doubt." *Oregon v Ice*, 555 US 160, 163 (2009).

"When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding." *Blakely v Washington*, 542 US 296 (2004).

Apprendi applies to criminal fines. "So far as *Apprendi* is concerned, the relevant question is the significance of the fine from the perspective of the Sixth Amendment's jury trial guarantee. Where a fine is substantial enough to trigger that right, *Apprendi* applies in full." *Southern Union Co. v United State*s, (6/21/12).

Southern Union Company v United States, 132 S Ct 2344 (6/21/12) (Sotomayor with Breyer, Kennedy, and Alito dissenting) Held: *Apprendi* applies to criminal fines. The Company in this case distributes natural gas. It stored liquid mercury without a permit. Children broke in, played with the liquid mercury, spread it around a nearby apartment complex, and residents were then displaced during cleanup and testing for mercury poisoning. A grand jury indicted the Company for knowingly storing liquid mercury "from on or about September 19, 2002 until on or about October 19, 2004." A trial jury convicted the Company of that count on a jury verdict form that stated the same time frame. The federal judge sentenced the Company under the federal statute that provides for $50,000 per day for each violation. The time frame in the indictment and jury form covers 762 days, so the probation office set a fine of $38.1 million. The Company objected that the jury was not asked to determine the duration of the violation, and the verdict form allowed for a conviction based on just one day, so the district court could not sentence the Company to more than $50,000 under *Apprendi*. The government argued that *Apprendi* did not apply to criminal fines. The district court concluded that *Apprendi* does apply to criminal fines but based on the "content and context of the verdict all together," that the jury had found a 762-day violation and imposed a fine of $6 million with a $12 million community service obligation. The First Circuit affirmed the sentence but only because it held that *Apprendi* does not apply to criminal fines.

The US Supreme Court reversed: *Apprendi* applies to criminal fines. "Criminal fines, like these other forms of punishment, are penalties inflicted by the sovereign for the commission of offenses. Fines were by far the most common form of noncapital punishment in colonial America." The Court's post-*Apprendi* cases "broadly prohibit judicial factfinding" that increases criminal sentences, penalties, punishments – "terms that each undeniably embrace fines."

The States "are free to enact statutes that constrain judges' discretion in sentencing – Apprendi requires only that such provisions be administered in conformance with the Sixth Amendment." The government's arguments, that requiring juries to figure out "fines" is impractical, confusing, and prejudicial to defendants, are just rehearsing the same arguments made over the past 10 years.

"So far as *Apprendi* is concerned, the relevant question is the significance of the fine from the perspective of the Sixth Amendment's jury trial guarantee. Where a fine is substantial enough to trigger that right, *Apprendi* applies in full."

As for petty fines and sentences: "Where a fine is so insubstantial that the underlying offense is considered 'petty,' the Sixth Amendment right of jury trial is not triggered, and no *Apprendi* issue arises." (Citing *Muniz v Hoffman*, 422 US 454, 477 (1975) which held that a $10,000 fine imposed on a labor union did not entitle the union to a jury trial). "The same, of course, is true of offenses punishable by relatively brief terms of imprisonment – these, too, do not entitle a defendant to a jury trial." *Ibid*. (citing *Blanton v North Las Vegas*, 489 US 538, 542-43 (1989) which established a rebuttable presumption that offenses punishable by 6 months' imprisonment or less are petty).

Note: In Oregon, trial courts must secure written jury waivers to allow for judicial factfinding in for both guilt-phase and sentencing-enhancement, under ORS 136.776.

Trial courts may accept jury waivers that pertain to guilt only if the jury waiver addresses sentencing enhancement factors. *State v Lafferty*, 240 Or App 564 (2011).

6. Plea Bargaining

"[T]here is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial." *Weatherford v Bursey,* 429 US 545, 561 (1977).

Defendants have a Sixth Amendment right to counsel that extends to the plea-bargaining process. *Padilla v Kentucky*, 130 S Ct 1473 (2010).

Missouri v Frey and ***Lafler v Cooper***, 132 S Ct 1399 (3/21/12) (Kennedy, Ginsburg, Breyer, Sotomayor, Kagan) In Frye, defense counsel received a plea offer but did not inform defendant of that plea offer, and defendant pleaded guilty to more severe terms than the plea offer contained. In Cooper, defendant rejected a plea offer of 51-85 months, on his counsel's bad advice that all agree fell below Sixth Amendment standards of adequate assistance of counsel. He then had a full and fair jury trial, in which the jury found him guilty, and he was sentenced to a harsher sentence than he had been offered in the plea bargain (185 – 360 months' mandatory imprisonment).

Held: Where counsel's ineffective advice led to an offer's rejection, and where prejudice alleged is having to go to trial, a defendant must show that but for the ineffective advice, there is a reasonable probability that the plea offer would have been presented to the court, that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than the actual judgment and sentence imposed.

"The fact that respondent is guilty does not mean he was not entitled by the Sixth Amendment to effective assistance or that he suffered no prejudice from his attorney's deficient performance during plea bargaining." The state's position here that a "fair trial wipes clean any deficient performance by defense counsel during plea bargaining * * * ignores the reality that criminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."

In sum, respondent may establish prejudice under *Strickland v Washington*, 466 US 668 (1984) while conceding the fairness of his conviction, sentence, and appeal. As a remedy, on remand, the state must reoffer its plea agreement that defendant rejected (due to counsel's bad advice) and the state trial court may exercise its discretion (1) to determine whether to vacate defendant's convictions and resentence him under the plea agreement, or (2) vacate just part of the convictions and resentence him, or (3) leave the convictions and sentence from the trial undisturbed.

I. Eighth Amendment

> "**Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted**." -- Eighth Amendment, US Const

1. Application to the States

The cruel and unusual punishment prohibition in the Eighth Amendment applies to the states through the due process clause of the Fourteenth Amendment. *Robinson*

v California, 370 US 660 (1962); *McDonald v City of Chicago*, 130 S Ct 1316, 3034 n 12 (2010).

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). But the US Supreme Court has not decided whether the Eighth Amendment's prohibition on excessive fines applies to the states through the Fourteenth Amendment. *McDonald*, 130 S Ct at 3035 n 13 (citing *Browning-Ferris Indust. v Kelco Disposal, Inc.*, 492 US 257, 276 n 22 (1989)).

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).

Miller v Alabama and ***Jackson v Hobbs***, 132 S Ct 2455 (6/25/12) (Kagan for majority, Roberts for dissent with Scalia, Thomas, Alito). In these two combined cases, two 14 year olds (who the majority calls "children," "juveniles," and "offenders" and who the dissent calls "murderers") were convicted of murder and sentenced to life without the possibility of parole. "State law mandated that each juvenile die in prison even if a judge or jury would have thought that his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence (for example, life with the possibility of parole) more appropriate." The Court held: "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" ("We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders."). The Court noted these precedents:

> *Thompson v Oklahoma*, 487 US 815 (1988) (plurality), capital punishment of offenders under age 16 violates the Eighth Amendment.
>
> *Roper v Simmons*, 543 US 551 (2005), the Eighth Amendment bars capital punishment for all juveniles under age 18.
>
> *Graham v Florida*, 130 S Ct 2011 (2010), life without parole violates the Eighth Amendment when imposed on juvenile nonhomicide offenders.
>
> *Kennedy v Louisiana*, 554 US 407 (2008), the Eighth Amendment prohibits imposing the death penalty for nonhomicide crimes.
>
> *Atkins v Virginia*, 536 US 304 (2002), the Eighth Amendment prohibits imposing the death penalty on mentally retarded defendants.

Children "are constitutionally different from adults for purposes of sentencing," they "are more vulnerable" to negative outside influences, and their "character" is not as well

formed. This is based "not only on common sense – on what 'any parent knows' – but on science and social science as well." Again: "By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment." In essence now the trial judges will make individualized decisions about minors' sentences after they have been convicted of murder.

Alito dissented: "Nothing in the Constitution supports this arrogation of legislative authority." And "aren't elected representatives more likely than unaccountable judges to reflect changing societal standards?" "Our Eighth Amendment case law is now entirely inward looking" in that "our Eighth Amendment cases are no longer tied to any objective indicia of society's standards." This majority "is saying that members of society must be exposed to the risk that these convicted murderers, if released from custody, will murder again."

3. Excessive Fines

(a). *Criminal in personam*

State v Goodenow, 251 Or App 139 (7/11/12) (Duncan, Armstrong, Haselton) (Jackson) (Petition for review due 11/13/12) Note: The US Supreme Court has not incorporated the Eighth Amendment's Excessive Fines Clause to the States. The court here footnoted that neither party raised the issue so it assumed for this case that the Excessive Fines Clause applies to the States through the Fourteenth Amendment. This case does not involve the state constitution; defendant failed to preserve that issue.

Defendant obtained a Visa card in her boyfriend's dead mother's name, and purchased over $11,000 of lottery tickets and food. One lottery ticket was a $1 million winner. She claimed the prize, payable in $50K annual installments. She used the $33,500 post-tax dollars to pay the Visa bill. A grand jury indicted her for multiple crimes including meth possession and cheating and two counts of "criminal forfeiture" under ORS 131.550 to 131.604 (forfeiture of all proceeds of illegal conduct). Defendant pleaded out to some crimes, others were dismissed. She waived her jury-trial right on the two criminal forfeiture counts and tried them to the court. She argued that forfeiture sought by the state was almost $1 million, which violated the Excessive Fines Clause of the Eighth Amendment under *United States v Bajakajian*, 524 US 321, 337 (1998). The trial court determined that all remaining lottery winnings were subject to forfeiture under Oregon law and did not analyze whether the forfeiture was proportional to the crimes.

The Court of Appeals affirmed in a detailed opinion. It held that defendant's lottery winnings are subject to forfeiture, the Excessive Fines Clause applies to the forfeiture, and the forfeiture did not violate the Excessive Fines Clause. The Excessive Fines Clause "limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense." (citing *Bajakajian*, 425 US at 328). The Clause applies to forfeitures, which are payments in-kind, as punishments. Under *Bajakajian*, "criminal *in personam* forfeitures are subject to the Excessive Fines Clause, even if, historically, the type of property to be forfeited has been subject to civil *in rem* forfeiture as 'guilty property.' In other words, it is the nature of the forfeiture, not the type of property forfeited, that controls whether the forfeiture is subject to the Clause." Here, the court agreed with defendant that "the criminal *in personam* forfeiture of her remaining lottery winnings is punitive, and, therefore, subject to the Excessive Fines Clause" for three reasons: (1) the state sought forfeiture against her personally; (2) the forfeiture was to

punish her (cannot be imposed on an innocent owner) per Oregon statutes; and (3) the forfeiture serves no remedial purpose, it does not compensate anyone for a loss. The court here was "clear:" "we hold that the forfeiture in this case was punitive because it has the same characteristics as the forfeiture in *Bajakajian*" and that the court is "not ruling that those characteristics are required in order for a forfeiture to be punitive. * * * [T]he Supreme Court has held that civil forfeitures can be punitive."

The then determined that the Excessive Fines Clause was not violated in this case. That pivots on "the relationship between the forfeiture and the crime for which it is ordered" under *Bajakajian*, 524 US at 334. The courts are to assess the gravity of the crime with the severity of the forfeiture. "If the forfeiture is 'grossly disproportional' to the gravity of the defendant's crime, then it is unconstitutional" under *Bajakajian*. After reciting the numerous excuses, rationales, and legal argument that defendant presented to argue that the gravity of the crimes exceeds the punishment, the court here noted that the punishment is not only to consider defendant's harm but her gain. She purchased the lottery ticket and over $11,000 in other goods by making unauthorized credit card charges that she had no intent to pay. Forfeiture of her winnings is simply not that severe: "It deprives defendant of a net gain from her crimes but does not inflict a net loss." In sum the court noted that here "the forfeiture is extraordinary, but so were defendant's immediate profits from her criminal conduct. The forfeiture is of those very profits." Affirmed.

(b). ***Civil in rem***

Cf. United States v Ferro, 681 F3d 1105 (6/11/12) (Pregerson, Hawkins, Bea) This is an appeal from the largest civil in rem forfeiture proceeding against a felon-in-possession-of-firearms case in American history. Robert Ferro is a former Army Special Forces Officer and Cuban exile who is part of a "quasimilitary group" bent on overthrowing Fidel Castro. His wife Maria is the claimant in this case. Before trial, he issued a will, giving all of his property to Maria. He was convicted of state crimes for possession of explosives, the ATF denied his application to renew his firearms license, and he lied to Maria by telling her that he legally was allowed to possess firearms even after his conviction. A decade after he got out of prison, ATF agents searched his home and found hundreds of rare and/or gold-plated collectible guns, hand grenades, ammo, machine guns, bullet proof vests, "a military rocket launcher tube" and other firearms worth $2.55 million. Maria did not know they owned all of those weapons. The government filed the present complaint that initiated a civil in rem forfeiture action, see 18 USC § 983. Maria raised the affirmative defense that she is an innocent owner under the statute.

The district court ordered that the government return 10% of the entire value to the claimant in guns or cash. Both the government and Maria appealed. Government wanted to pay back nothing. Maria wanted much more paid back.

In a detailed opinion, the Ninth Circuit panel held that (1) Maria is not entitled to the "innocent owner" defense thus the entire collection was forfeitable as the district court concluded; (2) forfeitures of "instrumentalities of crimes" are subject to excessiveness analysis under the Excessive Fines Clause; (3) excessiveness review must consider the individual culpability of the property owner and "must focus only on the conduct that actually gave rise to the forfeiture," rather than on any "other criminal conduct by the same person." The district court erred on the third point, so the court remanded.

The Ninth Circuit observed that until *United States v Bajakajian*, 524 US 321 (1998), the US Supreme Court had never applied the Excessive Fines Clause to hold that a particular fine was excessive. In 2000, Congress enacted numerous changes to the

federal forfeiture laws. It created a uniform innocent owner defense that applies to almost all civil in rem forfeiture proceedings. It also incorporated *Bajakajian*'s proportionality analysis for excessiveness. The effect of the federal statute on the Excessive Fines Clause for a forfeiture "of this type" is a novel question in the Ninth Circuit. The court held that the innocent owner defense does not apply to the wife here because she knew that her husband was a felon-in-possession. The court also held "that forfeitable property is subject to review under the Excessive Fines Clause even if it can be considered an 'instrumentality' of an offense. * * * [W]e think it clear that all types of civil forfeitures – save perhaps forfeitures of contraband such as unregistered hand grenades or illegal drugs – are subject to review for excessiveness." Finally, "it was error for the district court to focus solely" on the felon's conduct and to not consider Maria's culpability. "The Eighth Amendment's Excessive Fines Clause requires the property owner's culpability to be considered. A 'fine' as used in the Excessive Fines Clause refers to 'a payment to a sovereign as punishment for some offense.'" As the property owner, it is Maria who is forced to "pay the sovereign" and it is the wife who is being punished. Hence the proportionality inquiry must center on the wife's culpability and the various factors mentioned in *United States v $100,348 in Currency*, 354 F3d 1110, 1121 (9th Cir 2004). The Congress may have stated in the relevant law that the relevant inquiry is only the felon's conduct, but "it is here where we must break from the terms of the statute and proceed directly to the Eighth Amendment analysis. While a statute can provide more protection for a defendant than the Constitution requires, it cannot provide less. Because we conclude that the Constitution requires consideration of the culpability of the property's owner, a district court must undertake that analysis, even if it is not required to do so under the statute."

J. Due Process – Fourteenth Amendment

> "**No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.**" -- Fourteenth Amendment, US Const

1. Application to the States

The Fifth Amendment's due process clause applies to the federal government. The Fourteenth Amendment's due process clause applies to the States. *See Dusenbery v United States*, 534 US 161, 167 (2002).

In *McDonald v City of Chicago*, 130 S Ct 3016, 3034-35 n 12-14 (2010), the Court recited the provisions of the first eight amendments in the Bill of Rights that have been selectively incorporated to apply to the states through the Fourteenth Amendment's Due Process Clause. The only rights not fully incorporated are the Sixth Amendment right to a unanimous jury verdict, the Third Amendment's protection against quartering of soldiers (has not been decided), the Fifth Amendment's grand jury indictment requirement ("predates the era of selective incorporation"), the Seventh Amendment's civil jury requirement ("predates the era of selective incorporation"), and the Eighth Amendment's prohibition on excessive fines (has not been decided).

The Oregon Constitution does not contain a due process provision. *State v Faunce*, 251 Or App 58 (2012) (so noting).

2. Defining Procedural versus Substantive Due Process

(a). Interpreted by the U.S. Supreme Court: (Note: this is Fifth – not Fourteenth -- Amendment jurisprudence). "This Court has held that the Due Process Clause protects individuals against two types of government action. So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' *Rochin v California*, 342 US 165, 172 (1952), or interferes with rights 'implicit in the concept of ordered liberty,' *Palko v Connecticut*, 302 US 319, 325-26 (1937). When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. *Mathews v Eldridge*, 424 US 319, 335 (1976). This requirement has traditionally been referred to as 'procedural' due process." *United States v Salerno*, 481 US 739, 746 (describing due process under the Fifth Amendment).

(b). Interpreted by Oregon courts: A procedural due process claim "acknowledges that the state's objective is within its lawful authority, but that the process of achieving that objective does not afford the person who is the subject of the state's action with adequate procedural safeguards such as prior notice and a meaningful hearing. *E.g., Goldberg v Kelly*, 397 US 254 (1970)* * * * * * An argument grounded in substantive due process, on the other hand, asserts that the state's objective is simply beyond its power to achieve, regardless of how many procedural safeguards it might provide. Thus, for example, the state cannot punish a person for using contraception. *Griswold v Connecticut*, 381 US 479 (1965)." *Powell v DLCD*, 238 Or App 678, 682 (2010).

3. Punitive Damages (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.

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 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)).

4. Procedural Due Process

A Fourteenth Amendment procedural due process analysis has two steps: "the first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *Kentucky Dep't of Corrections v Thompson*, 490 US 454, 460 (1989).

"It is axiomatic that due process 'is flexible and calls for such procedural protections as the particular situation demands.'" *Greenholtz v Nebraska Penal Inmates*, 442 US 1, 12 (1979) (citation omitted).

Regarding probationers: "Although a probationer is afforded fewer procedural safeguards than a defendant in a criminal trial, some due process protections attach to probation violation proceedings. *Morrissey v Brewer*, 408 US 471, 489 (1972); *Gagnon v Scarpelli*, 411 US 778, 782 (1973). Those protections include 'the right to confront and cross-examine adverse witnesses,' unless the government shows good cause for not producing the witnesses. *Morrissey*, 408 US at 489." *State v Wibbens*, 238 Or App 737 (2011). To determine whether hearsay evidence at a probation-revocation hearing violates a probationer's right to confrontation in violation of the Due Process Clause of the Fourteenth Amendment, relevant factors include: (1) the importance of the evidence to the court's finding; (2) the probationer's opportunity to refute that evidence; (3) the difficulty and expense of obtaining witnesses; and (4) traditional indicia of reliability borne by the evidence." Here, due to defendant's important interest in confrontation, the absence of good cause for denying it, the balance weighs in favor of confrontation. Based on the four *Johnson* factors, the admission of the hearsay evidence violated defendant's due process right to confront an adverse witness. *Id*.

State v Erives, 252 Or App 93 (8/29/12) (Brewer, Sercombe, Ortega) (Umatilla) An Oregon statute requires courts to appoint interpreters when necessary to interpret proceedings and testimony of non-English-speaking parties (ORS 45.273 and 45.275). Also "where an accused does not understand or speak English well enough to comprehend or communicate adequately in a criminal proceeding, the accused's rights to fundamental fairness and due process of law, including the rights to participate in the proceeding, to know and defend against the accusations, and to communication with counsel, require that a qualified interpreter be provided." (citing a Ninth Circuit and a Second circuit case). In this case, it was legal error to not appoint an interpreter until after the state had rested in this probation-violation hearing. When the first/only defense witness (defendant himself) took the stand, the trial court sua sponte called for an interpreter. Defendant and his attorney never asked the trial court to revisit any prior part of the case thus the error is unpreserved. Although while "preparing for or conducting the probation violating hearing," it "might be an ideal practice" for the trial court "to review the OJIN register and determine whether an interpreter had been appointed for defendant in earlier court appearances in these cases," it was not "obvious error" not to do so in this case. It "was not obvious that defendant did not speak and understand English with adequate ability to communicate and comprehend effectively" thus "the trial court did no plainly err in failing sua sponte to do so."

5. Other Substantive Due Process

The substantive component of the due process clause of the Fourteenth Amendment "forbids the government to infringe certain fundamental [rights] *at all*, no matter what process is provided." *Reno v Flores*, 507 US 292, 302 (1993) (emphasis in *Reno*). A "fundamental right" is one that is "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id*. at 303. Substantive due process rights are created only by the Constitution. *Regents of Univ of Michigan v Ewing*, 474 US 214, 229 (1985).

Note: But see *Papachristou v City of Jacksonville*, 405 US 156 (1972), wherein the Court struck down a statutory prohibition against "nightwalking" (vagrancy). The Court noted that persons "'wandering or strolling' from place to place have been extolled by Walt Whitman and Vachel Lindsay," they may be sleepless, loafers, married to "rich wives," or may be "casing" a place for a holdup. But "the difficulty is that these activities are historically part of the amenities of life as we have known them. *They are not mentioned in the Constitution or in the Bill of Rights*. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. Theses amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged the lives of high spirits rather than hushed, suffocating silence." *Id*. at 164 (emphasis added). The Court stated that "the due process implications" are equally applicable to the States and to this vagrancy ordinance." *Id*. at 165. The Court did not identify its analysis as procedural or substantive due process right but rather characterized it as void for vagueness as incompatible with "the rule of law" (a phrase the Court used four times in this opinion).

(a). Notice

OSU Student Alliance v Ray, (9th Cir 2012), under First Amendment, *ante.*

FCC v Fox Television Stations, Inc., 132 S Ct 2307 (6/21/12) (Kennedy for unanimous Court with Sotomayor not participating) A federal statute provides that "whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined * * * or imprisoned not more than 2 years, or both." The FCC enforces that statute and has enacted regulations. The FCC's indecency policy was addressed in *FCC v Pacifica Foundation*, 438 US 726 (1978) wherein the Court upheld the FCC's determination, over a First Amendment challenge, that George Carlin's "Filthy Words" monologue was indecent because it contained offensive language "as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience." Subsequently the FCC enacted regulations describing three factors to be considered in what is "patently offensive."

Three incidents of alleged indecency are at issue in this case. At a televised Billboard Music Awards ceremony, Cher said "So f*** 'em." The second event was Nicole Ritchie at another televised Billboard Music Awards ceremony saying: "Have you ever tried to get cow s*** out of a Prada purse? It's not so f***ing simple." (Note: the Court used these asterisks rather than spelling the four-letter words in its opinion). The third event was a television broadcast of NYPD Blue, in which "the nude buttocks of an adult female character" were shown for about seven seconds, and "for a moment the side of her breast" while the woman was going to take a shower, and the woman's boyfriend's son entered the bathroom. The FCC then issued an order in which it declared, for the first time, that "fleeting expletives" could be actionable.

The FCC then concluded that the Fox and ABC broadcasts had been "indecent" under the FCC's new standard, but the FCC did not propose forfeitures against Fox. Eventually the Second Circuit concluded that the FCC's policy was unconstitutionally vague and invalidated the policy in its entirety. In the ABC case (nude buttocks) the FCC found the broadcast indecent and imposed a $27,500 forfeiture against all 45 tv stations that had broadcast the NYPD Blue episode. The Second Circuit vacated that order.

Citing *Papachristou v Jacksonville*, 405 US 156, 162 (1972), the Court held that because the FCC failed to give Fox or ABC "fair notice" before the broadcasts that "fleeting expletives and momentary nudity" could be found to be indecent, the FCC's standards were vague and violated due process, and its orders were set aside: "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." (citing *Connally v General Construction Co*., 269 US 385, 391 (1926). "This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment. * * * It requires invalidation of laws that are impermissibly vague." The void-for-vagueness doctrine applies both when speech is, and is not, at issue. Two due process concerns are present: (1) parties should know what is required of them and (2) precision and guidance are necessary so those enforcing the law do not act in an arbitrary or discriminatory way. "When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech."

The "Government can point to nothing that would have given ABC affirmative notice that its broadcast would be considered actionably indecent." Regarding the scope of the decision: (1) "the Court resolves these cases on fair notice grounds under the Due Process Clause" and does not "address the First Amendment implications" of the FCC policy. (2) It is "unnecessary for the Court to address the constitutionality of the current indecency policy" as expressed in the FCC's newly enacted order because the "Court adheres to its normal practice of declining to decide cases not before it." (3) the FCC may "modify its current indecency policy in light of its determination of the public interest and applicable legal requirements." The Second Circuit judgments are vacated.

(b). States' Jurisdiction

> The "Due Process Clause of the Fourteenth Amendment sets the outer boundaries of a state tribunal's authority to proceed against a defendant. *Shaffer v Heitner*, 433 US 186, 207 (1977). The canonical opinion in this area remains *International Shoe [v Washington*, 326 US 310 (1945)], in which we held that a State may authorize its courts to exercise personal jurisdiction over an out-of-state defendant if the defendant has 'certain minimum contacts with [the State] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."'". *Goodyear Dunlop Tires Operations v Brown*, 131 S Ct 2846 (2011) (unanimous) The Court noted that there are two kinds of jurisdiction: case-specific and general. Most of the US Supreme Court's decisions have been based on case-specific jurisdiction. *Goodyear Dunlop Tires* is the third US Supreme Court case ever to address general jurisdiction.

Robinson v Harley-Davidson Motor Company, 247 Or App 587 (01/05/12) (Schuman, Wollheim, Nakamoto) (Multnomah) Plaintiff is an Oregon resident who bought a Harley in Gladstone, Oregon. She took her motorcycle to a dealership in Idaho Falls [presumably a city in Idaho] to fix a wheel. The next day she was injured on the Harley in Wyoming. She sued the dealership, the Harley-Davidson company, and

the Oregon store that sold her the motorcycle. Defendant dealership owns/operates Harley franchises in Idaho and Wyoming. It has no store in Oregon. It has an interactive website though, that anyone can access, and it has sold parts and apparel to Oregon residents through its website. The trial court granted the Idaho Falls dealership's motion to dismiss under ORCP 21 A(2) for lack of personal jurisdiction under ORCP 4 L (Oregon's long-arm statute). The trial court concluded that defendant purposely directed activities at Oregon residents through its extensive advertising but the litigation did not arise from or relate to that advertising

The Court of Appeals affirmed: the claim does not arise from or relate to defendant's activities in Oregon. ORCP 4 L "extends the jurisdiction of Oregon courts over out-of-state defendants as far as the Due Process Clause permits." That Due Process question has two parts: (1) the defendant must have minimum contacts with the forum state, meaning the defendant "purposefully directed its activities at residents of the forum state and where the litigation arises out of or relates to those activities" and (2) even if minimum contacts exist, the exercise of jurisdiction must comport with fair play and substantial justice." (Citing *Circus Circus Reno, Inc. v Pope*, 317 Or 151 (1993) (quoting *Burger King Corp v Rudzewicz*, 471 US 462, 472 (1985)). Here, no fact relevant to the substance of plaintiff's negligence claim occurred in Oregon. The motorcycle was repaired in Idaho. Plaintiff's injuries occurred in Wyoming. Defendant's advertising activities are relevant only in plaintiff's attempt to establish jurisdiction. And like her negligence claim, her warrant claim is based on an untenable argument because "no action by defendant relating to the purchase or breach of plaintiff's warranty has been shown to have occurred in Oregon.

Willemsen v Invacare Corp. and China Terminal & Electric Corp., 352 Or 191 (7/19/12) (Kistler), *petition for cert filed* 10/02/12. Plaintiffs, who are Oregon residents, brought this action against defendants after their mother died in a fire allegedly caused by a defective wheelchair battery charger. Defendants are a Taiwanese corporation that makes the chargers (CTE) and an Ohio corporation that makes motorized wheelchairs (Invacare). Invacare sold wheelchairs in Oregon and CTE supplied Invacare with battery chargers. In a 2-year period, Invacare sold 1102 motorized wheelchairs with CTE chargers in Oregon. CTE moved to dismiss the claims against it on grounds that due process would permit an Oregon court to exercise personal jurisdiction only if CTE had purposely availed itself of the privilege of doing business here. The trial court denied CTE's motion, the Oregon Supreme Court denied CTE's petition for mandamus, and the US Supreme Court granted CTE's petition for certiorari, vacated the Oregon Supreme Court's order, and remanded after it *decided J. McIntyre Machinery, Ltd. v Nicastro*, 131 S Ct 2780 (2011). The trial court declined to vacate its order denying CTE's motion to dismiss.

The Oregon Supreme Court agreed with the trial court – Oregon courts may exercise personal jurisdiction over CTE. In a detailed opinion, the Court concluded that the Due Process Clause does permit Oregon to exercise personal jurisdiction over CTE "when it has not purposefully availed itself of the privilege of conducting business in Oregon." Under *Goodyear Dunlop Tires Operations, SA v Brown*, 131 S Ct 2846 (2011), a state may require out-of-state defendant to appear only when the state has general or specific jurisdiction over the defendant. The issue here is whether Oregon has specific jurisdiction, which, per *Goodyear Dunlop*, "depends on an affiliation between the forum and the underlying controversy, principally, activity or an occurrence that takes place in the forum State." Specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction. Here, CTE sold its chargers to Invacare in Ohio expecting that Invacare would sell its wheelchairs together with CTE's chargers nationwide. CTE didn't target Oregon, it argues, only Invacare targeted Oregon, therefore CTE did not purposely avail itself of the privilege of

doing business in Oregon. This case is similar to *Nicastro*. CTE understood that Invacare would sell its wheelchairs and CTE's battery chargers throughout the United States and CTE agreed to make the chargers to Invacare specs. Over a 2-year period, Invacare sold 1102 motorized wheelchairs with CTE chargers in Oregon: that shows a regular flow or regular course of sales in Oregon. The Court distinguished this case from *Asahi Metal Industry Co. v Superior Court of California*, 480 US 102 (1987). In this case, "Oregon residents seek to vindicate their claims for the death of their mother in the state where the death occurred, allegedly as a result of a defect in CTE's battery charger. Oregon has a strong interest in providing a form for its residents who are injured in this state to recover for their injuries."

In sum: "Requiring CTE to appear in Oregon does not offend traditional notions of fair play and substantial justice and thus does not preclude the trial court from exercise jurisdiction over CTE as a result of its contacts with this forum. The trial court could, consistently with due process require CTE to appear in an Oregon court."

(c). *Brady* violations

Smith v Cain, 132 S Ct 627 (01/10/12) (Roberts for 8-1 majority, with Thomas dissenting) *Brady v Maryland*, 373 US 83, 87 (1963) held that due process bars a State from withholding evidence that is favorable to the defense and material to the defendant's guilt or punishment. Under *Brady* and *Cone v Bell*, 556 US 449, 469-70 (2009), evidence is material if there is a "reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." Evidence impeaching eyewitness testimony may not be material if the State's other evidence is strong enough to sustain confidence in the verdict, per *United States v Agurs*, 427 US 97, 112-13 & n 21 (1976).

In this postconviction case, petitioner was charged with killing 5 people in an armed robbery of a home. Only one witness linked petitioner to the crime. No other witnesses and no other physical evidence linked petitioner to the crime. The state courts affirmed and denied review (and so did the US Supreme Court). During his postconviction efforts, petitioner obtained police files from his case, which included those of the chief detective, whose interview notes showed that the witness had said he "could not supply a description of the perpetrators other than they were black males" and that the witness "could not ID anyone because he could not see their faces" and he "could not identify any of the perpetrators."

Here, the State violated this petitioner's right to due process because it withheld evidence that was favorable to the defense and material to his guilt or punishment. The only issue in this case is whether those witness statements were material to the guilty verdict. It was material: the witness's "testimony was the only evidence linking [petitioner] to the crime" and the witness's "undisclosed statements directly contradict his testimony." Reversed and remanded.

Thomas dissented because petitioner did not show a "reasonable probability" that the jury would have been persuaded by the undisclosed evidence in the context of the entire record.

State v Faunce, 251 Or App 58 (7/05/12) (Nakamoto, Schuman, Wollheim) (Josephine) Defendant was a transient who lived at a campsite by WalMart at the railroad tracks near his dead buried cats. He was charged with fatally shooting another transient who made the mistake of panhandling at defendant's turf. Several months after he was arrested, police arrested another man who had had a weapon similar to defendant's

weapon. That man passed a polygraph test in which he was asked if he had killed the victim that defendant was accused of killing. The detective did not believe that the man's weapon had anything to do with the murder that defendant was charged with. The detective returned the man's weapon to him (although he was a felon). The prosecution failed to preserve that man's weapon and it also took over 2 years for the detective to produce her notes on that man to the DA's office.

Defendant claimed that because police failed to preserve the man's black powder pistol, "his due process right to access material exculpatory evidence was violated." He asserted "a violation of his compulsory process rights under Article I, section 11, of the Oregon Constitution and the Sixth Amendment," and he acknowledges that the Court of Appeals "has adopted the due process analysis" for such challenges. The Court of Appeals then turned to a due process analysis under *Brady v Maryland*, 373 US 83, 87 (1963). Under *Brady*, the Due Process Clause guarantees a criminal defendant access to evidence in the prosecutor's possession irrespective of the good faith or bad faith of the prosecution when that evidence is favorable to the defendant's right to a fair trial." In contrast, when a state fails to preserve evidence, the prosecutors good faith or bad faith may be relevant: to establish a due process violation from the state's failure to preserve evidence "a defendant need not show that the state acted in bad faith if it was apparent before the evidence was destroyed that the evidence was favorable and defendant would be unable to obtain comparable evidence elsewhere.

Here, the evidentiary value of the weapon is speculative. The police failed to follow its own policies and procedures when it returned the weapon to him (because he was a felon), but the trial court's finding that the state was merely negligent is supported by the record, and the state's negligence does not amount to bad faith. The state also delayed in sharing the DA's notes but the record supports the trial court's finding that those delays were not orchestrated in bad faith. His constitutional claims fail.

5. Right to Travel

(a). **Interpreted by Oregon courts**: 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).

(b). **Interpreted by Federal courts**: 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.

K. Equal Protection -- Fourteenth Amendment

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

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).

Cf. ***Briggs v Grounds***, 682 F3d 1165 (9th Cir 2012) (Tallman and Graber; Berzon dissenting) where the habeas petitioner alleged that the prosecutor's use of peremptory challenges to strike three African American prospective jurors violated his rights under the Equal Protection Clause. The Ninth Circuit panel affirmed the district court's denial of his petition in a lengthy and detailed opinion.

Cf. ***Ayala v Wong***, __ F3d __ (9th Cir 8/29/12) (Reinhardt, Wardlaw; Callahan dissenting) (panel granted habeas relief to petitioner sentenced to death where prosecutiion had used tis peremptory challenges to strike all black and Hispanic jurors)

L. Sovereign Immunity

> "**The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.**"
> - Eleventh Amendment, US Const

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).