Oregon State Bar

Constitutional Law Section

2017 Annual CLE

Travel Bans, Cake Artists, Gerrymandering, and Other Hot Constitutional Issues

Stanford Law Professor Pamela Karlan will give the keynote presentation, a 90-minute United States Supreme Court Review/Preview. Professor Karlan, a former law clerk to U.S. Supreme Court Justice Harry A. Blackmun, is co-director of Stanford's Supreme Court Litigation Clinic. She is one of the nation's leading experts on voting and the political process.

Thursday, December 7, 2017
8:25 a.m. to 1:15 p.m.

University of Oregon
White Stag Building
70 NW Couch Street, Portland

CLE Credits: 4.25 general credits pending

Program Schedule

8:00 **Doors open**

8:25 **Welcome and Introduction**

8:30 **US SUPREME COURT REVIEW**
Professor Pamela Karlan, Stanford

10:00 **Break**

10:15 **TRAVEL BANS, CAKE ARTISTS, AND GERRYMANDERING**
Matthew Adams, Northwest Immigration Rights Project
Professor Pamela Karlan, Stanford

Professor Karlan will join Matthew Adams for a panel discussion of travel bans, voting rights, gerrymandering, and bakers' refusals to sell cakes for gay weddings. Mr. Adams serves on the National Immigration Project's Board of Directors and received the 2016 Award of Merit from the Washington State Bar Association - its highest honor.

11:45 **Break**

12:00 **OREGON CONSTITUTIONAL LAW CASE REVIEW**
Hon. Jack Landau, Associate Justice, Oregon Supreme Court
Hon. David Schuman, Senior Judge, Oregon Court of Appeals
Alycia Sykora, Attorney, Bend

The annual review of criminal and civil constitutional cases will round out the CLE.

1:15 **CLE Concludes**

Register by 11/22/17 and subtract $20 from these prices:

$70	**Constitutional Law Section Members**
$95	**Non-section members**
$70	**OSB New Lawyers** *(admitted after 1/1/17)*
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Program Planners: Judge Michael Greenlick, CLE Committee Chair, Kevin Diaz, Matthew Kalmanson, Justice Jack Landau, Harrison Latto, Chin See Ming, Senior Judge David Schuman, Erin Severe, Alycia Sykora

Register online now at osbar.inreachce.com
and pay with a credit card or electronic check ***(search SCONST17)***

Oregon State Bar

CLE registration support and services provided by OSB CLE Seminars

Speaker Biographies

Matthew Adams is Legal Director of Northwest Immigrant Rights Project in Seattle. He defends individuals before the Immigration Court, the Board of Immigration Appeals, and the federal courts. Matt is a member of the King County Public Defenders Advisory Board and the National Immigration Project's Board of Directors. He graduated from University of California-Berkeley School of Law. In 2016, he received the Washington State Bar Association's Award of Merit – its highest honor.

Professor Pamela Karlan earned her Bachelor's, Master's, and law degrees from Yale. She is Kenneth and Harle Montgomery Professor of Public Interest Law and Co-Director of the Supreme Court Litigation Clinic at Stanford Law School.

Before joining the Stanford Law School faculty in 1998, she was a professor of law at the University of Virginia School of Law. She served as a law clerk to Justice Harry A. Blackmun of the U.S. Supreme Court and Judge Abraham D. Sofaer of the U.S. District Court for the Southern District of New York. Professor Karlan is a member of the American Academy of Arts and Sciences, the American Academy of Appellate Lawyers, and the American Law Institute.

A productive scholar and an award-winning teacher, she is co-director of the school's Supreme Court Litigation Clinic, where students litigate live cases before the Court. One of the nation's leading experts on voting and the political process, she has served as a commissioner on the California Fair Political Practices Commission, an assistant counsel and cooperating attorney for the NAACP Legal Defense Fund, and a Deputy Assistant Attorney General in the Civil Rights Division of the U.S. Department of Justice (where she received the Attorney General's Award for Exceptional Service – the department's highest award for employee performance – as part of the team responsible for implementing the Supreme Court's decision in *United States v. Windsor*). Professor Karlan is the co-author of leading casebooks on constitutional law, constitutional litigation, and the law of democracy, as well as numerous scholarly articles.

Justice Jack Landau graduated from Portland's Franklin High School with honors (1971), Lewis and Clark College (B.A. magna cum laude 1975), Northwestern School of Law at Lewis and Clark College (J.D. 1980), and University of Virginia School of Law (LL.M. 2001).

Before joining the Supreme Court in 2011, he served on the Court of Appeals (1993-2010). Before joining the Court of Appeals, he clerked for then-Judge Robert C. Belloni of the United States District Court for the District of Oregon (1981 - 1983), practiced law as an associate and partner in the Portland firm Lindsay, Hart, Neil & Weigler (1983 - 1989), and served the Oregon Department of Justice as Assistant Attorney General and Attorney-in-Charge in the Special Litigation Unit (1989 - 1991) and as Deputy Attorney General (1991 - 1993).

Justice Landau has been an adjunct professor at Willamette University College of Law

since 1993, where he has taught Legislation, and has written numerous articles for law reviews and other publications, including:

- *Some Observations on Statutory Construction in Oregon*, published in the *Willamette Law Review* (1996)
- *Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation*, published in the *Oregon Law Review* (2000)
- *The Unfinished Revolution: Interpreting the Oregon Constitution*, published in the *Oregon State Bar Bulletin* (2001)
- *The Search for the Meaning of Oregon's Search and Seizure Clause*, published in the *Oregon Law Review* (2008).

Senior Judge David Schuman received a B.A. from Stanford University, an M.A. from San Francisco State University, a Ph. D. in English Literature from the University of Chicago, and a J.D. from the University of Oregon Law School. Before attending law school, he taught English at the college level for nine years. He graduated with honors from the University of Oregon Law School in 1984. He clerked for the Honorable Hans Linde of the Oregon Supreme Court and then as an assistant attorney general in the Appellate Division of the Oregon Department of Justice.

In 1987, Judge Schuman became a member of the University of Oregon Law School faculty, where he taught constitutional law, criminal procedure, legislation, and administrative law; between 1994 and 1996 he also served as Associate Dean for Academic Affairs. While a law professor, he received the Ersted Award for Distinguished Teaching and published scholarly articles in the Oregon Law Review, Michigan Law Review, Vermont Law Review, American Criminal Law Review, Temple Law Review, and many other journals, as well as articles in The Washington Post, The Oregonian, The Chronicle of Higher Education and other periodicals.

In 1997, Oregon Attorney General Hardy Myers appointed Judge Schuman to be his Deputy Attorney General, where he served until 2001. In March 2001, Governor John Kitzhaber appointed him to the Oregon Court of Appeals. He was elected to a full six-year term in 2002 and re-elected in 2008. He retired in 2014 and returned to the University of Oregon faculty in 2015.

Alycia Sykora is an attorney in Bend. She serves as a pro tem judge in the Deschutes County Circuit Court. She graduated from the University of Michigan and the University of Oregon School of Law and clerked for Oregon Supreme Court Justice George A. Van Hoomissen. In 2015, she received the Edwin J. Peterson Professionalism Award from the Oregon Bench and Bar Commission on Professionalism.

The U.S. Supreme Court: Review and Preview

Pam Karlan
Stanford Law School

I. Introduction

II. The shape of the Court and its docket: evidence from October Term 2016

A. The Eight Justice Court and its effects

1. Microsoft Corp. v. Baker

Parties cannot get around Fed. R. Civ. P. 23(f) through voluntary dismissal with prejudice of individual claims

2. Murr v. Wisconsin

Regulatory takings: how to think about what is the proper unit of property against which to measure whether there's been a taking

Courts must consider a number of factors, such as "the treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land

3. Trinity Lutheran Church of Columbia v. Comer

Denial to a religious organization of access to a generally available benefit violates the Free Exercise Clause of the First Amendment

Footnote 3

B. The Nine Justice Court … and its effects

1. The cert. pool

2. Janus v. AFSCME

Whether Abood v. Detroit Board of Education should be overruled and public-sector "agency shop" arrangements invalidated under the First Amendment

3. Oral argument: BNSF v. Tyrrell

III. The Court's docket in October Term 2016: the "outrage" docket

A. Buck v. Davis

Ineffective assistance of counsel when defendant's lawyer elicits testimony during a capital sentencing hearing that his client's race makes him more likely to be a future danger

B. Moore v. Texas

Texas's standard for determining whether a defendant is too intellectually disabled to be executed does not comport with the Eighth Amendment

C. Nelson v. Colorado

Colorado cannot keep fees and restitution exacted from a defendant upon conviction when a criminal conviction is invalidated by a reviewing court and no retrial will occur and cannot require a defendant to initiate a civil action and prove her innocence by clear and convincing evidence in order to get a refund

D. Packingham v. North Carolina

North Carolina statute that North Carolina law makes it a felony for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages" violates the First Amendment because it is too sweeping a restriction

E. Maslenjak v. United States

For an individual to be convicted of knowingly procuring citizenship through a false statement, the government must show that that false statement was material in that the lie was about facts that would have mattered to an immigration official, because they would have justified denying naturalization or would lead to other facts that would result in denial of naturalization

IV. Criminal procedure and evidence

A. Pena-Rodriguez v. Colorado

Courts cannot invoke a general evidentiary rule barring juror testimony to impeach a verdict to refuse to consider clear evidence of racial bias on the part of a juror

B. Lee v. United States

A defendant who challenges a guilty plea on grounds of ineffective assistance need show only that he would have gone to trial, not that the outcome had he gone to trial would likely have been adverse

C. Carpenter v. United States

Does the seizure and search of historical cell phone records revealing the location and movements of a cell phone user over several months require a warrant?

V. Equality, the First Amendment, and the Culture Wars

A. Sessions v. Morales-Santana

Congress's decision to impose a different physical presence requirement on unwed citizen mothers of foreign-born children than on other citizen parents of foreign-born children violates the Fifth Amendment's guarantee of equal protection, but the Court cannot order Morales-Santana to be given citizenship

B. Matal v. Tam

15 U. S. C. §1052(a), which prohibits the registration of trademarks that may "disparage . . . or bring . . . into contemp[t] or disrepute" any "persons, living or dead" violates the First Amendment because it bans speech simply because "it expresses ideas that offend"

C. Pavan v. Smith

Arkansas statute that provides that the husband, but not the wife, of a woman who gives birth within the state will be listed on a child's birth certificate regardless whether the child is biologically related to that spouse, is invalid under the Fourteenth Amendment

D. Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission

Whether applying Colorado's public accommodations law to compel the petitioner to create expression that violates his sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment

E. National Institute of Family and Life Advocates v. Becerra

Whether the disclosures required by the California Reproductive FACT Act violate the First Amendment

F. Lozman v. City of Riviera Beach, Florida

Whether the existence of probable cause defeats a First Amendment retaliatory-arrest claim as a matter of law.

VI. Voting and Elections

A. Bethune-Hill v. Virginia State Board of Elections

The proper standard for determining whether a districting plan is a racial gerrymander: Plaintiffs need not show an "actual conflict between traditional redistricting criteria and race." Parties may show predominance either through direct evidence or through circumstantial evidence, such as a district's shape or demographic makeup. States can rely on race when they have a "strong basis in evidence" for concluding that it's required by the VRA.

B. Cooper v. Harris

Racial gerrymandering. Untangling racial and political motivations might be complex, but here the evidence at trial was sufficient to support the three-judge court's factual conclusion that race, not politics, accounted for the challenged district's configuration.

C. Gill v. Whitford

Is partisan gerrymandering justiciable?

D. In the pipeline: Abbott v. Veasey: challenge to Texas voter ID law

VII. Personal Jurisdiction

A. Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County

When a corporation is not "at home" in a state, there is no general jurisdiction, and specific jurisdiction exists only where the suit arises out of or is related to the corporation's contacts to the state. So out-of-state plaintiffs cannot sue simply because their injury is identical to the in-state plaintiffs' injury

The Oregon Constitution and Cases in 2017

Alycia Sykora

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

* * * * * *

"[I]t is vitally important that we supplement our specialized studies with serious attempts to take a crude look at the whole." Murray Gell-Mann, *The Simple and the Complex*, in COMPLEXITY, GLOBAL POLITICS, AND NATIONAL SECURITY 9 (1997).

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The Oregon Constitution and Cases

"At the birth of societies, the leaders of republics create the institutions; thereafter, it is the institutions that form the leaders of republics." Montesquieu, CONSIDERATIONS ON THE CAUSES OF THE GREATNESS OF THE ROMANS AND THEIR DECLINE 25 (1734) (David Lowenthal translation, 1999).

* * * * *

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

* * * * *

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

Timeline

1765 – The first known written use of the word "Oregon" as a geographical region may have been in August 1765, based on a "duplicitous" British explorer's conversations with Chief Pontiac in Detroit in 1760. That explorer, British Major Robert Rogers, submitted a proposal to King George III to take 200 men westward over land to discover the Northwest Passage:

> "The Rout Major Rogers proposes to take, is from the Great Lakes towards the Head of the Mississippi, and from thence to the River called by the Indians Ouragon, which flows into a Bay that projects North-Eastwardly into the [country] from the Pacific Ocean, and there to Explore the said Bay and its Outletts, and also the Western Margin of the Continent to such a Northern Latitude as shall be thought necessary."[1]

The request was denied.

June 1776 – The Virginia Convention of Delegates unanimously adopted the Virginia Declaration of Rights, written by George Mason, "an almost uneducated planter with little legal training," and with James Madison on the committee to draft that Declaration.[2] This was the first true Bill of Rights in the United States adopted by the people through an elected convention.[3]

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[1] Elliott, 91-115 (positing a French, Mohawk, Iroquoian, or Plains Indian origin: "Ouragon" is similar to the French "Ouragan," meaning windstorm, hurricane, or tornado). *But see* Carey at 9, 15, 256) ("Oregon is a word of Indian origin [that] perhaps originated with the Sautee or Chippewa branch of the Sioux"). Yet Eugene Duflot de Mofras wrote: "It is completely impossible to determine the etymology of the word 'Oregon' as it has no root in any European language and one cannot find it in any Indian language." Duflot de Mofras 4.
[2] Schwartz (Vol. I) 231. Virginia Declaration of Rights of 1776 is online here.
[3] Schwartz (Vol. I) 232

July 1776 – Declaration of Independence, drafted by Thomas Jefferson, was adopted by the Continental Congress.

July 1787 – The Confederation Congress, convening in New York City, adopted "*An Ordinance for the Government of the Territory of the United States North West of the River Ohio*," also known as the Northwest Ordinance of 1787. (Once the Constitution was ratified, the old Confederation Congress dissolved, and the new constitutional Congress adopted the Northwest Ordinance in a statute in early 1789).[4] The Congress had no power to protect personal liberties within the several states, but it did have power over the territories. The Northwest Ordinance – "perhaps the greatest achievement of the Confederation government" – contained the first Bill of Rights enacted by the new Federal Government.[5] It established a government for the Northwest Territory, outlined the process for admitting a new state to the Union, guaranteed that newly created states would become states on equal footing to the original thirteen states, and provided for civil liberties in the territories, such as religious freedom and prohibition of slavery.[6]

The Northwest Ordinance's guarantees of civil liberties were modelled on state bills of rights, and was "framed mainly from the laws of Massachusetts."[7] It "provided for an initial period of tutelage during which the entire territory would be controlled by a governor, secretary and three judges, all appointed by Congress," rather than letting settlers immediately select and operate their own governments.[8] "The ordinance of 1787, by which freedom was forever secured to the Northwest, to the territory out of which were formed the important states of Ohio, Indiana, Illinois, Michigan, and Wisconsin, was by far the most important anti-slavery measure from the organization of the government down to the proclamation of emancipation by Abraham Lincoln."[9]

October 1787 – March 1788 – Thomas Jefferson, James, Madison, and John Jay under the shared name "Publius" published essays in New York as THE FEDERALIST, intended "to promote the ratification of the new Constitution by the State of N. York, where it was powerfully opposed".[10]

October 1818 – A Joint Occupation Agreement (a treaty) divided Oregon Country between the British and Americans: "It is agreed that any country that may be claimed by either party on the northwest coast of America, westward of the Stony mountains . . . be free and open for the term of ten years . . . to the vessels, citizens, and subjects of the two Powers". (The word "Oregon" to describe the territory, as opposed to the river, was not officially used until 1822.).[11]

1820 – The Missouri Compromise of the Missouri Crisis of 1819. By 1804, all states north of the Mason-Dixon line had abolished slavery. The north attempted to limit slavery from spreading to the West.[12] That created a crisis of the role of federal power and states' power. To compromise, Congress admitted

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[4] Amar, AMERICA'S CONSTITUTION, 260; FEDERALIST NO. 38
[5] Schwartz 385; Levy 11
[6] Amar, AMERICA'S CONSTITUTION, 273; Wood, EMPIRE OF LIBERTY, 121-22, 363; Buan, 6
[7] Schwartz 386 (quoting Nathan Dane in an 1830 letter)
[8] Morgan 115
[9] Arnold 95
[10] Ellis 176; Wills, THE FEDERALIST PAPERS, vii-xxvii. Federalist Nos. 84 and 85 were printed in a book on May 28, 1788, but were not printed in newspapers - except for a small part of No. 84 – until after the New York Ratifying Convention had adjourned. Schwartz, Vol. 1, 578.
[11] Greenhow 344; Carey, GENERAL HISTORY, 256
[12] Wood, FRIENDS DIVIDED, 416.

Maine to the Union as a free soil (non-slave) state, Missouri as a slave state, and all western territories north of Missouri's southern border would be forever free.[13] This compromise was "a victory for the slaveholders."[14] "Had Missouri come in as a free state, it would probably have been decisive, and have given the balance of power to the North, and perhaps might have saved the republic from the great Civil War. As a free state, the route of free labor, of pioneer colonization, would have passed up the valleys of the Mississippi, the Missouri, and the Arkansas, to all the West, and to Northern Texas."[15] (The Kansas-Nebraska Act of 1854 negated the Missouri Compromise.)[16]

Later, in a fiery 1856 speech to Congress, Senator Charles Sumner described the Missouri Compromise: "The discussion ended with the admission of Missouri as a slaveholding State, and the prohibition of Slavery in all the remaining territory west of the Mississippi, and north of 36° 30', leaving the condition of other territory, south of this line, or subsequently acquired, untouched by the arrangement. Here was a solemn act of legislation, called at the time a compromise, a covenant, a compact, first brought forward in this body by a slaveholder, vindicated by slaveholders in debate, finally sanctioned by slaveholding votes, also upheld at the time by the essential approbation of a slaveholding President, James Monroe, and his Cabinet, of whom a majority were slaveholders, including Mr. Calhoun himself; and this compromise was made the condition of the admission of Missouri, without which that State could not have been received into the Union. The bargain was simple, and was applicable, of course, only to the territory named. . . . [A]dmit Missouri as a slave State, and, in consideration of this much-coveted boon, Slavery shall be prohibited forever in all the remaining Louisiana Territory above 36° 30'; and the North yielded."[17]

1824 – The British North-West Company surrendered its rights and merged with its hunting, trapping, and trading competitor, the Hudson's Bay Company. Its resources no longer wasted on rivalry, the Hudson's Bay Company founded settlements and trading posts west of the Rockies including on the Columbia River. It prospered.[18] British law governed in the trading posts.[19]

1827 – The Joint Occupation Agreement between Great Britain and the United States was renewed, providing that either party was at liberty to annul and abrogate it on one year's notice.[20]

1829 – The American Society for Encouraging the Settlement of Oregon Territory organized in Boston. In a letter to Congress, the Society wrote: "The uniform testimony of an intelligent multitude have established the fact, that the country in question, is the most valuable of all the unoccupied parts of the earth. . . . The Society view with alarm the progress, which the subjects of [Great Britain] have made, in the colonization of the Oregon Territory."[21]

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[13] Arnold 99; Moore 120. "The issue of slavery in the territories, as partly settled areas that had not yet become states were called, played a major part in bringing on the [Civil War]." Moore at 120; see also Amar, AMERICA'S CONSTITUTION, 266.
[14] Arnold 99
[15] Arnold 99
[16] Johnson 63, 243-44; Arnold 111-12
[17] Massachusetts Sen. Charles Sumner, May 19-20, 1856, "The Crime Against Kansas," page 6, here.
[18] J. Henry Brown, who had lived in Oregon since its provisional government, wrote: the "indifference of our Government allowed the Hudson's Bay Company to rob the country of over $30,000,000 in furs during the time that they possessed the country under joint occupancy, and came near turning the whole possession over to the British Government, instead of that portion now known as British Columbia". Brown v, 147. See also Johnson, 50.
[19] Greenhow, 326, 345, 364, 380
[20] Greenhow 354; 388.
[21] Hine & Bingham 95; Carey, GENERAL HISTORY, 268.

1834 – The first missionaries arrived in Oregon Country: "preachers preceded settlers."[22] Jason Lee founded a Methodist mission near Salem intending "to create a perfectionist social order in this secluded corner of the North American continent."[23] Ewing Young, a fur trader, arrived in the Willamette Valley.[24]

1838-39 – Methodist Missionaries settling in Oregon Country rejected the British Hudson's Bay Company's commissioned officers and appointed their own magistrate and constable. Thirty-five settlers signed a letter to the Senate stating that their settlement had begun in 1832 and they sought the United States' assistance in governance, security, and commerce. No bill passed, apparently because the Southern pro-slavery states opposed everything pertaining to Oregon and the Northern states were afraid of offending the British.[25] In early 1839, Rev. Jason Lee estimated about 100 Americans in Oregon, aside from Hudson's Bay Company employees. However, a visiting ship captain estimated 54 people in the summer of 1839: 24 as Hudson's Bay Company employees, 20 "American stragglers," and 10 clergymen associated with Rev. Jason Lee.[26]

1838 – A map of Oregon Territory in 1838 from the Oregon History Project is online here.

February 1841 – The wealthy distiller-fur trapper-turned-cattleman Ewing Young[27] died intestate without known heirs. No laws existed to distribute his estate. A committee of seven men therefore was appointed to frame a constitution and draft laws, although no record of the first meeting exists.[28] Dr. Ira L. Babcock was appointed to be the provisional government's "supreme judge with probate powers." The laws of New York were adopted.[29] This is the year the judicial branch began in Oregon.[30]

1842 –Dr. Elijah White arrived in Oregon with a presidential appointment as an Indian agent for Oregon.[31] The president anticipated that a bill would pass confirming that appointment, but it did not pass. Dr. White did not receive notice of that until the fall of 1843, so he continued his duties until then. He brought 114 Americans with him.[32] In early 1842, about 140 Americans were in Oregon.[33] By late 1842, about 400 Americans were in Oregon.[34]

1843 – In early 1843, settlers held two "wolf meetings" at a house in Champoeg to discuss waging "a defensive and destructive war against" "bears, wolves, panthers, &c" and a voluntary tax to protect livestock from wolves and for protections from other dangers "worse than wild beasts."[35] After much dissent, a new 12-man committee divided Oregon Territory into four districts. Three rudimentary branches of government were accepted with a nine-man legislative committee to form a code of laws.[36]

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[22] Carey, GENERAL HISTORY 255; see also Greenhow 361.
[23] Johnson 50; Carey, GENERAL HISTORY, 286.
[24] Brown 52.
[25] Brown 54-56.
[26] Carey, GENERAL HISTORY, 361, 369.
[27] White 78.
[28] Brown 82; Carey, GENERAL HISTORY, 318-21.
[29] Hine & Bingham 106 (Feb. 18, 1841 meeting minutes); Brown 82-83; Johansen 184-85
[30] Johnson, p. 11-12.
[31] Carey, GENERAL HISTORY 352; Brown 97; Ferrell 10; White, TEN YEARS IN OREGON, generally.
[32] Johansen 186
[33] Brown 87
[34] Greenhow 33
[35] Hine & Bingham 107 (Mar. 1, 1843 meeting minutes); Johansen 188; Carey, GENERAL HISTORY, 327-28.
[36] Johansen 188-89; Brown 102-103

July 1843 – The provisional government of Oregon was adopted after the legislative committee drew up a code of laws.[37] The laws of Iowa Territory from 1839, with principles of common law and equity, and the Northwest Ordinance of 1787, were used for a law code. The Iowa Code may have been chosen because Elijah White had a copy of the Iowa laws with him and he was on the nine-man legislative committee.[38] Some liberties were expressly protected: religious worship and sentiment, habeas corpus, trial by jury, cruel and unusual punishment prohibition, property compensation, contract rights, and a ban on slavery. The government had no taxing power. A three-man executive committee was elected, and one judge. "These gropings toward self-government suggest the innovative impulse on this Far Western frontier; the form that government took demonstrates the force of imitation and tradition."[39] Meanwhile, in June 1843, one thousand people mostly from Missouri, Illinois, and southern Ohio assembled at Westport, Missouri, and began the two-thousand mile trek to the Willamette Valley, with about 900 arriving in the fall.[40]

1844 – In May, a nine-member legislative body convened in Oregon Country.[41] New settlers voted out some of the existing code that the old settlers had enacted, but they retained Iowa statutes.[42] They revised the code and voted in a 50-cent poll tax and an ad valorem tax for all adult white males.[43] The first circuit courts, grand juries, and petit juries, convened.[44] On June 27, 1844, the legislative committee also voted, six to two, to prohibit "Negroes and Mulattoes from residing in Oregon." The law was to go into effect in two years, and if a Negro or Mulatto "shall fail to quit the country," then "he or she may be arrested upon a warrant" and "if guilty upon trial" without a jury, he or she "shall receive upon his or her bare back not less than twenty nor more than thirty-nine stripes, to be inflicted by the constable of the proper county."[45] Every six months, the man or woman was eligible for the same beatings. Oregon resident J. Henry Brown called the striping law a "dead law on the statute books," as no one was willing to enforce it.[46] On December 16, 1844, the striping punishment was repealed but the ban on "Negroes and Mulattoes" living in Oregon remained.[47] By late 1844, about 3,000 American citizens lived in Oregon Country.[48]

March 1845 – President Polk announced: It is "my duty to assert and maintain by all Constitutional means the right of the United States to that portion of our territory which lies beyond the Rocky Mountains. Our title to the country of the Oregon is 'clear and unquestionable,' and already are our people preparing to perfect that title by occupying it with their wives and children."[49]

July 1845 – An Organic Act and statutes were enacted for Oregon, again adopting Iowa laws and the

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[37] Hine & Bingham 108-13
[38] Johansen 190; cf. Brown 379, 402
[39] Hine & Bingham 93
[40] Greenhow 391; Johansen 191; Hine & Bingham 99.
[41] White 330.
[42] Hine & Bingham 116 (reprinting Peter H. Burnett, *Recollections of an Old Pioneer*).
[43] Carey, GENERAL HISTORY 344; Johansen 191.
[44] White 331-32 (grand juries).
[45] Brown 133-34 (reprinting the June 27, 1844 law); Nokes 47-50; Taylor 154-56; Carey, GENERAL HISTORY 342
[46] Brown 134; Carey, GENERAL HISTORY 342
[47] Brown 133, 136.
[48] Brown 140 (That year, U.S. Representative Owen, voting against annulling the 1818 Joint Occupation Treaty with Great Britain because it "might be offensive to her," estimated 2,000 Americans were in the Willamette Valley in January, with "5,000 and it may be twice 5,000 will have crossed the mountain passes before another year rolls around").
[49] President James K. Polk, *Inaugural Address*, March 4, 1845.

English common law as a default.[50]

August 1845 – 3,000 immigrants arrived into Oregon Territory, doubling its population.[51]

June 15, 1846 – Congress abrogated the Joint Occupation Agreement of 1818 (which had been renewed in 1827) through the five-article Treaty Establishing the Boundary West of the Rocky Mountains (also known as the "Oregon Treaty").[52] The division of real property between Great Britain and the United States was set at the 49th parallel giving Vancouver Island to Great Britain and the whole south to the south of the 49th degree is to belong to America. In 1846, about 8,000 to 9,000 non-native persons lived in Oregon Country.[53]

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

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

August-September 1849 – President Zachary Taylor's Secretary of State John M. Clayton sought to appoint Abraham Lincoln as secretary of the Oregon Territorial, "a lusterless pose which he rejected."[54] Then in September 1849, Secretary of the Interior Thomas Ewing invited Lincoln to become governor of the Oregon Territory, "a fairly prestigious job that paid three thousand dollars a year.[55] Lincoln declined.[56] "A remote satellite beyond the Rockies, Oregon must have seemed like political exile to Lincoln."[57]

1850 – The Donation Land Act of 1850 awarded settlers in Oregon 640 acres, and promised 320 acres to those who migrated without delay.[58] This increased traffic on the Oregon Trail, which stretched 2,000 miles, "like a great rope flung carelessly" from northern Missouri to Oregon.[59] That Act expired in 1856.[60]

May 30, 1854 – Congress passed the Kansas-Nebraska Act allowing territories to decide themselves if they wanted to become slave states, explicitly repealing the Missouri Compromise. (Nebraska had been north of the slavery line that the Missouri Compromise had established as free soil). Stephen Douglas, Senator from Illinois and Chair of the Committee on Territories, had introduced that bill to split the

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[50] White 358-67 (reprinting July 5, 1845, Amended Organic Laws of the Territory of Oregon); Carey, GENERAL HISTORY, 350.
[51] Carey, GENERAL HISTORY, 353
[52] Cunningham 31, 46. The Treaty is online here.
[53] Johansen 212
[54] Oates 89
[55] Oates 89
[56] Charnwood 96 ("It was Mrs. Lincoln who would not let him cut himself off so completely from politics.")
[57] Oates 89
[58] Hine & Bingham 379 (reprinting Paul Wallace Gates, *The Homestead Act in an Incongruous Land System*)
[59] Hine & Bingham 91
[60] Johnson 43-44

territories of Kansas and Nebraska and to allow slavery to exist in those territories if the people who settled there voted for it.[61] He "cloaked the bill in the democratic language of 'popular sovereignty,'" a phrase he borrowed from a Michigan senator.[62] The Kansas-Nebraska Act "was political suicide to him and to slavery itself; it was the beginning of the end."[63]

"The repeal of the Missouri Compromise removed the barrier against the extension of slavery over an area equal in extent to that of the entire thirteen original states."[64] "The repeal of the Missouri Compromise shocked the moral sense, and was everywhere regarded in the free states not only a humiliation, but as a gross violation of faith. Thoughtful men realized that the days of concession, of mutual compromise and forbearance had passed, and that the struggle between freedom and slavery was irresistible and at hand."[65] In other words, the Kansas-Nebraska Act of 1854 opened "all the national domain to slavery."[66]

Douglas's bill (which became the Kansas-Nebraska Act) "remains one of the great political miscalculations in American history. Rather than bringing North and South together . . . [it sparked the conviction] that the nation was headed towards civil war."[67] Consequentially, the Whig Party "collapsed, never again to revive" and two "new political organizations filled the vacuum . . . Those were "the nativist, anti-Catholic, American Party (known as the Know-Nothings) and the Republican Party."[68] The Republican Party was formed in opposition to the Kansas-Nebraska Act.

In the fight over Kansas as a free versus a slave state, William H. Seward announced in the Senate in 1854: "God give the victory to the side which is stronger in numbers as it is in right." In opposition, "slaveholders believed that the future of slavery in all of the great West rested on the outcome in Kansas"; a southern senator asserted: "If we win we carry slavery to the Pacific Ocean."[69] Kansas voters allowed slavery, but the election was the result of Missouri Senator Atchison having led thousands of armed, proslavery Missourians across the Kansas border to illegally vote to create a slave territory and intimidate anti-slavery voters. 4,908 of 6,307 ballots cast were illegal. But slavery became legal in Kansas.[70] Under new Kansas slave laws, "a person could be fined or imprisoned simply for expressing opinion against slavery," anyone helping slaves to escape could be executed, and voters were required to take an oath supporting those laws.[71]

Senator Charles Sumner, in his 1856 lengthy tirade against slavery to the Senate, "The Crime Against Kansas," explained one effect of the Kansas-Nebraska Act on Oregon: "the Congressional Prohibition of Slavery, which had always been regarded as a seven-fold shield, covering the whole Louisiana Territory north of 36° 30', was now removed, while a principle was declared, which would render the supplementary Prohibition of Slavery in Minnesota, Oregon, and Washington, 'inoperative and void,'

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[61] Ross 26; Arnold 109
[62] Ross 26; see also Sen. Charles Sumner, speech to the Senate, May 19-20, 1856, page 17, 19, 41, here.
[63] Arnold 110
[64] Arnold 112
[65] Arnold 111-12
[66] Nevins 361 (paraphrasing part of Lincoln's "A house divided itself cannot stand" senate campaign speech on June 16, 1858
[67] Ross 26
[68] Ross 27
[69] Ross 28
[70] Ross 28
[71] Ross 28; Sumner speech at 9

and thus open to Slavery all these vast regions, now the rude cradles of mighty States."[72] In other words, he said: "by the passage of the Nebraska Bill, not only Kansas, but also Nebraska, Minnesota, Washington," and even Oregon, have been opened to Slavery."[73]

Nevertheless, "Oregon Democrats generally praised the Kansas-Nebraska Act . . . as victories for 'popular sovereignty.'"[74]

May 1856 – Massachusetts Senator Charles Sumner delivered his speech "The Crime Against Kansas" excoriating two pro-slavery senators for endorsing "that harlot Slavery." He gave this two-day speech describing "the Crime against Nature, from which the soul recoils" after Kansans had elected a slavery-promoting territorial legislature, although the election result was from 4,908 illegal votes of the 6,307 total votes and the thousands of armed proslavery Missourians intimidated Kansans as they went to the polls.[75]

March 1857 - *Dred Scott v Sandford*, argued in May 1854, was published in March 1857 after the presidential election of 1856, held that Mr. Scott, as a black man or descendant of a slave, could not be a United States citizen, and the Missouri Compromise was unconstitutional under Article IV, section 3, of the US Constitution. The decision, among other effects, "prostituted" the "great tribunal of the United States Supreme Court."[76] Before *Dred Scott*, the US Supreme Court had overturned only one federal statute, and that was in *Marbury v Madison* (1803).[77] Horace Greeley's New York Tribune wrote that that opinion deserved no more respect than if made by a "majority of those congregated in any Washington bar-room."[78] However, one Oregon writer states that "Oregon Democrats generally praised the Kansas-Nebraska Act and *Dred Scott*, hailing them as victories for 'popular sovereignty.'"[79]

August-September 1857 – Sixty men convened as the Oregon Constitutional Convention Committee and draft Oregon's Constitution. Only one delegate, John McBride, was an abolitionist.[80] On the other end of the political spectrum, Matthew Deady was an avowed proslavery advocate.[81]

November 1857 – Oregon electors adopted the Oregon Constitution under the terms set out in Article XVIII of the draft Constitution.

February 14, 1859 – Congress accepted Oregon into the United States as the 33rd state.[82] The men who voted on the Constitution decided: "No Negro, Chinaman, or Mulatto shall have the right of suffrage;" "No free negro, or mulatto" was permitted to "be within" Oregon, or own real property, or enter

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[72] Sumner speech at 20
[73] Sumner speech at 61
[74] Mooney 736
[75] Ross 28
[76] Arnold 130-32
[77] Blum, Lawrence, THE SUPREME COURT 21 (9th ed. 2007)
[78] Ross 51
[79] Mooney 736
[80] *Cf*. Carey, GENERAL HISTORY, 509 (McBride introduced a proposal to include the anti-slavery provision in the Northwest Ordinance of 1787 into the new constitution, but it was defeated 41 to 9).
[81] *See, e.g.,* Johnson 155-57 (quoting Deady: "There are some millions of Africans owned as property . . . they are just as much property as horses cattle or land.").
[82] The Act of Congress Admitting Oregon is here.

contracts, or be a party to a lawsuit; and only "White foreigners" of Oregon were entitled to enjoy property rights. The original Oregon Constitution is online here.

November 6, 1860 – Oregon's three (of 180 nationwide) electoral votes for U.S. president went to Abraham Lincoln over his three rivals.[83] In "1860 the party of Lincoln's first goal was to stop the western expansion of this Evil Empire called the Slave Power; then, once that was accomplished, the goal would be to push slavery back. The idea was very similar to the domino theory of communist containment a hundred years later: first stop communist expansion at the world level, then try to roll bak the advances it had already made."[84]

Around that time, the 1860 Census of States reported the Oregon white population as 52,343 and a "free colored" population as 121.[85] As comparison, South Carolina had a white population of 291,623, a slave population of 402,541, and a "free colored" population of 9,648.[86]

March 1861 – Abraham Lincoln was inaugurated (an estimated 25,000 in attendance) with his "well-loved friend" the Oregon Senator E.D. Baker introducing him.[87] A "bent, shrunken Chief Justice Taney, tottering with age" administered the oath to Lincoln.[88] By the date of his inauguration, the legislatures of South Carolina, Mississippi, Florida, Alabama, Georgia, Louisiana, and Texas had voted to secede from the Union.[89]

April 1861 - The Confederacy opened fire on Fort Sumter in Charleston Harbor, South Carolina. "It was the Confederacy that fired the first shot."[90] In response, President Lincoln called 75,000 militiamen into national service to "re-possess the forts, places, and property which have been seized from the Union."[91]

January 1, 1863 – Lincoln's Emancipation Proclamation. The Proclamation limited emancipation only to the states, or parts of states, still in rebellion. It did not include slaves in the four Union-loyal slave states (Delaware, Maryland, Kentucky, and Missouri).[92] No slave declared free by the Proclamation was ever returned to slavery after making it to Union-held territory.[93]

March 4, 1865 -- Lincoln's Second Inaugural Address given after he won 55% of the vote in an election that did not include the Southern states still in rebellion.[94]

April 15, 1865 – Lincoln's assassination.

December 6, 1865 – Thirteenth Amendment prohibiting slavery was ratified and adopted by requisite ¾

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[83] Nevins, EMERGENCE OF LINCOLN: PROLOGUE TO CIVIL WAR, 312-13
[84] Amar, THE LAW OF THE LAND, 130-31
[85] *Id*. at 488 (reprinting *Appleton's Annual Cyclopaedia*, 1861).
[86] *Id*.
[87] *Id*. at 458
[88] *Ibid*.
[89] Ross 59
[90] Farber 114
[91] Ross 61; Farber 116-17 (quoting Lincoln)
[92] Guelzo 9
[93] Guelzo 9
[94] Stewart 12

of states (27 of 36). Congress received or recognized Oregon's ratification two days later.[95]

July 20, 1868 – Secretary of State William Seward certified that 28 states (three-fourths of the 37 states as required by Article V) had approved the Fourteenth Amendment to the United States Constitution.[96] One part of the Fourteenth Amendment provides that all persons born or naturalized in the United States are citizens of the United States, which specifically invalidates Taney's *Dred Scott* opinion to that slaves, former slaves, and their descendants cannot be citizens.

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

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

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

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

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

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[95] Amar, AMERICA'S CONSTITUTION, 366-67

[96] Stewart 303

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A "claim under the state's own law must be more than a perfunctory afterthought. First things first." Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U BALT L REV 379, 390 (1980).

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"Operating under its original statehood constitution of 1859, Oregon is one of the few states to retain its original, albeit often amended, constitution." Robert F. Williams, *Should the Oregon Constitution Be Revised, and If So How Should It Be Accomplished?*, 87 Or L Rev 867, 867 (2008).

"The Oregon Constitution is relatively long. It has been amended on average nearly one-and-a-half times per year. This amendment rate is somewhat above the mean rate of amendment for state constitutions." *Id*. at 869. "In considering the stability of the Oregon Constitution, it is clear that it has been *changed* through amendment and judicial interpretation but has never been either *replaced* or *reformed*. These are very important distinctions in the area of state-constitutional development." *Id*. at 871.

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The current Oregon Constitution as a whole is here. Much of it the original Oregon Constitution was based on the Indiana Constitution of 1851, here. Justice Hans Linde has written that "Oregon's constitution in 1859 adopted Indiana's copy of Ohio's version of sources found in Delaware and elsewhere." Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 UNIVERSITY OF BALTIMORE LAW REVIEW 379, 391 (1980) (no citation).

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Chapter 1: The Rivalship of Power

"But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary." James Madison, FEDERALIST NO. 51 (Feb. 6, 1788).

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

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

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

1.1 History

"There is only scant reference in the record [of the Constitutional Convention] to the article on distribution of powers in the Oregon Constitution." Claudia Burton, *A Legislative History of the Oregon Constitution of 1857*, 39 WILLAMETTE L REV 245, 253 (2003). "There is no reported discussion of section 1 at the Convention." *Id*. at 258.

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

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

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

1.2 Separation of Powers

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

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

1.2.1 Oregon Constitution

1.2.1.A Separation

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

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

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

1.2.1.B Delegation

"Three provisions of the Oregon Constitution, taken together, prohibit the delegation of legislative power to make laws." *State v Davilla*, 234 Or App 637, 645 (2010), *rev den*, 350 Or 717 (2011). Article I, section 21, provides that no law shall "be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution." Article III, section 1, provides that the "powers of the Government shall be divided into three separate

branches, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these branches, shall exercise any of the functions of another, except as in this Constitution expressly provided." And Article IV, section 1(1), provides that the "legislative power of the state, except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly, consisting of a Senate and a House of Representatives." *City of Damascus v Brown*, 266 Or App 416 (2014).

"Accountability of government is the central principle running through the delegation cases." *Corvallis Lodge No. 1411 v OLCC*, 67 Or App 15, 20 (1984); *City of Damascus v Brown*, 266 Or App 416 (2014).

"The test for determining whether a particular enactment is an unlawful delegation of legislative authority or a lawful delegation of factfinding power is whether the enactment is complete when it leaves the legislative halls. A legislative enactment is complete if it contains a full expression of legislative policy and sufficient procedural safeguards to protect against arbitrary application." *State v Self*, 75 Or App 230, 236-37 (1985); *City of Damascus v Brown*, 266 Or App 416 (2014).

1.2.2 United States Constitution

"In structuring their unique governmental form, the Framers [of the United States Constitution] sought to avoid undue concentrations of power by resort to institutional devices designed to foster three political values: checking, diversity, and accountability. By simultaneously dividing power among the three branches and institutionalizing methods that allow each branch to check the others, the Constitution reduces the likelihood that one faction or interest group that has managed to obtain control of one branch will be able to implement its political agenda in contravention of the wishes of the people. By dividing power on a vertical as well as lateral plane (i.e., between the state and federal governments), they sought to assure that not all policy decisions would be made at one political level. And by implementing a diluted form of popular sovereignty, they assured that those in power would be generally responsive to those they represent while reducing the danger of a tyrannical majority."
Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L J 449, 451 (1991).

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

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

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

"In the leading case to find a separation-of-powers violation, *United States v Klein*, 80 US (13 Wall) 128 (1872), Congress had passed a statute requiring courts to treat pardons of Confederate sympathizers as conclusive evidence of disloyalty, and the Supreme Court found the statute invalid for prescribing a rule of decision to the courts. But while *Klein* illustrates that Congress may not "usurp[ ] the adjudicative function assigned to the federal courts," later cases have explained that Congress may "chang[e] the law applicable to pending cases," even when the result under the revised law is clear. *Axel Johnson Inc. v. Arthur Andersen & Co*., 6 F3d 78, 81 (2d Cir 1993). In *Robertson v Seattle Audubon Society*, 503 US 429 (1992), Congress had passed legislation to resolve two environmental suits challenging logging in the Pacific Northwest. The result of the cases under the new law was clear: the statute stated that 'Congress hereby determines and directs' that if the forests at issue were managed under the terms of the new statute, it would 'meet[ ] the statutory requirements that are the basis for' the plaintiffs' environmental law challenges in those particular cases. 503 US at 434–35 (quoting Department of the Interior and Related Agencies Appropriations Act, Pub.L. No. 101–121, § 318(b)(6)(A), 103 Stat. 701, 747 (1989)). The Ninth Circuit held this statute to be unconstitutional under *Klein* as directing a particular decision in the two cases. *Id*. at 436. But the Supreme Court rejected this position, concluding instead that "[t]o the extent that [the statute] affected the adjudication of the cases, it did so by effectively modifying the provisions at issue in those cases," not by compelling findings or results under those provisions. *Id*. at 440." *Petersen v Islamic Republic of Iran*, 758 F3d 185 (2d Cir 2014).

1.3 Judicial Power and Justiciability

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

"All judicial power, authority, and jurisdiction not vested by this Constitution, or by laws consistent therewith, exclusively in some other Court shall belong to the Circuit Courts, and they shall have appellate jurisdiction, and supervisory control over the County Courts, and all other inferior Courts Officers, and tribunals." -- Article VII (Original), section 9, Or Const

Regarding the effect of the amendment to Article VII: "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. * * * *." -- Article VII (Amended), section 2.

"[N]othing in the text of the constitution itself defined the term 'judicial power.' * * * [N]othing in the text of the constitution itself imposed any limitations on its exercise. Neither of the judicial-power provisions [in the original 1857 state constitution at Article VII, section 1 and Article VII, section 9] was patterned after the judicial-power provisions of the federal constitution, which expressly limited the exercise of judicial power by federal courts to specifically enumerated categories of 'cases' and 'controversies. To the contrary, the 1857 constitution vested '[a]ll judicial power' in the courts, without limitation or qualification. That departure from the federal pattern was apparently deliberate. The original Article VII, in fact, was one of the few provisions of the 1857 constitution to have been largely drafted from scratch." *Couey v Atkins*, 357 Or 460, 492 (2015) (citing Claudia Burton, *A Legislative History of the Oregon Constitution of 1857: Part II*, 39 WILLAMETTE L REV 245, 393-94 (2003), Charles Henry Carey, THE OREGON CONSTITUTION, 475-76 (1926), and W.C. Palmer, *The Sources of the Oregon Constitution*, 5 OR L REV 200, 2007 (1926)).

See Gregory A. Chaimov, *Justiciability*, OREGON CONSTITUTIONAL LAW MANUAL (2013), www.osbar.org/secured/barbooks/viewchapter.asp?bid=85&cid=2343.

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

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

"Oregonians can point to the year 1841 and say with certainty that it was the year the judicial branch was created. Prior to 1841 the only organization with activities that could be said to approximate judicial activities was the Hudson's Bay Company. The Company's chief representative in the Oregon country, Dr. John McLoughlin, acted as executive, legislator, and

judge." Donald C. Johnson, *Politics, Personalities, and Policies of the Oregon Territorial Supreme Court, 1849-1859*, 4 ENVT'L L 11, 11-12 (1973). That court, before 1841, had only probate authorities. *Id*. at 13.

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

1.3.1 Subject Matter Jurisdiction

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

See generally *State v Nix*, 356 Or 768 (2015), vacating appellate courts' decisions based on lack of subject matter jurisdiction.

The legislature has conferred limited jurisdiction on the Court of Appeals to hear and decide appeals by the state in criminal cases. See ORS 138.060 (identifying trial court decisions that state may appeal in criminal cases). *State v Wenning*, 282 Or App 21, 22 (2016).

1.3.1.A Habeas corpus

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

King's authority superseded the writ. *Id*. at 50; *see also* Thomas F.T. Plunkett, A CONCISE HISTORY OF THE COMMON LAW 58 (1956) ("*Darnel's Case* has shown doubts" of the continued improvement of the common law due to the writ because *Darnel's Case* held that a king's mere statement of a reason for imprisonment was sufficient) .

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

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

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

American colonists preferred whipping to imprisonment. *Id*. Some colonial charters recognized it, then disallowed it, in the 1600s. John Peter Zenger of New York, prosecuted for seditious libel for printing material criticizing the governor, was eventually freed after his counsel obtained a writ of habeas corpus (a trial jury acquitted him in 1735). *Id*. at 57; Akhil Reed Amar, THE BILL OF RIGHTS 24, 84-85 (1998); Gordon S. Wood, EMPIRE OF LIBERTY 259 (2009).

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

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

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

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

1.3.1.B Jurisdiction

Under the Oregon Constitution, circuit courts have subject matter jurisdiction over all actions unless some statute or other source of law divests them of jurisdiction. *Longstreet v Liberty Northwest Ins Corp*, 238 Or App 396 (2010) (citing *State v Terry*, 333 Or 163, 186 (2001), *cert denied*, 536 US 910 (2002)).

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

Courter v City of Portland, 286 Or App 39, 46 (6/07/17) (Multnomah) (Maizels, judge pro tem) In 2003, the city exercised its power of eminent domain to acquire plaintiffs' property to build a water tank and related items. A jury awarded plaintiffs just under $600,000 in just compensation for that taking. The trial court awarded the city some acreage and "an easement" on an accessway on plaintiffs' property. The city built the tank and buried pipes from 4 to 15 feet on that way. Plaintiffs contend that the city represented that it would bury the pipe at least 18 feet. Plaintiffs filed a complaint raising an inverse condemnation claim, seeking money damages and a declaratory judgment interpreting what it contends is an ambiguous easement. The city argued that the inverse condemnation claim was "not ripe" because there was no imminent injury and plaintiffs' claims were based on hypothetical future events. Plaintiffs responded that burying the pipes only four feet was an entirely new taking that decreased the property value for its future development. The city argued that trial courts do not have jurisdiction under the Declaratory Judgments Act to interpret another court's judgment. The trial court granted summary judgment for the city.

The Court of Appeals reversed and remanded. The case is ripe. The court also rejected the city's argument that trial courts do not have jurisdiction under the Declaratory Judgments Act to issue

declarations construing the meaning of a prior judgment entered by a circuit court. The city based that argument on *Oregonian Publishing Co., LLC v Waller*, 253 Or App 123 (2012), *rev den*, 353 Or 714 (2013). In that case, the court had noted that under Article VII (Original), section 9, of the Oregon Constitution, a circuit court lacks authority to review the decisions of another circuit court unless the authority is otherwise provided by the constitution or a law. In this case, the court explained that "an action to construe an ambiguous term [in a prior judgment] does not raise the constitutional problem identified in *Oregonian Publishing Co., LLC*, because it is not a request for 'review' by one circuit court of a prior judgment entered by another ciruit court. Rather it is a request for a declaration determining or clarifying the parties' legal interests under the prior judgment." *Id*. at 53. An "action to construe an ambiguous term in a prior judgment fits squarely within the court's authority under the Declaratory Judgments Act" and "where courts have the opportunity to resolve uncertainty or insecurity" regarding parties' rights, courts are obligated to liberally construe the Act. *Id*.

1.3.1.B(i) Standing

The words "standing," "ripeness," and "mootness" are not in Oregon's Constitution (or in the federal constitution). Justice Linde has written:

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

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

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

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

"'Standing' is a legal term that identifies whether a party to a legal proceeding possesses a status or qualification necessary for the assertion, enforcement, or adjudication of legal rights or duties.

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

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

Under the Declaratory Judgments Act, "ORS 28.020 does not allow an organization to assert the rights of its members." *Oregon Taxpayers United PAC v. Kiesling*, 143 Or App 537, 544, 924 P2d 853, *rev. denied* 324 Or 488 (1996), *cert. denied* 520 US 1252 (1997).

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

Unlike the concepts of ripeness and mootness, which inquire about "when" litigation has occurred (too soon or too late), standing asks "who." Standing is an answer to the question: "What's it to you?" *Kellas v Dept of Corrections*, 341 Or 471, 477 n 3 (2006) (quoting Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U L REV 881, 882 (1983)).

Even though a plaintiff had standing when defendant evicted her in violation of a contract, the plaintiff lost standing, and the court will not infer it, because she disclaimed any interest in damages in her complaint and oral arguments. Further, her request for attorney fees does not un-moot the claims "because the court had not entered a judgment in plaintiff's favor" when the case became moot. The case became moot after defendant moved to dismiss, and at that time, the trial court had not determined the parties' rights and obligations. The possibility of an attorney fee award does not prevent her claim from becoming moot. *Nordbye v BRCP/GM Ellington*, 271 Or App 168 (2015)

Compare Oregon standing with Article III of the United States Constitution: "Article III of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies.' U. S. Const., Art. III, §2. The doctrine of standing gives meaning to these constitutional limits by 'identify[ing] those disputes which are appropriately resolved through the judicial process.' *Lujan* v. *Defenders of Wildlife*, 504 US 555, 560 (1992). 'The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of

the political branches.' *Clapper* v. *Amnesty Int'l USA*, 568 US ___ (2013). To establish Article III standing, a plaintiff must show (1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likel[ihood]' that the injury 'will be redressed by a favorable decision.' *Lujan*, *supra*, at 560-561 (internal quotation marks omitted)." *Susan B. Anthony List v Driehaus*, 134 S Ct 2334 (2014) (credible threat of enforcement sufficient to allege an Article III injury for standing).

1.3.1.B(ii) Ripeness

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

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

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

Justiciability has two requirements: (1) the dispute must involve present facts and (2) it must be a dispute in which a prevailing plaintiff can receive meaningful relief from a losing defendant." The "present facts" element is met when the legislature has acted. As to the second element (meaningful relief): "a judgment declaring the Act unconstitutional will have a concrete impact on plaintiffs in this case only if several contingencies occur. The connection is too speculative" in this case. *Hale v State of Oregon*, 259 Or App 379 (2013).

A complaint challenging the lawfulness of a rule that has not yet been adopted is "classically unripe and thus not justiciable." *Couey v Atkins*, 357 Or 460, 476 n 7 (2015).

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

1.3.1.B(iii) Mootness

Federal

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, with *So Pac Terminal Co v Int'l Comm*, 2019 US 498 (1911), the United States Supreme Court has recognized 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).

Voluntary cessation: Article III of the United States Constitution prohibits courts from adjudicating cases or controversies that have become moot. *Already, LLC v Nike, Inc*., [133 S. Ct. 721, 726](#) (2013). A case is often deemed moot when the conduct a plaintiff challenges ceases to exist. In federal courts, a "case becomes moot only when it is impossible for a court to grant 'any effectual relief whatever' to the prevailing party." *Knox v Serv. Emps. Int'l Union, Local 1000*, 132 S.Ct. 2277, 2287 (2012) (quoting *Erie v Pap's A.M*., 529 U.S. 277, 287 (2000)) (other internal quotation marks omitted). The voluntary cessation of challenged conduct will not "ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed," *id*.; in such cases, an injunction provides "effectual relief" because it precludes the defendant from reviving the challenged conduct in that manner. Accordingly, courts will find a case moot after a defendant voluntarily discontinues challenged conduct only if "(1) it can be said with assurance that 'there is no reasonable expectation' that the alleged violation will recur" and "(2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Cty. of Los Angeles v Davis*, 440 U.S. 625, 631 (1979) (alteration omitted) (quoting *United States v. W.T. Grant Co*., 345 U.S. 629, 633 (1953)). ***American Freedom Defense Initiative v Metropolitan Trans. Authority***, 815 F3d 105 (2d Cir 2016).

Oregon

In *Brownstone Homes Condo. Ass'n v Brownstone Forest Hts*, 358 Or 26 (2015), the Oregon Supreme Court summarized mootness: An appeal is moot when a court decision will no longer have a practical effect on the rights of the parties. *Dept. of Human Services v G.D.W*., 353 Or 25, 32 (2012). Under Oregon law, when changed circumstances render an appeal moot, it will be dismissed. *State v Hemenway*, 353 Or 498, 501 (2013). Whether an appeal has become moot may be raised at any time during the appellate process. ORAP 7.05(1)(c). The Court lacks constitutional authority to decide moot cases. The judicial power granted to courts under the Oregon Constitution is limited to the adjudication of an existing controversy. *Hemenway*, 353 Or at 500 (quoting *Yancy v Shatzer*, 337 Or 345, 362 (2004)). *Couey v Atkins*, 357 Or 460, 520 (2015) "has qualified that broad, categorical assertion." "[A]t least as to public actions and those involving issues of public importance, whether mootness requires dismissal of an action is a prudential matter and not one of the constitutional command." *Brownstone*, 358 Or at 30.

Regarding "social stigma associated with a judgment stating that [a] mother physically abused her daughter and engaged in erratic behavior," the Court of Appeals has stated that "in light of the confidentiality of DHS and juvenile court records," "the possibility of a social stigma associated with the underlying judgment itself is minimal and speculative. Additionally, a stigma already exists for mother" because of her involvement with DHS, "and that stigma would not be alleviated by a reversal of the underlying judgment." A juvenile court assumed jurisdiction over a mother's four year old based on her physical abuse. While the mother's appeal was pending, the juvenile court dismissed jurisdiction. The court dismissed the mother's appeal from a juvenile dependency case as moot. *N.L. v L.E*., 279 Or App 712 (2016).

Voluntary cessation: "The voluntary cessation of a practice that is challenged in an action for declaratory and injunctive relief does not, in itself, render an action moot; if the law were

otherwise, wrongdoers could cease their wrongdoing as soon as complaints are filed and resume the wrongdoing as soon as the complaints are dismissed for being moot." *Tanner v OHSU*, 157 Or App 502, 510 (1998). A case is not moot only when defendants maintain that they have "a legal right" to resume challenged conduct and a court determines that a future dispute is likely. *Crandon Capital Partners v Shelk*, 202 Or App 537, 548 (2005), *rev'd on other grounds*, 342 Or 555 (2007); *see also Progressive Party of Oregon v Atkins*, 276 Or App 700, 709 (2016) (plaintiffs did not establish that a future dispute over the issue is likely).

1.3.1.B(iv) Mootness Exceptions

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

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

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

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

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

"Article VII (Amended), section 1, does not require dismissal in public actions or cases involving matters of public interest." *Couey v Atkins*, 357 Or 460, 520 (2015).

Alleging an overbreadth claim does not establish a mootness exception or excuse a party "from establishing the justiciability of that claim." *Couey v Atkins*, 357 Or 460, 475 (2015).

ORS 14.175 allows for a mootness exception in cases that are capable of repetition yet evading review: "In any action in which a party alleges that an act, policy or practice of a public body * * * is unconstitutional or is otherwise contrary to law, the part may continue to prosecute the action and the court may issue a judgment on the validity of the challenged act, policy or practice even though the specific act, policy or practice giving rise to the action no longer has a practical effect

on the party if the court determines that: (1) The party had standing to commence the action; (2) The act challenged by the party is capable of repetition, or the policy or practice challenged by the party continues in effect; and (3) The challenged policy or practice, or similar acts, are likely to evade judicial review in the future."

That statute was enacted in 2007 in response to *Yancy v Shatzer*, 337 Or 345 (2004), see *Couey v Atkins*, 357 Or 460, 479 (2015). That statute does not violate Article VII (Amended), section 1, of the Oregon Constitution, which does not require dismissal of moot public actions or cases involving matters of public interest. *Id.* at 483 & 520.

> *Couey v Atkins*, 357 Or 460 (2015) In *Yancy v Shatzer*, the Oregon Supreme Court had held that the "judicial power" in Article VII (Amended), section 1, of the Oregon Constitution does not confer authority to decide moot cases, including moot cases that are capable of repetition yet evade review. *Couey*, 357 Or at 468, 484, 520-21. In this case, the Supreme Court overruled *Yancy*'s justiciability analysis. The Court here held that based on the "text, historical context, and case law interpreting Article VII (Amended), section 1, there is no basis for concluding that the court lacks judicial power to hear pubic actions or cases that involve matters of public interest that might otherwise have been considered nonjusticiable under prior case law." *Id*. at 520. Mootness and standing are not implicit in Article VII (Amended), section 1 – at least not in pubic action cases or those involving matters of public importance." *Id*. at 521. In other words: "there are no justiciability limitations on the exercise of judicial power in public actions or cases involving matters of public interest," although naturally separations of power principles limit the "judicial power." *Id*. at 520. "Public action" or "public interest" cases include redemption of county-issued warrants that operate on all county taxpayers, election notices, public bonds, liquor licenses that involve public welfare, and as here, cases "challenging the lawfulness of an action, policy, or practice of a public body." *Id*. at 521-22.
>
> Plaintiff in this case had been a paid, registered initiative-petition signature gatherer who also wanted to be a volunteer signature gatherer. A law (*former* ORS 250.048(9) (*renumbered as* ORS 250.048(10)) provides that he could not do so. Plaintiff commenced this declaratory judgment action against the Secretary of State, alleging that the law was overbroad and thus violated his rights of freedom of expression and association. He then stopped working as a paid gatherer. His registration expired. The Secretary of State moved for summary judgment based on mootness. Plaintiff responded that he intended to resume work, but even if he didn't (and the case was moot), under ORS 14.175, it was likely to evade judicial review in the future, so the case should proceed. The trial court entered summary judgment for the Secretary. The Court of Appeals affirmed, 257 Or App 434 (2013), concluding that the case was not subject to the statutory mootness exception in ORS 14.175 because plaintiff could have requested expedited consideration.
>
> The Supreme Court reversed and remanded. The Court rejected plaintiff's contention that he could just assert an overbreadth claim to avoid establishing justiciability on that claim. *Id*. at 475. The Court footnoted that it "has never explained the source of overbreadth analysis under the Oregon Constitution." *Id*. at n 6.
>
> The Court held that the action is moot; however, it is likely to evade judicial review under ORS 14.175 and "the legislature does possess the constitutional authority to enact

the statute." *Id*. at 463. This case involves a public action or involves a public interest, and "at the least, such proceedings include those challenging the lawfulness of an action, policy, or practice of a public body, and such matters are precisely those to which ORS 14.175 applies." *Id*. at 521.

The Court noted that the "capable of repetition rule" on which ORS 14.175 is based was first recognized in *Southern Pacific Terminal Co. v International Comm. Comm*., 219 US 498 (1911). Since then, every jurisdiction in the United States has adopted that rule, except Oregon, until *Couey*. That exception (ORS 14.175 which codified common law) applies to election cases. *Id*. at 481-83. The trial and intermediate courts erred in holding that plaintiff is not entitled to proceed under ORS 14.175.

ORS 14.175 does not violate Article VII (Amended), section 1. *Yancy*, which held to the contrary, is overruled, because *Yancy* cannot be fairly reconciled with other decisions of the Oregon Supreme Court on Article VII (Amended), section 1 (*Kellas*). The Court addressed stare decisis and what constitutes an "error" in constitutional analysis sufficient to warrant reversal. *Id*. at 485-86. There are three categories of errors described in cases: (1) a prior pronouncement was dictum or was adopted without analysis or explanation, such as in *State v Christian*, 354 Or 22, 40 (2013) (overbreadth analysis beyond free-speech cases); (2) analysis that is clearly incorrect, such as in *State v Mills*, 354 Or 350, 370-71 (2013); and (3) cases that cannot be reconciled with other decisions on the same constitutional provision, such as *State v Savastano*, 354 Or 64, 93-94 (2013). This case is an example of that third category, with *Yancy* and *Kellas* that cannot be reconciled. *Id*. at 488.

The Court examined the "judicial power" provision of Article VII (Amended), section 1, of the Oregon Constitution, which was adopted by initiative petition. The court noted that its stated interpretive method for construing initiative-adopted amendments to the state constitution have shifted. In *Ecumenical Ministries v Oregon State Lottery Comm'n*, 318 Or 551 (1994), the court used the same process as in *PGE v BOLI*, 317 Or 606 (1993) (sequential approach that did not permit examining history without textual ambiguity), but under *Priest v Pearce*, 314 Or 411, 415-16 (1992), the text is considered in its historical context without rigid sequencing. *Id*. at 490. In *State v Gaines*, 346 Or 160 (2009) and *State v Algeo*, 354 Or 236, 245 (2013), the court "abandoned the strictly sequential requirements of *PGE*" and "dispensed with the requirement of establishing an ambiguity before examining the history of a constitutional amendment adopted by an initiative. Now, as in the case of statutory construction, when construing constitutional amendments adopted by initiative, we 'consider the measure's history, should it appear useful to our analysis,' without necessarily establishing the existence of multiple reasonable constructions of the provision at issue." *Id*. at 490 (citing *Algeo*). The Court explained that the shift means that "there remains little, if any, practical distinction" between interpreting original and initiative-adopted amendments. *Ibid.*

The Court then considered the "judicial power" in 1857 in Article VII, section 1, and in 1910 in Article VII, section 9, of the Oregon Constitution, neither of which define the term "judicial power." *Id*. at 491. Neither is patterned after the federal constitution, and in fact the original Article VII was one of the few original provisions that was "largely drafted from scratch." *Id*. at 492. In 1910, voters amended the constitution and reworded

it, without defining "judicial power." The Court considered the historical context of judicial power, pre-dating the federal constitution to early English common law, perhaps even "to Roman times." *Id*. at 493 n 14. The Court concluded that in 1857 and 1910, "the general rule was that persons with no personal stake could initiate public actions to vindicate public rights." *Id*. at 498. There was no suggestion in case law that "judicial power" had a limit on courts' authority to decide moot cases. *Id*. at 501. In fact, a thorough examination of the historical context from 1857 and 1919 "shows a complete absence of evidence that the framers would have understood the 'judicial power' conferred in either 1857 or 1910 to have been limited to what we now term 'justiciable' cases." *Id*. at 510.

Kellas and Yancy are competing concepts. *Yancy* viewed justiciability as a constitutional requirement inherent in the nature of "judicial power" conferred under the constitution. And *Kellas* concluded that nothing in the text or historical context of Article VII (Amended), section 1, suggests such limitations on the exercise of judicial power. In light of the examination of the text, historical context, and case law relevant to the adoption of Article VII (Amended), section 1, the Court concluded that "*Kellas* has the better of the argument, at least to the extent that courts are presented with 'public actions' or cases involving matters of 'public interest.'" *Id*. at 515. *Yancy*'s justiciability analysis is disavowed. *Id*. at 520. "We hold only that Article VII (Amended), section 1, does not require dismissal in public actions or cases involving matters of public interest." *Id*.

Eastern Oregon Mining Assoc. v Dep't of Environmental Quality, 360 Or 10 (2016)
This case is a challenge to an order in *other than* a contested case. Such cases require an additional layer of judicial review above what is required for challenges to agency rules or orders. It is "quite common" for such cases "to take five years or substantially longer to fully litigate." *Id*. at 19 & n 2. This challenge is likely to evade review within the meaning of ORS 14.175(3). The Court remanded for the Court of Appeals to determine "the appropriate exercise of the discretion" that ORS 14.175 affords.

Progressive Party of Oregon v Atkins, 276 Or App 700 (2016) After a party voluntarily ceases the challenged action, a case is moot if a court determines that a future dispute is unlikely. In this case, the Secretary of State voluntarily ceased a challenged practice and asserted that she has no plans to adopt another rule like the one challenged. Further, "plaintiffs have not identified evidence suggesting that there is *any* likelihood that defendant will take action in the future similar to the past action that plaintiffs challenged: Accordingly, plaintiffs have not established that the challenged act is one that is "capable of repetition" for purposes of ORS 14.175(2)."

1.3.1.B(v) Inherent Power

<u>Generally</u>: "Courts have inherent power to do certain things that are necessary for them to be able to do in order to perform their judicial functions, when the legislature has not otherwise given them authority to do those things. *Ortwein v Schwab*, 262 Or 375, 385 (1972), *aff'd*, 410 US 656 (1973). * * * However, by its nature, inherent power is a limited source of judicial power. *See Ortwein*, 262 Or at 385." *Cox v M.A.L.*, 239 Or App 350 (2010).

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

Sentencing: "Oregon subscribes to the common-law rule that, once a valid sentence is executed – that is, once a defendant begins serving it – the trial court loses jurisdiction over the case, and thus power to modify the sentence. *State v Jacobs*, 295 Or 632, 636 (1983). The common law rule includes an exception: If the sentence is invalid because it is contrary to law in some respect, the court is deemed to have failed to pronounce any sentence, and thus it has not yet exhausted its jurisdiction and can substitute a valid sentence for the one that is void. *State v Nelson*, 246 Or 321, 324, *cert denied* 389 US 964 (1967). That appears to be the only exception recognized in the common law." *State v Johnson*, 242 Or App 279 (2011).

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

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

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

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

1.3.2 Stare decisis

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

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

"In the area of constitutional interpretation, our cases emphasize that decisions 'should be stable and reliable,' because the Oregon Constitution is 'the fundamental document of this state.'" *Farmers Insurance Co. v Mowry*, 350 Or 686 (2011) (quoting *Strahanan v Fred Meyer, Inc*., 331 Or 38 (2000)). "*Strahanan* makes the point that this court is the ultimate interpreter of state constitutional provisions – subject only to constitutional amendment by the people – and if we have erred in interpreting a constitutional provision, there is no one else to correct the error. *Id.* The Court will "begin with the assumption that issues considered in our prior cases are correctly decided, and 'the party seeking to change a precedent must assume responsibility for affirmatively persuading us that we should abandon that precedent.'" *Id.* (citing *State v Ciancanelli*, 339 Or 282, 290 (2005)).

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

See *State v Hickman*, 358 Or 1 (2015) and *Couey v Atkins*, 357 Or 460 (2015).

State supreme court interpretations of state law are binding on federal courts. Wainwright v Goode, 464 US 78, 84 (1983). But state intermediate-level appellate court interpretations of state law are not binding on federal courts if a federal court is "convinced by other persuasive data" that the state supreme court would decide the matter otherwise. *City of Portland v Homeaway.com, Inc*., No. 3:15-cv-01984-MO (Mosman) slip op p. 13 n 5 (Mar. 9, 2017) (quoting *West v AT&T Co*., 311 US 223, 237 (1940).

1.3.3 Policy Questions

(i). U.S. Constitution

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

On the "political question" doctrine and the Guarantee Clause of Article IV, section 4 of the United States Constitution, see *New York v United States*, 505 US 144, 184 (1992) (addressing history, cases, and commentaries, but not resolving the "difficult question" of whether all claims under the Guarantee Clause present nonjusticiable political questions").

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

(ii). Oregon Constitution

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

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

1.3.4 Appointments to State Supreme Court

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

Article VII (Amended), section 2a, of the Oregon Constitution permits only regularly elected or appointed sitting judges to serve as pro tem Supreme Court members. Thus, "non-judge members of the bar cannot be appointed as pro tempore members of the Supreme Court." *Moro v State of Oregon*, 354 Or 657 (2014).

1.4 Legislation

Oregon's Legislative Department is established in Article IV of the Constitution, here. That Article contains 33 sections. Those are only briefly described herein.

Oregon laws may originate either in the Legislative Assembly or via initiative petition. Both methods are "legislative acts." *Rooney v Kulongoski*, 322 Or 15, 25 (1995).

1.4.1 Introduction

The Legislative Assembly is described in Article IV:

1. Legislative power and initiative and referendum power.
1b. Prohibition on some payments for signatures on initiative or referendum petitions.
2. Limit of 30 Senators and 60 Representatives.
3. How senators and representatives are chosen, vacancies, and qualifications.
4. Terms: Senators' terms are four years. Representatives' terms are two years.
5. *Repealed*. (Originally required census of white people every ten years).
6. Apportionment of Senators and Representatives.
7. Districts and subdistricts.
8. Qualifications: citizenship, residency, age (21 years), and effect of felonies.
9. Privileges from civil process and arrest during legislative sessions. Almost absolute freedom of speech during debate.
10. Regular sessions are held annually: odd-numbered years have 160-day limits and even-numbered years have 35-day limits, excluding organizational sessions, with multiple five-day extensions.
10. Emergency sessions may be held.
11. Each house chooses its own officers and qualifications; neither adjourns more than 3 days without the consent of the other house.

12. 2/3 of each house constitutes a quorum.
13. Each house must keep a journal of its proceedings. Adjournment requires 1/10 consent.
14. Deliberations "shall be open".
15. With a 2/3 vote, each house may punish or expel a member for "disorderly behavior"
16. Either house during session "may punish by imprisonment, any person, not a member, who shall have been guilty of disrespect to the house by disorderly or contemptuous [sic] behavior in its presence" for up to 24 hours.
17. "Each house shall have all powers necessary for a branch of the Legislative Department, of a free, and independant [sic] State."
18. "Bills may originate in either house, but may be amended, or rejected in the other; except that bills for raising revenue shall originate in the House of Representatives."
19. Provides for reading bills and voting.
20. Single-subject rule: "Every Act shall embrace but one subject"
21. "Every act, and joint resolution shall be plainly worded, avoiding as far as practicable the use of technical terms."
22. Revision and amendment of acts and interpretation of conflicts.
23. Prohibition on passing "special or local laws".
24. Suits against the State.
25. Bills are passed by a simple majority, except that bills to raise revenue require 3/5 vote of the House.
26. "Any member of either house, shall have the right to protest, and have his protest, with his reasons for dissent, entered on the journal."
27. "Every Statute shall be a public law, unless otherwise declared in the Statute itself."
28. Acts take effect 90 days after the end of the session except for emergency clauses.
29. Provides for legislators' salaries.
30. "No Senator or Representative shall, during the time for which he may have been elected, be eligible to any office the election to which is vested in the Legislative Assembly; nor shall be appointed to any civil office of profit which shall have been created, or the emoluments of which shall have been increased during such term; but this latter provisions shall not be construed to apply to any officer elective by the people."
31. Provides for oaths of legislators.
32. Defines income tax.
33. Despite Article I, section 25, of the Oregon Constitution, a 2/3 vote of all elected members of each house is required to pass a bill that reduces a criminal sentence that was approved by the people under Article I, section 1, of the Oregon Constitution.

1.4.2 Legislative Power and Limits

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

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

Power and limits of legislators and requirements for bills and petitions are set out in Article IV, outlined in the preceding section herein.

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

The constraints of Article I, section 21, apply only to the delegation of the legislative authority to enact laws – that is, 'the constitutional function of the legislature to declare whether there is to be a law; and, if so, what are its terms.' *Marr v Fisher* et al, 182 Or 383, 388 (1947). Accordingly, although consistently with Article I, section 21, 'the legislature cannot delegate it power to make a law, it is well settled that it may make a law to become operative on the happening of a certain contingency or future event.' *Id*." *Hazell v Brown*, 238 Or App 487, 496 (2010), *aff'd*, 352 Or 455 (2012).

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

1.4.2.A The Debate Clause

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

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

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

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

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

1.4.2.B Origination Clause

> "**Bills may originate in either house, but may be amended, or rejected in the other; except that bills for raising revenue shall originate in the House of Representatives**." -- Article IV, section 18, Or Const

City of Seattle v Dept. of Rev., 357 Or 718 (2015) ORS 307.060 allows Oregon to tax property interest held by taxpayers. The Oregon legislature repealed a 2005 property tax exemption that had benefitted out-of-state municipal corporations. Three municipal corporations in Washington State that have an interest in electrical transmission capacity purchased from an Oregon power administration ("taxpayers") challenged the resultant tax assessments in the Oregon Tax Court. They contended, among other things, that the law repealing their tax exemptions was void because it was a bill to raise revenue that had improperly originated in the Oregon Senate rather than in the Oregon House of Representatives. Article IV, section 18, of the Oregon Constitution requires "that bills for raising revenue shall originate in the House of Representatives." In 2011, the Tax Court held that the legislature had enacted a bill for raising revenue, but it had originated in the House. In 2013, the Tax Court decided that *Power Resources Coop. v Dept. of Rev.*, 330 Or 24 (2000) controlled the case. *Power Resources* held that a taxpayer's partial capacity ownership share is a possessory interest that can be taxed. The Tax Court ruled against the taxpayers, who directly appealed to the Oregon Supreme Court under ORS 305.445.

The Court affirmed, with its reasoning split. *Power Resources* remains controlling precedent because taxpayers did not persuade the Court that it should abandon it. The concurrence would hold that the bill essentially had originated in the House for Article IV, section 18, purposes. The concurrence considered this to be a "gut and stuff" bill "where the operative provisions of the Senate bill were 'gutted' and the House 'stuffed' new operative provisions" into it. The majority held that this "bill does generate revenue" but it "removes a tax exemption – it does not directly levy a tax." *Id*. at 735, 737. Under *Bobo v Kulongoski*, 338 Or 111 (2005) and *Northern Counties Trust v Sears*, 30 Or 388 (1895), to determine if a bill was written for raising revenue, there is a two-pronged test. First, does a bill bring money into the treasury. If yes, then does the bill have the essential features of a bill levying a tax. The first prong is satisfied easily. After analysis, the Court here concluded that "in declaring that a property interest previously exempt from taxation is now subject to taxation, the legislature did not levy a tax." *Id*. at 734.

1.4.2.C One-Subject Rules

Two parts of the Oregon Constitution require proposed laws to involve only one subject. One applies to initiative petitions (Article IV, section 1(2)(d)) and the other applies to legislative acts (Article IV, section 20).

"**Every Act shall embrace but one subject, and matters properly connected therewith**." -- Art. IV, section 20, Or Const.

"**A proposed law or amendment to the Constitution shall embrace one subject only and matters properly connected therewith**." -- Art. IV, section 1(2)(d), Or Const

The two provisions are worded differently, but they "should be given the same meaning." *OEA v Phillips*, 302 Or 87, 93 (1986).

To avoid violating the single-subject provisions, the text of the law must have a unifying principle logically connecting all provisions. *Caleb v Beesley*, 326 Or 83, 87-93 (1997). If the law does not, then the law violates the single-subject rule. If it does, then the question is whether any other matters in the law are properly connected to the unifying principle. *Id*. at 93; *see also State v Mercer*, 269 Or App 135, 138 (2015). In *State v Fugate,* 332 Or 195 (2001), the single subject was deemed to be "the prosecution and conviction of persons accused of crime" and that did not violate the single-subject rule. In *Caleb*, the single subject was deemed to be "mandatory imprisonment of any person, 15 years of age or older, who is convicted of a listed felony on or after April 1, 1995" and that did not violate the single-subject rule. In McIntire v Forbes, 322 Or 426 (1996), a law involving light rail, card-lock service stations, land use, animal feeding, pesticides, timber harvesting, shooting ranges, and protecting salmon from cormorants did not have a unifying subject and thus violated the single-subject rule.

1.4.3 Initiative and Referendum Powers

Article IV, section 1, sets out both initiative and referendum powers of the people, here. The Oregon Secretary of State provides online manuals on initiative and referenda, here and here.

"The powers of initiative and referendum reserved by the people in Article IV, section 1, of the Oregon Constitution allow them to enact statutes, adopt or reject bills passed by the legislature, and adopt amendments to the state constitution." *Couey v Atkins*, 357 Or 460, 463 (2015) (describing process).

See James N. Westwood, *Initiative and Referendum*, OREGON CONSTITUTIONAL LAW MANUAL (2013), www.osbar.org/secured/barbooks/viewchapter.asp?bid=85&cid=2341.

Oregon is one of 27 states that have an initiative process. Other states with an initiative process are: Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, South Dakota, Utah, Washington, Wyoming, and U.S. Virgin Islands. See *Oregon Legislative Services Committee*, Background Brief, page 3, www.oregonlegislature.gov/citizen_engagement/Reports/InitiativeReferendumProcess.pdf.

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

"The current wording of Article IV, section 1, was adopted by the people in 1968, pursuant to legislative referral." *Stranahan v Fred Meyer, Inc*., 331 Or 38 (2000). The original version of Article IV, section 1, adopted as part of the original Oregon Constitution, provided: "The Legislative

authority of the State shall be vested in the Legislative Assembly, which shall consist of a Senate, and a House of Representatives. The style of every bill shall be `Be it enacted by the Legislative Assembly of the State of Oregon,' and no law shall be enacted except by bill." *Id*. at note 16 (citing not to 1857 but to 1859).

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

In Article IV, section 1, subsections (2), (3), and (5), "[t]here are two types of referenda: the citizen referendum and the legislative referendum. The citizen referendum allows the people, after they gather the required number of signatures, to approve or reject legislation that was previously passed by a legislative body. The legislative referendum is the process by which the legislature is required to refer certain matters to the voters for their approval." Subsections (2) and (3) provide "a clear distinction between an initiative and referendum – that an initiative empowers the people to 'enact or reject' a proposed law and a referendum provides the ability to 'approve or reject' an act, or a part of an act of the Legislative Assembly." *American Energy, Inc. v City of Sisters*, 250 Or App 243 (2012).

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

<u>Note</u>: "When interpreting a statute adopted via initiative, [Oregon courts] may consider the history of the measure, including 'the ballot title and arguments for and against the measure included in the voters' pamphlet and contemporaneous news reports and editorial comment on the measure.' *Ecumenical Ministries v Oregon State Lottery Comm*., 318 Or 551, 560 n 8, 871 P2d 106 (1994); *see also State v Algeo*, 354 Or 236, 246, 311 P3d 865 (2013) (court may consider history of voter-adopted measure, if useful to court's analysis, in addition to considering text and context). *But see State v Sagdal*, 356 Or 639, 643, 343 P3d 226 (2015) (court exercises caution in relying on statements of advocates, such as those contained in voters' pamphlet, due to partisan character)." *State v Turnidge*, 359 Or 364, 387 n 14 (2016).

1.4.3.A Initiative Petitions

"The power to enact laws and amend the constitution through the initiative process was not reserved to the people until 1902". *State v Mercer*, 269 Or App 135, 137 n 6 (2015) (citing *Armatta v Kitzhaber*, 327 Or 250, 271 (1998)).

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

    - Power to propose laws and amendments to the Constitution and enact or reject them independently of the legislative assembly.
    - Initiative laws require a petition signed by at least 6% of the total number of votes cast for all candidates for Governor at the last Governor's election.
    - Initiative amendments to the Constitution require a petition signed by at least 8% of the total number of votes cast for all candidates for Governor at the last Governor's election.
    - Initiative petitions must include the full text of the law or amendment proposed and may include only one subject. (See **Section 1.4.2.C**, *ante*).
    - Initiative petitions must be filed at least four months before the election.

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

- Under Article IV, section 1(4):

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

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

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

The Oregon Supreme Court's "Article IV, section 1, jurisprudence also has addressed petitioning activities, in particular, the solicitation of signatures. In *Campbell/Campf/Collins*, 265 Or 82 [1973],

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

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

1.4.3.B Referenda

"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." -- Article IV, section 1(3)(a), Or Const

(i). Article IV, section 1(3), describes the "referendum power" that the people reserved:

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

Article IV, section 1(3)(a) was originally adopted as Article IV, section 1, in 1902. *Rossolo v Multnomah County Elections Division*, 272 Or App 572, 574 n 2 (2015) (no citation). In 1906, another provision was added as Article IV, section 1a. *Ibid*. (no citation). Article IV, sections 1 and the later-enacted section 1a, were modified in 1968 through HJR 16 (1967), and restated as Article IV, section 1(3)(a).

"Under the Oregon Constitution, Oregon voters retain the right of referendum to approve or reject legislation enacted by the Oregon legislature. Or. Const. art. IV, § 1(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.'). 'When a referendum is invoked, the act of the legislature then becomes merely a measure to be voted on by the people, and, if the people vote in the affirmative, the measure becomes an act; if they vote in the negative, the measure fails.' *Portland Pendleton Motor Transp. Co. v. Heltzel*, 197 Or. 644, 647, 255 P.2d 124 (1953) (en banc); *see also Davis v. Van Winkle*, 130 Or. 304, 307, 278 P. 91 (1929) ('In fact, the measure enacted by the Legislature, which is referred to the people, is not a law. It will never become a law unless a majority of voters voting upon the referred bill vote in favor of the bill.')." *M.S. v Brown*, (D Or 2016) ("Here, a referendum on SB 833 was called, and Oregon voters rejected Measure 88. As a result, SB 833 never became law and would not become law even if this Court invalidated the voters' rejection of Measure 88.")

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

- Under Article IV, section 1(4):

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

An Oregon federal district court has explained: "The Oregon Constitution makes clear that 'referendum measures shall be submitted to the people as provided in this section and by law not inconsistent therewith.' Or. Const. art. IV, § 1(4)(b) (emphasis added). As noted by the Oregon Supreme Court, the right of referendum was 'was created to benefit the majority of the people by suspending operation of a statute until the people have an opportunity to approve or reject legislation.' *Bernstein Bros. v Dep't of Revenue*, 294 Or. 614, 619, 661 P.2d 537 (1983) (emphasis added); *see also Hoffman v. Pub. Employees Retirement Bd*., 31 Or. App. 85, 94, 569 P.2d 701 (1977) ('Plaintiffs have confused the effect of a referendum, which does suspend the effective date of an act, and an initiative, which has no such effect.') (citing Or. Const. art. IV, §§ 1(4)(d), 28) (emphasis added). Regardless of whether legislation is 'enacted'" when passed by the legislature, if a referendum is properly called, the legislation is suspended and does not become effective until approved by Oregon voters. *Bernstein Bros*., 294 Or. at 619, 661 P.2d 537; *Heltzel*, 197 Or. at 647, 255 P.2d 124; *Davis*, 130 Or. at 307." *M.S. v Brown*, Case No. 6:15-cv-02069-AA (D. Or 2016).

1.4.3.CMunicipalities

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

1.5 Executive Power

Article V of the Oregon Constitution sets out the Executive Department, online here.

Under Article V, the Governor:

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

1.5.1 Reprieves, Commutations, and Pardons

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

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

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

A death-penalty reprieve under Article V, section 14, does "not require a reprieve to specify and end date" or "limit the Governor to granting reprieves only for a particular purpose, as long as the effect of the reprieve is to delay, temporarily, the execution of the sentence." Further, "neither the text nor the historical circumstances surrounding Article V, section 14, unequivocally requires an act of clemency to be accepted by the recipient to be effective; nor do they require an act of clemency to have a stated end date or to be granted only for a particular purpose." Finally, "none of the Oregon cases holds that an unconditional act of clemency is effective only on acceptance by the recipient." The "executive power to grant clemency flows from the constitution and is one of the Governor's only checks on another branch of government." A reprieve is valid and effective regardless if it is accepted. *Haugen v Kitzhaber*, 353 Or 175 (2013).

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

1.5.2 Balance of Power

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

1.5.3 Administrative Department

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

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

For a list of state agencies, boards, and commissions under the Administrative Department, see here.

1.5.3.A Secretary of State

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

1.5.3.B Treasurer

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

1.5.4 Municipalities

1.5.4.A Interpretation of County Codes

"Whether the county's interpretation of its code is inconsistent with the code, or the purposes or policies underlying the code, 'depends on whether the interpretation is plausible, given the interpretative principles that ordinarily apply to the construction of ordinances under the rules of *PGE* [*v Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993),] as modified by *State v Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009).' *Setniker v Polk County*, 244 Or App 618, 633-34, 160 P3d 800, *rev den*, 351 Or 216 (2011) (internal quotation marks omitted; brackets in original). Merely because a stronger or more logical interpretation exists does not make a local government's interpretation implausible. *Siegert v Crook County*, 246 Or App 500, 509, 266 P3d 170 (2011)." *Gould v Deschutes County*, 272 Or App 666, 675 (2015).

1.5.4.B County Officers

Article VI, sections 6 through 9, of the Oregon Constitution set out elections of county officers, terms, and qualifications, online here.

> **"Section 6. County Officers:** There shall be elected in each county by the qualified electors thereof at the time of holding general elections, a county clerk, treasurer and sheriff who shall severally hold their offices for the term of four years.
> **Section 7. Other officers.** Such other county, township, precinct, and City officers as may be necessary, shall be elected, or appointed in such manner as may be prescribed by law.—
> **Section 8. County officers' qualifications; location of offices of county and city officers; duties of such officers.** Every county officer shall be an elector of the county, and the county assessor, county sheriff, county coroner and county surveyor shall possess such other qualifications as may be prescribed by law. All county and city officers shall keep their respective offices at such places therein, and perform such duties, as may be prescribed by law.
> **Section 9. Vacancies in county, township, precinct and city offices.** Vacancies in County, Township, precinct and City offices shall be filled in such manner as may be prescribed by law." — Article VI, sections 6 to 9, Or Const

1.5.4.C Home Rule

Article VI, section 10, sets out "home rule" in a long provision adopted in 1958, online here.

> "**The Legislative Assembly shall provide by law a method whereby the legal voters of any county, by majority vote of such voters voting thereon at any legally called election, may adopt, amend, revise or repeal a county charter. A county charter may provide for the exercise by the county of authority over matters of county concern. Local improvements shall be financed only by taxes, assessments or charges imposed on benefited property, unless otherwise provided by law or charter. * * * The initiative and referendum powers reserved to the people by this Constitution hereby are further reserved to the legal voters of every county relative to the adoption, amendment, revision or repeal of a county charter and to legislation passed by counties which have adopted such a charter; and no county shall require that referendum petitions be filed less than 90 days after the provisions of the charter or the legislation proposed for referral is adopted by the county governing body.** * * *." – Article VI, section 10, Or Const (in part).

Article XI, section 2 also provides "home rule" for cities and towns with municipal charters, online here.

> **"Corporations may be formed under general laws, but shall not be created by the Legislative Assembly by special laws. The Legislative Assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon, and the exclusive power to license, regulate, control, or to suppress or prohibit, the sale of intoxicating liquors therein is vested in such municipality; but such municipality shall within its limits be subject to the provisions of the local option law of the State of Oregon**." – Article XI, section 2, Or Const

Those two provisions address "home rule" for cities and towns and counties. *City of La Grande v PERS*, 281 Or 137, 140 (1978). See also *GTE Northwest, Inc. v Oregon Public Utility Comm'n*, 179 Or App 46 (2002) and *Thunderbird Mobile Club, LLC v City of Wilsonville*, 234 Or App 457 (2010).

See Jerry Lidz, *Home Rule*, OREGON CONSTITUTIONAL LAW MANUAL (2013), www.osbar.org/secured/barbooks/viewchapter.asp?bid=85&cid=2342.

In *Rogue Valley Sewer Service v City of Phoenix*, 357 Or 437, 445 (2015), the Oregon Supreme Court explained: "'Home rule' itself is not a constitutional term, and the actual constitutional terms differ from state to state. But 'home rule' has been described as the 'political symbol' for the objectives of local authority." *LaGrande/Astoria v. PERB*, 281 Or 137, 140 n 2, 576 P2d 1204, *adh'd to on recons*, 284 Or 173, 586 P2d 765 (1978). Home rule is the authority granted to Oregon's cities by Article XI, section 2, and Article IV, section 1(5), of the Oregon Constitution—adopted by initiative petition in 1906—to regulate to the extent provided in their charters. Article XI, section 2, provides, in part, "The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon[.]" In the same 1906 election, voters "reserved" initiative and referendum powers "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." Or Const, Art IV, § 1(5).

"The purpose of the home-rule provision is to 'allow the people of the locality to decide upon the organization of their government and the scope of its powers under its charter without having to obtain statutory authorization from the legislature." *Northwest Natural Gas Co. v City of Gresham*, 359 Or 309, 336 (2016) (quoting *LaGrande/Astoria v. PERB*, 281 Or 137, 140 n 2, *adh'd to on recons*, 284 Or 173 (1978)).

Article VI, section 10, "reserve[s] to county voters with respect to county tax legislation the same 'referendum powers' previously reserved to state voters with respect to state tax legislation[.]" Those include the referendum powers set forth in Article IV, section 1(3)(a), and section 1(5), of the Oregon Constitution, and the implicit referendum authority for an act "regulating taxation or exemption" in Article IX, section 1a, of the Oregon Constitution. *Rossolo v Multnomah County*

Elections Div., 272 Or App 572, 573-74 (2015) (quoting *Multnomah County v Mittleman*, 275 Or 545, 551 (1976)).

Under "home rule" tenets, a local law is valid and not preempted by state law if "it is authorized by the local charter or by a statute," and if it does not "contravene" state or federal law. *Rogue Valley Sewer Services v City of Phoenix*, 357 Or 437, 450 (2015). A state law can preempt a municipal law in two ways. One, the state may pass a law expressly precluding all municipal regulation in an area, so that the state occupies the field. *Id*. at 454. Or a state law will preempt a municipal law if the laws conflict; in such cases courts construe the municipal law as "intended to function consistently with state laws." *City of La Grande v PERS*, 281 Or 187, 148 (1978).

See *Rossolo v Multnomah County Elections Div*., 272 Or App 572, 573-74 (2015). Plaintiff filed a prospective petition with the county to refer to voters three provisions of an ordinance that involved how tourism tax revenues would be spent. The county elections officer rejected the petition in that it did not meet "constitutional or legislative requirements." Plaintiff appealed to the circuit court under ORS 246.910. Plaintiff contended that the county has "home-rule" authority to expand the type of measures subject to the initiative or referendum process. Defendants contended that the county could not expand the initiative and referendum authority of its voters beyond what is in Article VI, section 10, even if the county could authorize referenda on administrative matters. The court concluded that the ordinance plaintiff sought to submit to county voters was an administrative act of the county board of commissioners, not a legislative act, and therefore is not the subject of a referendum. The circuit court granted defendants' motion for summary judgment.

The Court of Appeals affirmed: The county code does not permit the referral of administrative propositions, and this proposal involves administrative proposals. It framed the issue as whether that measure qualifies as a "part thereof" of "legislation" that can be referred under the express and incorporated terms of Article VI, section 10. Interpreting the text of Article VI, section 10, under *Priest v Pearce*, 314 Or 411, 415-16 (1992), the text itself states that the referendum power applies only to legislation passed by counties and to legislative provisions. In a 94-word sentence, the court basically said that a proposed law is legislative if it makes generally applicable law and is "more than temporary." A law is executive, administrative, or adjudicative if "it applies previous policy to particular actions, or is otherwise compelled by "predicate policy." *Id*. at 584. This proposed measure is administrative in nature.

See *Qwest Corp v City of Portland*, 275 Or App 874 (2015). The Court of Appeals affirmed the trial court's judgment granting declaratory relief to the city. The city imposed a utility license fee as a tax on Qwest for the privilege of doing business within the city. Qwest alleged that that tax violates a state law on privilege taxes that caps the amount municipalities can charge telecommunications carriers for use of municipal rights-of-way, and the state law preempts the city law. The Court of Appeals engaged in a preemption analysis and concluded that the city's tax does not conflict with the state privilege tax law, because the city's tax is not a privilege tax law.

1.5.4.D Conflict Between Codes and Statutes

In *State v Uroza-Zuniga*, 287 Or App 214, 218 (2017) the Court of Appeals held that a Beaverton ordinance is not preempted by state law because ORS 430.402(1)(b) specifically provides for the

type of ordinance in question. The court described the basis and method of determining if a statute preempts a municipal code:

> "Under Article XI, section 2, of the Oregon Constitution, Oregon's municipalities may not enact ordinances that "conflict" with state laws. *City of Portland v Jackson*, 316 Or 143, 146, 850 P2d 1093 (1993). 'An ordinance is said to "conflict" with a state statute if the ordinance either prohibits conduct that the statute permits, or permits conduct that the statute prohibits.' *State v. Krueger*, 208 Or App 166, 169, 144 P3d 1007 (2006). Although statutes are not typically written in terms of permitted conduct (i.e., statutes are typically written in terms of prohibited conduct), we have noted that when the state legislature expressly permits specified conduct, by implication local governments may not prohibit that conduct, and a conflict resulting in preemption can exist. *Jackson*, 316 Or at 147. *Jackson* laid out the analysis used to identify such a conflict. We 'first must examine the ordinance and statutes that the parties claim are in conflict.' *Id*. at 151. Second, 'we determine what conduct the ordinance prohibits.' *Id*. Third, 'we look to see whether the applicable statute *** permit[s] that conduct[.]' *Id*. (emphasis in original). Finally, '[i]f the ordinance prohibits conduct that the statute permits, the laws are in conflict and the ordinance is displaced under Article XI, section 2.' *Id*."

1.6 Federalism and Police Power

States' "police power" does not arise from the United States Constitution. It is an "inherent attribute of the states' territorial sovereignty." See Kenneth R. Thomas, *Federalism, State Sovereignty, and the Constitution: Basis and Limits of Congressional Power*, published as Congressional Research Report (2013) RL30315, here.

The United States Constitution contains specific limits on states' police power:

- Limits on regulating foreign imports and exports, Article I, section 10, clause 2;
- Limits on conducting foreign affairs, Article I, section 10, clause 3;
- Respecting the decisions of other states and courts, Article IV, section 1;
- Congressional permission required to vary state territory, Article IV, section 3, clause 2;
- Limits on burdens to interstate commerce, Article I, section 8, clause 3.

1.7 Federal Preemption

> "Whether federal law preempts a state statute is a question of law, which [Oregon courts] review for legal error. *Dept. of Human Services v. J. G*., 260 Or App 500, 507, 317 P3d 936 (2014). Federal preemption of state law originates in the United States Constitution. Article VI, clause two, of the United States Constitution states, in part, 'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * ** shall be the supreme Law of the Land * **.' In accordance with that clause, 'state laws that conflict with federal law are without effect.' *Altria Group, Inc. v. Good*, 555 US 70, 76, 129 S Ct 538, 172 L Ed 2d 398 (2008) (internal quotation marks omitted). To determine 'the scope of a statute's pre-emptive effect,' we look to 'the purpose of Congress' as 'the ultimate touchstone.' *Id*. (internal quotation marks and brackets omitted). Congress may indicate its preemptive intention either 'through a statute's express language or

through its structure and purpose.' *Id*." *Herinckx v Sanelle*, 281 Or App 869, 873 (2016) (held: "ORS 112.515, as applied here, is preempted by ERISA").

Chapter 2: Free Expression and Assembly

"If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind. Were an opinion on a personal possession of no value except to the owner; if to be obstructed in the enjoyment of it were simply a private injury, it would make some difference whether the injury was inflicted only on a few persons or on many. But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception ad livelier impression of truth, produced by its collision with error." John Stuart Mill, *Utilitarianism, Liberty, and Representative Government*, p. 104, viii (New American Ed. 1951) (*Liberty* was originally published in 1859).

"There is the greatest difference between presuming an opinion to be true, because, with every opportunity for contesting it, it has not been refuted, and assuming its truth for the purpose of not permitting its refutation." *Id*. at 107.

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"[S]hall we just carelessly allow children to hear any casual tales which may be devised by casual persons, and to receive into their minds ideas for the most part the very opposite of those which we should wish them to have when they are grown up?

"We cannot.

"Then the first thing will be to establish a censorship of the writers of fiction, and let the censors receive any tale of fiction which is good, and reject the bad; and we will desire mothers and nurses to tell their children the authorized ones only. Let them fashion the mind with such tales, even more fondly than they mold the body with their hands; but most of those which are now in use must be discarded." Plato, THE REPUBLIC, Book II.

2.1 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

See **Section 2.9**, *post*, on the First Amendment.

2.1.1 Origins

2.1.1.A Framers and Voters

In a 1987 case interpreting Article I, section 8, the Oregon Supreme Court opined: "Oregon's pioneers brought with them a diversity of highly moral as well as irreverent views, we perceive that most members of the Constitutional Convention of 1857 were rugged and robust individuals dedicated to founding a free society unfettered by the governmental imposition of some people's views of morality on the free expression of others." *State v Henry*, 302 Or 510, 523 (1987)

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

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

"In contrast to California, the people of the Oregon Country were a homogeneous lot." David Alan Johnson, FOUNDING THE FAR WEST 41, 143 (1992). "More modern-minded observers remarked often on the seeming disregard of Oregon farmers to the opportunities before them." *Id*. at 47. "The Oregonians' embrace of these midwestern [constitutional] models [that limited voting to free white males] testified to the framers' common mold. Indistinguishable in terms of origin, age, length of residence, or occupation, as a group they underlined the one-dimensional character of the charter society of Oregon." *Id*. at 142.

Only one man at the Oregon Constitutional Convention was a Republican and opponent of slavery: John McBride. *Id*. at 162. An 1850 census reported 207 black persons in Oregon but that number was alternatively estimated at "about 55," because the 207 count included 114 "Indians or half-breeds" and 38 Hawaiians as those 207 "Negroes." Berwanger 81. There appear to have

been very few Jews in Oregon in the 1850s. Steven Lowenstein, THE JEWS OF OREGON 1850-1950 7 (1987).

In short, that dicta from *Henry* is difficult to reconcile with history. That case is addressed in **Section 2.4**, *post*.

2.1.1.B Text

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

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

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

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

2.1.2 Interpretation: The *Robertson* framework

"[W]hatever else may be said about Article I, section 8, we would turn it into an historical footnote if we were to declare that it referred only to forms of expression commonly used in 1857. Radio and television (not to mention film) thus would go wholly unprotected. Instead, we take the view that 'expression,' as a concept used in Article I, section 8, must have a scope consonant with society's expanding methods of expressing itself. The same appreciation of the wording of Article I, section 8, leads us to state that many (if not all) art forms — dance, painting, sculpture, music, photography — have, and are generally accepted as having, expressive components." *State v Ciancanelli*, 339 Or 282, 311 n 24 (2005).

Oregon courts interpret many or most of the original parts of the Oregon Constitution under the *Priest v Pearce*, 314 Or 411 (1992) analysis: The wording, historical circumstances, and Oregon Supreme Court interpretive case law. But it still interprets Article I, section 8, under the three-part "*Robertson* framework" that is "compatible with the 'natural rights' approach" that is "a possible source of Article I, section 8." *State v Ciancanelli*, 339 Or 282, 314 (2005) (addressing *Priest v Pearce*).

State v Robertson, 293 Or 402 (1982) is "the guiding rubric by which Oregon appellate courts have resolved Article I, section 8, challenges to various laws regulating constitutionally protected expression." *Karuk Tribe v Tri-County Metropolitan Trans Dist*, 241 Or App 537 (2011), *aff'd by an equally divided court*, 355 Or 239 (2014); *State v Babson*, 355 Or 383, 391 (2014) (using *Robertson* framework).

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

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

> First, laws that are explicitly directed at prohibiting "speech itself," or the *substance* of any opinion or any subject of communication, violate Article I, section 8, "unless the scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach." *State v Plowman,* 314 Or 157, 163-64, *cert den,* 508 US 974 (quoting *Robertson,* 293 Or at 412); *State v Moyer*, 348 Or 220 (2010) (quoting *Plowman*); *State v Henry*, 302 Or 510, 515-25 (1987) (on the "historical exception" exception); *State v Hirschman*, 279 Or App 338, 352 (2016) ("To determine whether a statute falls within an established historical exception to the protections of Article I, section 8, we must consider 'the initial principle that underlies the historic legal prohibition' on expression. *Moyer*, 348 Or at 237.").
>
> Second, laws that focus on proscribing the pursuit or accomplishment of forbidden *results* are divided further into two categories. Those are considered *Robertson* second and third category analyses. A *Robertson* category-2 law is one that focuses on forbidden *effects* or harms, and specifies that speech might cause that harm, so the law expressly prohibits expression used to achieve those effects. Those are presumptively constitutional unless they are incurably overbroad. An example is a statute prohibiting using a verbal threat to coerce another person. *Robertson*, 293 Or at 415. *Plowman*, 314 Or at 164; *Wilson v Dep't of Corrections*, 259 Or App 554, 558 (2013).
>
> "To be valid as a law that focuses on a harmful effect of speech, the law must 'specify expressly or by clear inference what "serious and imminent" effects it is designed to prevent.'" *Moser v Frohnmayer*, 315 Or 372, 379 (1993) (quoting *Oregon State Police Ass'n v State of Oregon*, 308 Or 531, 541 (1989) (Linde, J., concurring).
>
> Some "burdens on expressive activities are permissible, such as time, place, and manner restrictions" under *Robertson*'s second category, see *State v Babson*, 355 Or 383 (2014).

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

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

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

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

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

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

> "If the answer to the third inquiry is that the enactment proscribes expression or the use of words, rather than harm, it violates Article I, section 8, unless there is a claim, as here, that infringement on otherwise constitutionally protected speech is justified

under the "incompatibility exception" to Article I, section 8. In that event, a fourth inquiry needs to be addressed.

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

A rule banning overnight presence on the state capitol steps does not facially violate Article I, sections 8 and 26, but its enforcement may have violated those provisions as applied to defendants who held an overnight protest on the steps; case remanded to permit defendants to "question" two legislators within the confines of the Debate Clause of the Oregon Constitution. *State v Babson*, 355 Or 383 (2014).

2.1.3 Limits and "Abuse of that Right"

In the Article I, section 8, context, "One may be 'responsible' for abuse in a number of ways. Although Article I, section 8, logically could be read as referring only to moral responsibility, we think it unlikely that either the framers of the Oregon Constitution or those who voted to adopt it would have viewed a moral admonition as an appropriate subject for a substantive provision of their constitution. Instead, we think it inescapable that the term must be read as referring to legal accountability for any 'abuse' of the expansive right described in the first clause of Article I, section 8." *State v Ciancanelli*, 339 Or 282 (2008).

"We know that Article I, section 8, was part of the original Oregon Constitution and was derived from the free speech guarantee in Indiana's 1851 constitution. Charles Henry Carey, ed., *The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857* 468 (1926). As this court acknowledged in *Jackson,* the wording is not peculiar to Oregon and Indiana, and was widely used in other state constitutions, beginning with the Pennsylvania Constitution of 1790. *Jackson,* 224 Or at 348-49.

"There is no record of any specific discussion of Article I, section 8, at Oregon's Constitutional Convention in 1857. However, we do have a record of comments made during the Constitutional Convention about a proposed amendment to *another* provision of the draft constitution that shows that a range of points of view was present there. Specifically, Carey reports that, on September 9, 1857, delegate Perry B. Marple moved to amend proposed Article I, section 10, of the draft constitution to provide that, in 'prosecutions' for libel, the truth may be given in mitigation of damages, rather than in 'justification.' Carey* * * at 309. The omnipresent Matthew Deady moved to make the provision even less protective and suggested, by way of illustration, that the editor of the San Francisco Bulletin was guilty of a 'malicious use of power' with regard to certain stories that had appeared in that newspaper. *Id.* at 309-10. Thomas Dryer, then editor of the Oregonian, a Whig newspaper, complained bitterly about the suggested amendments as attempts to muzzle the press and suggested that 'the previous section [which was to become Article I, section 8] covered all the ground.' *Id.* at 310. Delegate George Williams apparently agreed with Dryer that Article I, section 8, 'embraced all that was required' and moved to strike the provision pertaining to libel altogether. *Id.* A rather lengthy 'debate' between Dryer and Deady ensued, with Deady decrying the "irresponsible public press" and Dryer stating that it would be strange if the press were to be debarred from denouncing corruption and villainy. Dryer also said, in apparent reference to Article I, section 8, that "it was also strange that the whole judiciary should lock hands together on this subject. When the newspapers spoke of any prominent official — and told the truth — it was invariably characterized as `abuse.'" *Id.* The dispute between Deady and Dryer suggests that there was no clear agreement among the delegates as to the meaning of the term "abuse" in the context of Article I, section 8. In fact, Dryer seemed to have feared a different kind of "abuse," one in which a conservative judiciary would abuse its authority to interpret the Oregon Constitution to undermine the very freedom that, in Dryer's view, Article I, section 8, sought to guarantee. Neither does it appear that there was any clear winner in the dispute: the delegates may have concluded that Article I, section 8, "covered all the ground," but they did not feel compelled to further clarify the abuse clause." *Id*.

2.1.3.A Historical Exceptions

In *State v Robertson*, 293 Or 402, 412 (1982) the Court stated that 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 restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach. Examples are perjury, solicitation or verbal assistance in crime, some forms of theft, forgery and fraud and their contemporary variants." "[M]isrepresentations made with intent to injure or defraud * * * were statutorily prohibited as criminal acts as early as 1864 * * * . That early statute covered a variety of misrepresentations, including those aimed at defrauding individuals and the 'body politic.'" *State v Moyer*, 348 Or 220, 234-35 (2010)

The "historical exception" analysis arises under the first category of *Robertson*. *State v Moyer*, 348 Or 220, 232 (2010) (statute prohibiting making a campaign contribution in a false name fell within the first *Robertson* category because "the falsity that the statute prohibits can only be achieved through expression- through one person's communication of a falsehood to another person").

To determine if a statute falls within an established historical exception to the protections of Article I, section 8, "the initial principle that underlies the historic legal prohibition" on

expression must be considered." *Moyer*, 348 Or at 237; *see also State v Hirschman*, 279 Or App 338, 352 (2016) (held: statute against making an offer to purchase a voter's ballot that does not require intent to complete the "transaction" is not akin to solicitation and is not within a historical exception, thus violates Article I, section 8).

"Although the laws making those acts criminal may be 'written in terms' directed at speech, all those crimes have at their core the accomplishment or present danger of some underlying actual harm to an individual or group, above and beyond any supposed harm that the message itself might be presumed to cause to the hearer or to society." *State v Ciancanelli*, 339 Or 282 (2005).

2.1.3.B Rules of Professional Conduct

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

2.1.3.C Defamation

"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

"The action of defamation is brought by a person who has been libeled or slandered by the utterance of another. To be actionable, the utterance must defame the person bringing the action. Three categories of affirmative defenses are available: (1) the utterance was true; (2) the utterance was absolutely privileged; or (3) the occasion of the utterance was qualifiedly privileged. The latter defense, unlike the others, does not bar the action, but requires plaintiff to prove that the defendant acted with actual malice." *Bank of Oregon v Independent News, Inc*., 298 Or 434, 437 (1985). *Bank of Oregon* continued:

"A tension exists within Article I, section 8 between the right to communicate on any subject whatever and the abuse of this right. There is no basis under the Oregon Constitution to provide more protection to certain non-abusive communication based upon the content of the communication. Speech related to political issues or matters of 'public concern' is constitutionally equal to speech concerning one's employment or neighbors, so long as that speech is not an abuse of the right. See *State v Robertson*, 293 Or. 402, 435, 649 P.2d 569 (1982) ('The right of free expression is as important to many people in their personal and institutional relationships as it is in the narrower "civil liberties" related to politics, and nothing in Article I, section 8, suggests that it is limited to the latter.'). The Oregon Constitution does not recognize hierarchies of speech defaming someone, based on that person's access to the means of rebutting the defamation. The Oregon Constitution does not require a higher standard of proof in a defamation action where the plaintiff is a 'public figure' rather than a 'private individual.' Article I, section 8 does not provide the media with any protection not available to other citizens. It is settled Oregon law

"that in the absence of a statute, newspapers as such have no peculiar privilege but are liable for what they publish in the same manner as the rest of the community." *Kilgore v. Koen*, 133 Or at 7, 288 P. 192 (rule consistent with the 'liberty of the press' guaranteed by federal and state constitutions); see *Wheeler v Green*, 286 Or. 99, 117-18, 593 P.2d 777 (1979) (Oregon Constitution does not mention separately a 'freedom of the press'); *see also State* ex rel. *Oregonian Pub. Co. v Deiz*, 289 O' 277, 287, 613 P.2d 23 (1980) (Linde, J., concurring) ('Freedom of expression, in Oregon, does not single out the professional press.'). For that reason, any standard of liability in defamation cases required by the Oregon Constitution should be the same for all defendants." *Bank of Oregon*, 298 Or at 438-40.

A statement in voters' pamphlet that "this bond levy will DOUBLE the Fire District Tax assessments for the next 20 Years" is clearly and unequivocally stating an "objective, mathematical fact." *Yes On 24-367 Committee v Deaton*, 276 Or App 347, 354 (2016).

2.2 Politicking, Campaigning, Lobbying, Voting

2.2.1 Political Speech

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

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

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

2.2.2 Campaign Contributions, Expenditures, and Reporting

A. Oregon Constitution

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

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

B. First Amendment

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

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

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

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

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

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

felony for all corporations — including nonprofit advocacy corporations — either to expressly advocate the election or defeat of candidates or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election." Limits on electioneering communications were upheld in *McConnell* v. *Federal Election Comm'n*, 540 US 93, 203-209 (2003) ("*McConnell* permitted federal felony punishment for speech by all corporations, including nonprofit ones, that speak on prohibited subjects shortly before federal elections.").

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

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

"The Court has recognized that First Amendment protection extends to corporations." (about 22 string cites omitted). "This protection has been extended by explicit holdings to the context of political speech* * * * * * Under the rationale of these precedents, political speech does not lose FirstAmendment protection 'simply because its source is a corporation.'" (citations omitted). "Corporations and other associations, like individuals, contribute to the `discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster" * * * The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not "'natural persons.'" The "Government lacks the power to ban corporations from speaking." "If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or

> associations of citizens, for simply engaging in political speech." "Political speech is 'indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.' *Bellotti*, 435 US, at 777." (other citations omitted). It is irrelevant for purposes of the First Amendment that corporate funds may "have little or no correlation to the public's support for the corporation's political ideas." *Id*., at 660 (majority opinion). "All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker's ideas." "The Framers may not have anticipated modern business and media corporations. See *McIntyre* v *Ohio Elections Comm'n*, 514 US 334, 360-361 (1995) (Thomas, J., concurring in judgment). Yet television networks and major newspapers owned by media corporations have become the most important means of mass communication in modern times. The First Amendment was certainly not understood to condone the suppression of political speech in society's most salient media. It was understood as a response to the repression of speech and the press that had existed in England and the heavy taxes on the press that were imposed in the colonies."

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

2.2.3 Voting and Elections

2.2.3.A "Offering to Purchase" Votes

> In ***State v Hirschman***, 279 Or App 338 (2016), the Court of Appeals held that that statute – prohibiting making an offer to purchase a ballot – is facially unconstitutional under Article I, section 8, and "is not wholly contained within a well-established historical exception to the protections of Article I, section 8." The defendant was an "internet troll" who, as a "political" joke, offered to purchase a ballot for $20. He was charged with knowingly offering to purchase ballots in violation of ORS 260.710(9), which provides:

> "A person may not manufacture or knowingly use a fraudulent ballot return identification envelope or secrecy envelope or sell, offer to sell, purchase or offer to purchase, for money or other valuable consideration, any official ballot, replacement ballot, ballot return identification envelope of secrecy envelope."

That statute was held facially unconstitutional.

2.2.3.B Petitioning for Redress and Attorney Fees

"[B]aseless litigation is not immunized by the First Amendment right to petition." *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 US 731, 743, 103 S Ct 2161, 76 L Ed 2d 277 (1983). ***Clackamas County Oregon v Clackamas River Water***, 280 Or App 366, 371 (2016) ("allowing for the possibility that the First Amendment's guarantee of the right to petition might impose some restriction on fee shifting in election contests or other direct challenges to governmental action—as distinct from litigation involving only private parties—"baseless litigation is not immunized by the First Amendment right to petition.").

2.2.3.C Ballot Access

The following summary of US Supreme Court case law on state ballot-access issues is excerpted from *Libertarian Party of New Hampshire v Gardner*, 843 F3d 20 (1st Cir 2016). New Hampshire changed the time period during which New Hampshire law allows parties to gather nomination signatures and submit nomination papers. Before 2014, New Hampshire allowed parties to gather nomination signatures and submit nomination papers for about 21 months from the prior November election to early August of the pertinent election year. In 2014, New Hampshire reduced that time period to about 7 months by delaying the start date to January 1 of the pertinent election year. The Libertarian Party of New Hampshire filed a lawsuit claiming that the new restriction violated its rights under the First and Fourteenth Amendments to the United States Constitution. The district court granted summary judgment against the Libertarian Party. The First Circuit affirmed. Its reasoning is block quoted in excerpts below:

> "The Supreme Court first considered a constitutional challenge to state-enacted ballot-access regulations in *Williams v Rhodes*, 393 U.S. 23 (1968). Such challenges implicate 'two different, although overlapping, kinds of rights--the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively,' thereby triggering scrutiny under both the First and Fourteenth Amendments. *Id*. at 30. The Ohio ballot-access regulations challenged in *Williams* required a new party seeking to place its candidates on the statewide ballot to file, by the February preceding the November election, nominating petitions signed by a number of voters equal to at least fifteen percent of the total vote cast in the most recent gubernatorial election. The regulations further required that the party establish a party organization, and conduct primaries or national conventions. All in all, the Court found that the regulations 'tend[ed] to give [the Republicans and Democrats] a complete monopoly,' *id*. at 32, closing off the ballot to a party that actually gathered 450,000 nominating signatures. *Id*. at 26. Noting that, at that time, '[f]orty-two states require[d] third parties to obtain the signatures of only 1% or less of the electorate' with no

apparent problems, *id*. at 33 n 9, the Supreme Court rejected Ohio's stated justifications.

"Three years later, the Court considered a similar challenge to Georgia's ballot-access laws. *See Jenness v. Fortson*, 403 U.S. 431 (1971). In brief, Georgia granted a party's nominees automatic access to the ballot only if a candidate of the party 'received 20% or more of the vote at the most recent gubernatorial or presidential election.' *Id*. at 433. Otherwise, a candidate for an office needed to gather within 180 days signatures of five percent of the total number of voters eligible to vote in the prior election for that office, all of whom were eligible to sign such nominating petitions. *Id*. Pointing to what it regarded as 'surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot,' *id*. at 442, the Court found in Georgia's regime 'nothing that abridges the rights of free speech and association secured by the First and Fourteenth Amendments,' *id*. at 440. It also concluded that the plaintiffs' "claim under the Equal Protection Clause of the Fourteenth Amendment fares no better.' *Id*.

"Another three years later, the Court considered California's claim that its five-percent requirement was similarly valid. *Storer v Brown*, 415 US 724 (1974). In California, though, the party seeking ballot access could gather signatures only from persons who did not vote in a primary conducted by the major parties. As the Court observed in remanding the case for further factfinding, one would need to gather more than five percent of this restricted subset of eligible voters in order to equal five percent of the entire set of voters in the previous election. *Id*. at 739; *see also Am. Party of Tex. v. White*, 415 US 767, 784 (1974) (finding that requiring signatures totaling one percent of the vote cast in the previous gubernatorial election to be gathered from only those who did not vote in a party primary 'falls within the outer boundaries of support the State may require').

"On the two occasions when the Supreme Court has actually struck down five-percent requirements where the pool of those who could sign was not substantially restricted, it has done so not because it determined a five-percent requirement by its nature imposed too significant a burden, but because the state itself recognized it could achieve its goals without so high a signature requirement. In *Illinois State Board of Elections v. Socialist Workers Party*, 440 US 173 (1979), for example, the Court struck down an Illinois signature requirement for ballot access in political subdivision elections that exceeded the signature requirements for ballot access in statewide elections. *See id*. at 186–87. It did the same in *Norman v. Reed*, 502 U.S. 279 (1992), explaining that Illinois's requirement had 'unconstitutional breadth' because 'a prerequisite to establishing a new political party in multidistrict subdivisions [was] some multiple of the number of signatures required of new statewide parties.' *Id*. at 293.

"Neither the Supreme Court nor any circuit court has struck down a statewide ballot-access regime on the grounds that a signature requirement of five percent (or less) is too much, or that six months (or more) is too little time within which to gather the signatures from a pool of substantially all voters. *See, e.g., Rainbow Coal. of Okla. v. Okla. State Election Bd*., 844 F2d 740, 741–42, 747 (10th Cir. 1988) (finding a law requiring 45,497 signatures, or five percent of the number of voters in the previous election, in one year a 'relatively high signature requirement' but not impermissible); *Libertarian Party of Fla. v. Florida*, 710 F 2d 790, 794 (11th Cir. 1983) (finding a law requiring 144,492 signatures, or three percent of the state's registered voters, in 188 days 'not impermissibly burdensome').

"The New Hampshire combination of percentage and timeframe, while likely more demanding than the laws in many states, is markedly less burdensome than the regime at issue in *Jenness*. Ballot access under the actual New Hampshire requirement of three percent in seven months required approximately 2,114 valid signatures per month. By contrast, if applied to New Hampshire, the Georgia requirements of five percent in 180 days approved in *Jenness* would have required [Libertarian Party] to gather well more than 4,111 valid signatures per month to gain ballot access in 2016. Moreover, the nominating petition in Georgia secured a place on the ballot only for the nominated candidate, not for a party's whole slate. *Jenness*, 403 U.S. at 432.

"[Libertarian Party] argues that *Jenness* blessed only Georgia's five-percent requirement, not its 180-day window. It is true that the specific challenge in *Jenness* focused on the five-percent requirement. But it is also true that in distinguishing *Williams*, *Jenness* contrasted 'the totality of the Ohio restrictive laws taken as a whole,' *id*. at 437 (quoting *Williams*, 393 U.S. at 34) with Georgia's entire "statutory scheme," *id*. at 438. Similarly, and as we have already noted, the differing results in *Jenness* and *Storer* hinged precisely on consideration of the manner in which the five-percent requirement need be satisfied. Notably, *Jenness* expressly described Georgia as allowing a nominee to 'seek, over a six months' period, the signatures of 5% of the eligible electorate.' *Id*.; *see also Developments in the Law -- Elections*, 88 HARV. L. REV. 1121, 1143 (1975) (*Jenness* 'specifically endorsed a comprehensive approach to evaluating the constitutionality of a state's ballot access restrictions.').

"It therefore follows that [Libertarian Party]'s challenge to New Hampshire's three-percent-within-seven-months requirement must fail unless either *Jenness*'s approval of a more broadly applicable five-percent-within-180-days requirement is no longer good law, or this case is distinguishable on other grounds. [LIBERTARIAN PARTY] does not argue that *Jenness* is no longer good law. Rather, it argues that, for a variety of reasons, this case presents materially distinguishing facts. * * * * * Collectively, these arguments that the change in start date by itself imposes a substantial burden fail to convince us that New Hampshire's ballot-access regime is as burdensome as-much less more burdensome than--the Georgia regime upheld in *Jenness*. To the extent they represent any burden for a political party that has a sufficient modicum of support to mount statewide campaigns that contribute to the voters' understanding and meaningful options, the burden is minimal. With social media and other modern technology, finding and connecting with supporters can happen with greater expediency than ever before. Contacting many supporters to contribute to fundraising efforts is easier today than it has ever been. And, perhaps more importantly, $50,000 just isn't what it once was, especially in politics.

"With a cumulative burden well less than that found acceptable in controlling precedent, and with no other attributes that themselves pose significant barriers to access, New Hampshire's regulations stand as an admittedly robust but nevertheless constitutional exercise of the state's 'broad power to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives," which power is matched by state control over the election process for state offices.' *Wash. State Grange*, 552 U.S. at 451 (quoting Art. I, § 4, cl. 1; *Clingman v. Beaver*, 544 U.S. 581, 586 (2005)). We affirm the judgment of the district court granting New Hampshire's motion for summary judgment in this facial challenge to part of the state's ballot-access framework."

2.3 Stalking

"A person may obtain a stalking protective order in two ways. One method involves filing a complaint with law enforcement. See ORS 163.735 to 163.744. The other method * * * does not require law enforcement involvement. The victim instead directly petitions the circuit court to issue a civil stalking protective order. ORS 30.866." *State v Ryan*, 350 Or 670 (2011). The "substantive standards for an SPO under ORS 163.738 are the same as for an SPO under ORS 30.866; the difference between the two types of SPOs is the manner in which the SPO proceeding is initiated." *V.M. v Miley*, 264 Or App 719 (2014) (citing *Carter v Bowman*, 249 Or App 590, 593-94, *rev den* 352 Or 377 (2012)).

See ORS 30.866 for statutory elements for civil cases. For a civil stalking protective order to properly issue, a contact involving expression must involve a threat that instills a fear of imminent and serious personal violence from the speaker, is unequivocal, and is objectively likely to be followed by unlawful acts. *S.L.L. v MacDonald*, 267 Or App 628 (2014). "Imminent" does not mean "immediate." *Id*.

See ORS 163.735 *et seq* for statutory elements for criminal stalking cases. For a criminal stalking conviction to properly entered, a contact involving expression must involve a threat that instills 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). "Imminent" does not mean "immediate." *S.L.L. v MacDonald*, 267 Or App 628 (2014).

2.3.1 Civil Stalking Protective Orders

See ORS 30.866 for statutory elements for civil cases.

To obtain a civil Stalking Protective Order (an SPO), the petitioner must show by a preponderance of the evidence that the stalker engaged in intentional, knowing, or reckless repeated and unwanted conduct, that is objectively reasonable *C.J.L. v Langford*, 262 Or App 409 (2014) and "if the contact involves speech, Article I, section 8, of the Oregon Constitution requires proof that the contact constitutes a threat. A threat 'is a communication that instills in the addressee a fear of imminent and serious personal violence from the speaker, is unequivocal, and is objectively likely to be followed by unlawful acts.' *State v Rangel*, 328 Or 294, 303 (1999). But a threat does not include 'the kind of hyperbole, rhetorical excesses, and impotent expressions of anger or frustration that in some contexts can be privileged even if they alarm the addressee.' *State v Moyle*, 299 Or 691, 705 (1985)." *Swarringim v Olson*, 234 Or App 309, 311-12 (2010).

An "SPO can issue only where the evidence establishes that any unwanted contacts have caused the petitioner objectively reasonable apprehension for her or her family's *personal safety*. ORS 30.866(1)(c)." *Huber v Landolt*, 267 Or App 753, 761 (2014) (emphasis by court). That is, "unwanted contact that is unsettling, unusual, or unpleasant" may be insufficient to warrant an SPO. *Ibid*. Courts "assess the objective reasonableness of a person's apprehension over personal safety by examining the cumulative effect of the relevant unwanted contacts on that person." *Id. at* 759; *Christensen v Carter/Bosket*, 261 Or App 133, 139-40 (2014).

Name-calling alone is insufficient to meet the *Rangel* standard for speech-based contacts. *K.R. v Erazo*, 248 Or App 700 (2012). Name-calling also may be insufficient to meet the standard for non-expressive contacts that is less stringent than *Rangel*'s. *V.M. v Miley*, 264 Or App 719 (2014)

(letter stating "you are a slutty whore" accompanying a box of condoms, sending letters to 27 of victim's friends, and driving by her street, with no history of violence, is insufficient for an SPO).

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

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

Where a person's past violence was remote and isolated, as opposed to recent and pervasive, a victim's apprehension may not be objectively reasonable to support an SPO. *A.M.M. v Hoefer*, 269 Or App 218 (2015); *Tesema v Belete*, 266 Or App 650 (2014).

Unwanted sexual overtures, without more, are not threats under *Rangel*. *Habrat v Milligan*, 208 Or App 229, 236 (2006); *S.J.R. v King*, 272 Or App 381, 387 (2015).

"In the absence of inherently threatening contacts, something more is required than merely unsettling, unusual, or unpleasant contact." *J. D. K. v. W. T. F.*, 276 Or App 533, 539 (2016) (quotations and citations omitted).

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

2.3.2 The Crime of Violating an Existing SPO

Stalking is a crime defined in ORS 163.732. Violating either a civil or criminal SPO is another crime defined in ORS 163.750.

In contrast with a petition to obtain an SPO, when defendant is charged with the crime of violating an existing SPO (ORS 163.750), Article I, section 8, does not require the state to prove that defendant made an unequivocal threat that caused the victim to fear imminent and serious personal violence. *State v Ryan*, 350 Or 670 (2011). "[B]ecause defendant's communications with the victim were already prohibited by the stalking protective order [and that underlying SPO was not challenged], the state was not required by Article I, section 8, to prove under ORS 163.750 that defendant had communicated an unequivocal threat to the victim." *Id.*; *see also State v Nahimana*, 252 Or App 174 (2012) (under *State v Ryan*, 350 Or 670 (2011), *Rangel*'s narrowing standard does not apply to the crime of violating an existing SPO); *State v Nguyen*, 250 Or App 225 (2012) (Under *Ryan*, "a defendant who seeks to challenge a conviction under ORS 163.750 on free speech grounds first must successfully attack the underlying stalking protective order.").

2.3.3 Terminating an SPO

ORS 30.866 allows a victim to petition and obtain a civil SPO directly with the court without having law enforcement issue a complaint to the stalker. That statute does not provide for any method for a stalker to terminate an SPO. But the criminal stalking statute (ORS 163.738(2)) does provide for terminating an SPO when the reasons for the SPO "are no longer present," see

Edwards v Biehler, 203 Or App 271, 277 (2005). The statutes require the same evidentiary showing for issuance. *C.L.C. v Bowman*, 249 Or App 590 (2012).

"Constitutionally protected speech" may be considered in determining the termination of an SPO. *C.L.C. v Bowman*, 249 Or App 590 (2012) (website postings). (But note that (as stated in an unrelated context by a different court): "Even protected speech is not equally permissible in all places and at all times." *Frisby v Schultz*, 487 US 474, 479 (1988) (quoting *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc*., 473 US 788, 799 (1985)). A group's "choice of where and when to conduct its [protected speech, here it was] picketing is not beyond the Government's regulatory reach—it is 'subject to reasonable time, place, or manner restrictions' that are consistent with the standards announced in this Court's precedents. *Clark v Community for Creative Non-Violence*, 468 US 288, 293 (1984)." *Snyder v Phelps*, 562 US 443 (2011), slip op at 10.

2.3.4 The Crime of Stalking

See ORS 163.735 *et seq* for statutory elements for criminal stalking cases. For a criminal stalking conviction to properly entered, a contact involving expression must involve a threat that instills 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) (narrowing the statute). "Imminent" does not mean "immediate." *S.L.L. v MacDonald*, 267 Or App 628 (2014).

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

2.3.5 Jury Right in Civil Stalking Cases Seeking Money Damages

When a plaintiff files a petition under ORS 30.866 for both a stalking protective order and compensatory money damages for the stalking "the parties are entitled to a jury trial on the claim for money damages" under Article I, section 19, and Article VII (Amended), section 3, of the Oregon Constitution (although the statute does not grant any jury trial right). *M.K.F. v Miramontes*, 352 Or 401 (2012).

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

"The right to jury trial must depend on the nature of the relief requested and not on whether, historically, a court of equity would have granted the relief had the legal issue been joined with a separate equitable claim. * * * Article I, section 17, and Article VII (Amended), section 3, of the Oregon Constitution do not guarantee a right to jury trial for claims or request for relief that, standing alone, are equitable in nature and would have been tried to a court without a jury. By

the same token, in the absence of a showing that the nature of a claim or request for relief is such that, for that or some other reason, it would have been tried to a court without a jury, those provisions do guarantee a right to jury trial on claims or requests that are properly categorized as 'civil' or 'at law.'" *M.K.F. v Miramontes*, 352 Or 401 (2012).

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

2.4 Profanity, Obscenity, and Fighting Words

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

Obscenity is <u>not</u> a "historical exception" to the protections of Article I, section 8. "As Judge Tanzer aptly noted in *State v. Tidyman*, 30 Or. App. 537, 547, 568 P.2d 666, *rev. den*. 280 Or. 683 (1977), the problem with the United States Supreme Court's approach to obscene expression is that it permits government to decide what constitutes socially acceptable expression, which is precisely what Madison decried: 'The difficulty [with the United States Supreme Court's approach] arises from the anomaly that the very purpose of the First Amendment is to protect expression which fails to conform to community standards.' We hold that characterizing expression as 'obscenity' under any definition, be it *Roth*, *Miller* or otherwise, does not deprive it of protection under the Oregon Constitution. Obscene speech, writing or equivalent forms of communication are 'speech' nonetheless. We emphasize that the prime reason that 'obscene' expression cannot be restricted is that it is speech that does not fall within any historical exception to the plain wording of the Oregon Constitution that 'no law shall be passed restraining the expression of [speech] freely on any subject whatsoever.' We do not hold that this form of expression, like others, may not be regulated in the interests of unwilling viewers, captive audiences, minors and beleaguered neighbors. No such issue is before us. But it may not be punished in the interest of a uniform vision on how human sexuality should be regarded or portrayed. * * * 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." *State v Henry*, 302 Or 510, 525 (1987).

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

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

See Alycia N. Sykora, *Right to Assemble, Instruct, and Petition*, OREGON CONSTITUTIONAL LAW MANUAL (2013), www.osbar.org/secured/barbooks/viewchapter.asp?bid=85&cid=2350.

2.5.1 Article I, section 26

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

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

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

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

In *State v Babson,* 355 Or 383 (2014), the Court concluded that facially, rules prohibiting overnight loitering on the Capitol steps does not violate Article I, sections 8 or 26. The Court remanded to determine whether enforcing the rule, *as applied* to defendants, violated Article I, sections 8 or 26. The Court's 63-page opinion reviewed 30 years of *Robertson*. Laws "written in terms" directed at speech that expressly regulate expression are assessed under *Robertson*'s first category. In this case, the court considered only the text of the overnight rule – not the context or legislative history – because it does not do so when "the meaning or scope of the text of a statute is not in dispute" under *Gaines*. This rule is not "written in terms directed to the substance of any 'opinion' or 'subject' of communication," thus it is not unconstitutional under the first *Robertson* category.

Laws "directed in terms against the pursuit of a forbidden effect" and the "proscribed means [of that effect] include speech or writing" are assessed under *Robertson*'s second category. Such laws

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

Laws "directed only at causing * * * forbidden effects" that are applied to a person for his expression are assessed under *Robertson*'s third category. The Oregon Supreme Court noted that case law under this "third category" is "largely undeveloped." The most detailed as-applied analysis under Article I, section 8, is *City of Eugene v Miller*, 318 Or 480 (1994), which held an ordinance invalid as applied to that defendant's conduct. *Miller*'s "general premise applies equally here: a law is invalid as applied to particular expression if 'it did, in fact, reach privileged communication,' and enforcement of the law against a particular defendant 'impermissibly burden[ed] his right of free speech.'" (quoting *Miller*). No one disputes that enforcement of the overnight rule did burden defendants' expressive activities. However, the Oregon Supreme Court "has acknowledged that some burdens on expressive activities are permissible, such as time, place, and manner restrictions," citing *Outdoor Media Dimensions v Dep't of Transportation*, 340 Or 275, 289-90 (2006), *State v Henry*, 302 Or 510, 525 (1987), and *City of Portland v Tidyman*, 306 Or 174, 182 (1988). That time, place, and manner test has been used in *Robertson* category two cases, as in *Outdoor Media*, and it "also can be applied under the third category of *Robertson*." (The Court provided no citation.). When "a law is enforced in a way that restricts 'far more' speech than is necessary to advance the government interest, that enforcement is not a reasonable restriction on the time, place, and manner of expression." The Court concluded that the overnight rule "advanced the government's legitimate interests without restricting substantially more speech than necessary." Defendants also had "ample alternative locations" to protest.

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

“legislators could not have asserted the privilege in response to questions about their direct involvement.”

2.5.2 Speech or Debate Clause - Federal

“The Speech or Debate Clause provides that, ‘for any Speech or Debate in either House, [a member of Congress] shall not be questioned in any other Place.’ U.S. Constitution, Art. I, § 6, cl. 1. Evident from its plain language, the focus is on the improper questioning of a Congressman. As such, the Clause is violated when the government reveals legislative act information to a jury because this “would subject a Member to being ‘questioned’ in a place other than the House or the Senate.” *United States v. Helstoski*, 442 US 477, 490 (1979).” *United States v Renzi*, __ F3d __ (9th Cir October 9, 2014). “[I]f a member of Congress offers evidence of his own legislative acts at trial, the government is entitled to introduce rebuttal evidence narrowly confined to the same legislative acts, and such rebuttal evidence does not constitute questioning the member of Congress in violation of the Clause.” *Id*. (agreeing with 2nd, 3rd, and D.C. Circuits).

In 2016, the Third Circuit addressed United States Senator Robert Menendez’s attempt to use the Speech or Debate Clause to protect against a grand jury indictment against him. *United States v Menendez*, 831 F3d 155 (3d Cir 2016), *cert denied*. The court held that his speech was “not to engage in true legislative oversight or otherwise influence broad matters of policy” and affirmed the district court’s “conclusion that the Speech or Debate Clause does not protect any of the challenged acts.” The Third Circuit reasoned in part as block quoted below:

> The Speech or Debate Clause provides that “for any Speech or Debate in either House” Members of Congress “shall not be questioned in any other Place.” U.S. Const. art. I, § 6, cl. 1. The “central role” of the Clause is to “prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary.” *In re Grand Jury*, 821 F.2d 946, 952 (3d Cir. 1987) (quoting *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 502 (1975)). It was “not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators.” *United States v. Brewster*, 408 U.S. 501, 507 (1972); *see also Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) (stating that legislators must be “immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good”).
>
> The Supreme Court has read the Clause “broadly” to guarantee Members of Congress immunity from criminal or civil liability based on their legislative acts, *Gravel v. United States*, 408 U.S. 606, 615 (1972), and to create a privilege against the use of “evidence of a legislative act” in a prosecution or before a grand jury, *United States v. Helstoski*, 442 U.S. 477, 487 (1979); see *Gravel*, 408 U.S. at 622. But because the privilege “was designed to preserve legislative independence, not supremacy,” invocations of it that go “beyond what is needed to protect legislative independence” must be “closely scrutinized.” *Hutchinson v. Proxmire*, 443 U.S. 111, 126-27 (1979). More specifically, “the Speech or Debate Clause must be read broadly to effect [ ] its purpose of protecting the independence of the Legislative Branch, but no more than the statutes we apply . was its purpose to make Members of Congress super-citizens, immune from criminal responsibility.” *Brewster*, 408 U.S. at 516. A Member seeking to invoke the Clause's protections bears “the burden of establishing the applicability of legislative immunity .

by a preponderance of the evidence." *Lee*, 775 F.2d at 524 (citing *In re Grand Jury Investig*. (Eilberg), 587 F.2d 589, 597 (3d Cir. 1978)).

In practice, the Speech or Debate privilege affords protection from indictment only for "legislative activity." *Gravel*, 408 U.S. at 625; *see also United States v. Johnson*, 383 U.S. 169, 184-85 (1966); *United States v. Helstoski*, 635 F.2d 200, 205-06 (3d Cir. 1980). Legislative acts have "consistently been defined as [those] generally done in Congress in relation to the business before it." *Brewster*, 408 U.S. at 512. They do not include "all things in any way related to the legislative process." *Id*. at 516; see *Gravel*, 408 U.S. at 625 ("That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature."). The takeaway is that "[t]he Speech or Debate Clause does not immunize every official act performed by a member of Congress." *McDade*, 28 F.3d at 295. Rather, it protects only acts that are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel*, 408 U.S. at 625.

2.6 Advertising

A transit district's advertising policy that forbade publishing a group's salmon-restoration advertisement on its vehicles violated Article I, section 8, because the policy classified acceptable and not-acceptable displays based on their subject matter. *Karuk Tribe v Tri-County Metropolitan Trans Dist*, 241 Or App 537 (2011), *aff'd by an equally divided court*, 355 Or 239 (2014) (the policy explicitly regulated expression based on content).

Oregon Natural Resources Council Fund v Port of Portland, 286 Or App 447 (6/28/17) (Multnomah) (Duncan, Hadlock, Ortega, Sercombe, Egan, DeVore, Tookey, Garrett, DeHoog, Schorr, Flynn) (Armstrong concurring) The Portland airport is run by a municipal corporation (the Port of Portland). The airport had a rule barring ads containing religious or political messages. The airport denied an ad that plaintiff Oregon Wild wanted to run on clear-cut forests. Oregon Wild filed for a declaration judgment. The circuit court held that the airport's rule violated Article I, section 8, under *Karuk Tribe v TriMet*, 241 Or App 537 (2011), *aff'd by an equally divided court*, 355 Or 239 (2014), because the rule restricts the content of speech by barring political by not commercial ads. The trial court ordered the airport to accept the ad. The airport appealed.

The Court of Appeals affirmed. First, Oregon Wild asked the Court of Appeals to dismiss the case as moot, because the ad had run, and it did not want to run the expensive ad any longer. The case is not moot because "the judgment has the practical effect of allowing Oregon Wild to submit *any* political advertisement, because the court ruled that the advertising policy unconstitutionally distinguished between commercial and political speech." *Id*. at 456 (emphasis by court).

On the merits, the airport contended that its rule is not a "law," so Article I, section 8, does not apply. The text of Article I, section 8, begins: "No law shall be passed …" The court concluded that "the framers" would have understood the passing of a law to include the enactment of a rule, based on Webster's dictionary circa 1828. *Id*. at 459 & n 8. The court

declined the airport's argument that municipal corporations "act in dual capacities, proprietary and governmental." Id. at 460. The airport did not explain "why the framers would have intended to give local governments greater latitude to restrict speech while acting in a proprietary capacity." *Id*. at 461 & n 10. With a 74-word sentence, the court repeated that a municipal corporation passing a law under Article I, section 8, is not distinguishable from enactment of a rule. *Id* at 463.

State v Robertson, 293 Or 402 (1982) applies to this case. *Robertson* classifies laws in free-expression cases. A law is classified under the first *Robertson* category if it is "written I terms directed to the substance of any 'opinion' or 'subject' of communication." *Robertson*, 293 Or at 412. If it is, then the law violates Article I, section 8, unless the scope of the restraint is "wholly confined within some historical exception that was well established when the first American guarantees of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach." *Robertson*, 293 Or at 412. In this case, "the text expressly regulates based on the content of particular advertisements, prohibiting religious and political content while allowing commercial content." *Id*. at 464. This is a first-category *Robertson* case. *Id*. at 465.

Turning then to the historical-exception issue, the airport argued that there is a "proprietary function" doctrine that was well-established historical exception to rules otherwise applying to state actors. The Court of Appeals concluded that "none of the principles in the 'government as proprietor' case law naturally extend to the context of governmental interference with free expression . . . let alone demonstrate a 'well established exception for the type of speech restriction" in this case. *Id*. at 465-66. In sum, the airport did not establish that its content-based restriction was "wholly confined within some historical exception" under *Robertson* and *State v Moyer*, 348 Or 220, 233 (2010).

The concurrence believes that the airport's ad restrictions do not violate Article I, section 8, and *Karuk* was "wrongly decided," but *Karuk* binds the court in this case.

2.7 Soliciting, Public Sales

2.7.1 Oregon Constitution

One of the leading cases on sales or solicitation as free expression is *City of Eugene v Miller*, 318 Or 480 (1994). A city code banned all sidewalk vending except "the food, beverages, flowers or balloons designated on the license." Defendant, nicknamed "Frog," sold "joke books" regularly on a city sidewalk. Books were not allowed to be sold on sidewalks in Eugene. Frog was convicted of violating that city code because he sold joke books on sidewalks in Eugene. His conviction was reversed under Article I, section 8. The Oregon Supreme Court explained:

> "It may be that the city could, within its legitimate powers and without violating Article I, section 8, ban all sidewalk vending, including the sale of expressive material. It also may be that the city could permit the sale only of certain narrowly drawn categories of goods, where a special public need for such goods could be shown. On those points, we express no opinion. So long as the city chooses to make its sidewalks available for some general commercial activity, however, it may not treat a vendor of expressive material more restrictively than vendors of other merchandise--at least, not without being able to

offer some explanation as to how the sale of the other material meets a special need or how the sale of the expressive material in question gives rise to special problems reasonably justifying the regulation of the vendor of expressive material differently and more stringently than other vendors. No such explanation has been made in these cases. Indeed, beyond the mathematics of the situation, there does not appear to be any rational basis for the burden that the city has chosen to place on defendant's expressive activity. In the absence of such a basis, Article I, section 8, requires that defendant be given the same opportunity for the public sale of his expressive material goods that is given to vendors of other products. As applied, the ordinance under which defendant was convicted unconstitutionally denied defendant that opportunity. Defendant's convictions properly were reversed." *City of Eugene v Miller*, 318 Or 480, 492 (1994).

2.7.2 First Amendment

"Without question, solicitation of funds 'is a form of speech protected under the First Amendment.' [*Int'l Soc'y for Krishna Consciousness, Inc. v Lee (Lee I)*, 505 US 672, 677 (1992)]. The Supreme Court, however, has traditionally afforded solicitation less protection than other forms of speech. Compare *Lee v Int'l Soc'y for Krishna Consciousness, Inc.* (Lee II), 505 US 830, 831 (1992) (per curiam) (invalidating the Port Authority's ban on literature distribution in New York City's airport terminals), with *Lee I*, 505 US at 683–85 (upholding the Port Authority's ban on solicitation in New York City's airport terminals), *United States v Kokinda*, 497 US 720, 733–37 (1990) (plurality opinion) (upholding a federal regulation banning solicitation on U.S. Post Office premises, including adjacent sidewalks), and *Heffron v Int'l Soc'y for Krishna Consciousness, Inc*., 452 US 640, 654–56 (1981) (upholding a rule restricting solicitation to designated booths within the Minnesota State Fairgrounds). This is so, the Court has said, because of 'the disruptive effect that solicitation may have.' *Lee I*, 505 US at 683; *see also Kokinda*, 497 US at 736 (explaining that 'solicitation is inherently more disruptive than other speech activities')." *Internat'l Society for Krishna Consciousness v City of Los Angeles*, 764 F3d 1044 (9th Cir 2014).

2.8 Equal Accommodation; Denial of Service

2.8.1 History in United States

The United States Supreme Court has described a history of public accommodation laws in *Hurley v Irish-American Gay Group of Boston*, 515 US 557 (1995):

"At common law, innkeepers, smiths, and others who 'made profession of a public employment,' were prohibited from refusing, without good reason, to serve a customer. *Lane v. Cotton*, 12 Mod. 472, 484-485, 88 Eng. Rep. 1458, 1464-1465 (K.B. 1701) (Holt, C. J.); see *Bell v. Maryland*, 378 U.S. 226, 298 , n. 17 (1964) (Goldberg, J., concurring); *Lombard v. Louisiana*, 373 U.S. 267, 277 (1963) (Douglas, J., concurring). As one of the 19th century English judges put it, the rule was that "[t]he innkeeper is not to select his guests[;] [h]e has no right to say to one, you shall come into my inn, and to another you shall not, as every one coming and conducting himself in a proper manner has a right to be received; and for this purpose innkeepers are a sort of public servants." *Rex v. Ivens*, 7 Car. & P. 213, 219, 173 Eng. Rep. 94, 96 (N.P. 1835); M. Konvitz & T. Leskes, A Century of Civil Rights 160 (1961).

"After the Civil War, the Commonwealth of Massachusetts was the first State to codify this principle to ensure access to public accommodations regardless of race. See Act Forbidding Unjust Discrimination on Account of Color or Race, 1865 Mass. Acts, ch. 277 (May 16, 1865); Konvitz & Leskes, supra, at 155-56; L.G. Lerman & A. Sanderson, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N. Y. U. Rev. L. & Soc. Change 215, 238 (1978); F. Fox, *Discrimination and Antidiscrimination in Massachusetts Law*, 44 B. U. L. Rev. 30, 58 (1964). In prohibiting discrimination "in any licensed inn, in any public place of amusement, public conveyance or public meeting," 1865 Mass. Acts, ch. 277, 1, the original statute already expanded upon the common law, which had not conferred any right of access to places of public amusement, Lerman & Anderson, supra, at 248. As with many public accommodations statutes across the Nation, the legislature continued to broaden the scope of legislation, to the point that the law today prohibits discrimination on the basis of "race, color, religious creed, national origin, sex, sexual orientation . . ., deafness, blindness or any physical or mental disability or ancestry" in "the admission of any person to, or treatment in any place of public accommodation, resort or amusement." Mass. Gen. Laws 272:98. Provisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments. *See, e.g., New York State Club Assn., Inc. v. City of New York*, 487 U.S. 1, 11 -16 (1988); *Roberts v. United States Jaycees*, 468 U.S. 609, 624 -626 (1984); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 -262 (1964)."

2.8.2 Oregon

See *Sweet Cakes by Melissa*, BOLI final order.

In *Blachana, LLC v BOLI*, 273 Or App 806, *adh'd to as modified*, 275 Or App 46 (2015), a North Portland bar owner/manager left two voicemails on a patron's telephone, asking her and her group (the T Girls) not to come to the P Club (Twilight Room Annex) on Friday nights because the group's presence was "hurting business" and that he was sorry. (The messages are here). The group is 8-54 people who are a mix of gay, straight, married, single, transgendered, who had gathered there on Fridays. The bar owner explained that the decline in business on Fridays at that club seems to be due to people thinking that "we're a tranny club" or "a gay bar," and the bar is neither, and "it's all about money." The group never returned to that bar. BOLI became involved because the bar is a place of public accommodation, and Oregon law prohibits denying service to persons based on sexual orientation. The bar owner said he had a "right to express" a request that the group not visit the bar. In other words, the voicemail was not a "denial of service" to a place of public accommodation that Oregon statutes prohibit, but merely constitutionally protected free expression of opinion.

BOLI determined that the bar owner's voicemail denied equal accommodations to the group at the bar due to sexual orientation, which violates three statutes (ORS 659A.403, 659A.406, and 659A.409, here). BOLI ordered damages of $400,000 plus $3,000 in civil penalties on the bar and $2,000 in civil penalties on the bar owner who left the voicemails. The bar sought judicial review, contending that BOLI's order violated their rights, as applied, under Article I, section 8, of the Oregon Constitution.

The Court of Appeals affirmed, noting that one argument was unpreserved. In its first opinion, the court wrote that no one challenged BOLI's findings. On reconsideration, the court wrote that it had "incorrectly stated that respondents had not challenged BOLI's findings" and rewrote part of its opinion, but did not change its conclusions.

Significantly, the bar did not argue that the Oregon Constitution protects them from actually denying service. They argued that they did not deny actual service by leaving the voicemails. The court reiterated that BOLI's findings that the bar's "request" was "an actual denial of service" is supported by substantial evidence. BOLI had concluded that the bar's owner's speech itself constituted the forbidden effect under a third-category *Robertson* assessment: The bar owner was verbally barring the group from the bar on Friday nights.

2.9 First Amendment

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

2.9.1 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).

The First Amendment, through the Fourteenth, also applies to municipal governments vested with state authority. *Reed v Town of Gilbert*, 135 S Ct 2218 (2015).

2.9.2 State Action

In *New York Times v Sullivan*, 376 US 254, 265 (1964), the Supreme Court addressed the applicability of the First Amendment in an action between private parties: "We may dispose at the outset of two grounds asserted to insulate the judgment of the Alabama courts from constitutional scrutiny. The first is the proposition relied on by the State Supreme Court -- that 'The Fourteenth Amendment is directed against State action, and not private action.' That proposition has no application to this case. Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. *See, e.g.,*Alabama Code, Tit. 7, §§ 908-917. The test is not the form in which state power

has been applied but, whatever the form, whether such power has, in fact, been exercised. *See Ex parte Virginia,* 100 U. S. 339, 346-347; *American Federation of Labor v. Swing,* 312 US 321."

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

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

State "action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" *Brentwood*, 531 US at 295.

A "host of facts" can bear on whether action may be state action: when the state exercises its coercive power or significant encouragement; when a private actor is a willful participant in joint activity with the state; when an entity is controlled by the state or an agency; when an entity has been delegated a public function by the state; when an actor is entwined with governmental policies; or when the government is entwined in the entity's management or control. *Id*. at 296. On state action, see also *Rendell-Baker v Kohn,* 457 US 830 (1982) and *National Collegiate Athletic Ass'n v Tarkanian,* 488 US 179 (1988). See also *Webber v First Student, Inc*., 928 F Supp 2d 1244, 1249 (D Or 2013) (Section 1983 action); *Giulio v BV Centercal, LLC*, 815 F Supp 2d 1162, 1177 (D Or 2011) (Section 1983 action for violations of First, Fourth, Fifth, and Fourteenth Amendments).

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

2.9.3 Scrutiny and Forum

Note: The "First Amendment strictures that attend the various types of government-established forums do not apply" when "the State is speaking on its own behalf." *Walker v Texas Div., Sons of Confederate Veterans, Inc*., 576 US __, No. 14-144 (2015) (*held*: Texas's specialty license plate designs constitute government speech, therefore Texas was entitled to reject a proposal for plates featuring a Confederate battle flag; "forum analysis" applies only to private speech on public property, not government speech); *cf. Matal v Tam*, 137 S Ct 1744 (2017) ("None of our

government speech cases even remotely supports the idea that registered trademarks are government speech.")

For First Amendment private speech analysis, the U.S. Supreme Court has classified "forums" into three categories: (1) traditional public forums, (2) designated public forums, and (3) limited public forums (sometimes called "nonpublic forums." *International Society for Krishna Consciousness, Inc. v Lee*, 505 US 672, 678-79 (1992); *Arkansas Education Television Comm'n v Forbes*, 523 US 666, 677 (1998). In traditional and designated public forums, content-based restrictions are prohibited unless they satisfy strict scrutiny. *Pleasant Grove City, Utah v Summum*, 555 US 460, 469 (2009). In limited public forums (or "nonpublic forums"), content-based restrictions are permissible if they are reasonable and viewpoint-neutral. *Id*. at 470.

In other words: "Laws that impinge upon speech receive different levels of judicial scrutiny depending on the type of regulation and the justifications and purposes underlying it. On the one hand, regulations that discriminate against speech based on its content 'are presumptively invalid,' *R.A.V. v. City of St. Paul, Minn*., 505 US 377, 382 (1992), and courts usually 'apply the most exacting scrutiny,' *Turner Broad. Sys., Inc. v. FCC*, 512 US 622, 642 (1994); *see also United States v Playboy Entertainment Grp., Inc.*, 529 US 803, 814 (2000). On the other hand, 'area[s] traditionally subject to government regulation,' such as commercial speech and professional conduct, typically receive a lower level of review. *Cent. Hudson Gas & Electric Corp. v Pub. Serv. Comm'n of N.Y*., 447 U.S. 557, 562–63 (1980) (regulation of commercial speech); *see also Keller v State Bar of Cal.*, 496 U.S. 1, 13–16 (1990) (regulation of legal profession)." *Stuart v Camnitz*, 774 F3d 238 (4th Cir 2014) (physician compelled speech case).

Strict scrutiny "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Arizona Free Enterprise Club's Freedom Club PAC v Bennett*, 564 US __ (2011); *Perry Education Ass'n v Perry Local Educators' Ass'n*, 460 US 37, 35 (1983). See discussion, *post*, on content-neutral restructions.

2.9.3.A Viewpoint Discrimination

"The Supreme Court has made clear that government suppression of speech based on the speaker's motivating ideology, opinion, or perspective is impermissible. *See Rosenberger v. Rector & Visitors of Univ. of Va*., 515 U.S. 819, 828, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) ('It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.'); *Mahoney v. Babbitt*, 105 F.3d 1452, 1456 (D.C.Cir.1997) (holding that the First Amendment does not permit the federal government to bar ideological opponents from peacefully protesting on the sidewalks of Pennsylvania Avenue during President Clinton's second Inaugural Parade)." *Moss v United States Secret Service*, 572 F3d 962, 970 (9th Cir 2009).

"Government discrimination among viewpoints – or the regulation of speech based on 'the specific motivating ideology or the opinion or perspective of the speaker' – is a 'more blatant' and 'egregious form of content discrimination.' *Rosenberger v Rector and Visitors of the University of Virginia*, 515 US 819, 829 (1995)." *Reed v Town of Gilbert*, 576 US __, 135 S Ct 2218 (2015).

"Congress enacted the Lanham Act in 1946 to provide a national system for registering and protecting trademarks used in interstate and foreign commerce. Congress's purpose in enacting the Lanham Act was to advance the two related goals of trademark law. First, the purpose of the

Lanham Act is to "protect the public so it may be confident that, in purchasing a product bearing a particular trade-mark which it favorably knows, it will get the product which it asks for and wants to get." *Two Pesos, Inc. v. Taco Cabana, Inc*., 505 U.S. 763, 782 n.15 (1992) (Stevens, J., concurring) . . . Second, the Lanham Act ensures that a markholder can protect "his investment from . . . misappropriation by pirates and cheats." *Id*.; *see also Inwood Labs., Inc. v. Ives Labs., Inc*., 456 U.S. 844, 854 n.14 (1982). *In Re Tam*, 808 F3d 1321 (Fed Cir 2015), *aff'd sub nom Matal v Tam*, 137 S Ct 1744 (2017).

In *In Re Heeb Media, LLC* (2008), the US Patent and Trade Office denied an application to register the mark "HEEB" under 15 U.S.C. §1052(a), on the ground that applicant's mark "is disparaging to a substantial composite of the referenced group, namely, Jewish people."

Part of the Washington Redskins tradename dispute, which dealt with laches, is at *Pro-Football, Inc. v Harjo*, 567 F Supp 2d 46, 62 (D.D.C. 2008).

2.9.3.B Content-Neutral Restrictions

Content-neutral time, place, and manner regulations are permitted even in traditional public forums if the regulations are narrowly tailored to serve a significant governmental interest and leave open ample alternative channels of communication. *Ward v Rock Against Racism*, 491 US 781, 791 (1989); *Nativity Scenes Comm'n v City of Santa Monica*, 784 F3d 1286 (9th Cir 2015) (held: city's repeal of all private unattended displays from its public parks was a content-neutral time, place, and manner regulation); *Moss v United States Secret Service*, 572 F3d 962, 970 n 8 (9th Cir 2009) ("Content neutral regulation of speech, even in a public forum, is permissible if it is narrowly tailored and provides for alternative avenues of communication.") (citing *Hill v Colorado,* 530 US 703, 725-26 (2000)).

Content-neutral regulations are suspect when they suppress more speech than is necessary to accomplish their objectives. *Martin v City of Struthers*, 319 US 141, 145-46 (1943); *Schneider v Town of Irvington*, 308 US 147, 162 (1939); *Nativity Scenes Comm'n v City of Santa Monica*, 784 F3d 1286 n 5 (9th Cir 2015) (held: "blanket bans applicable to all speakers are content-neutral").

2.9.3.C Content-Based Restrictions

"The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison Co. v Public Service Comm'n of New York*, 447 US 530, 537 (1980).

In *Reed v Town of Gilbert*, 576 US __, 135 S Ct 2218 (2015), the Court explained that "the crucial first step in the content-neutrality analysis" is to determine whether the law is "content neutral on its face." *Id*. at 2228. A facially content-neutral law will still be categorized as content-based if it cannot be justified without reference to the content of the regulated speech or adopted by the government because of disagreement with the message the speech conveys. *Id*. at 2227 (quoting *Ward v Rock Against Racism*, 491 US 781, 791 (1989)).

"A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the

regulated speech. *Cincinnati v Discovery Network, Inc*, 507 US 410, 429 (1993)." *Reed*, 576 US at __. Strict scrutiny "applies either when a law is content based on its face or when the purpose and justification for the law are content based." *Reed*, 576 US at ___ (held: ordinance that imposed more stringent restrictions on signs directing the public to a church meeting than on "political" signs was content based. And an ostensibly viewpoint-neutral law is content based if it was "adopted by the government because of disagreement with the message the speech conveys.").

In *Rideout v Gardner*, 838 F3d 65 (1st Cir 2016), the Court of Appeals for the First Circuit struck down a statute involving $1,000 statutory fines for posting "ballot selfies" (the New Hampshire law stated that no voter shall allow his ballot to be seen by any person with the intention of letting it be known how he is about to vote). It summarized:

> "Content-based regulations are subject to strict scrutiny, which requires the government to demonstrate 'a compelling interest and narrow[ ] tailor[ing] to achieve that interest.' [*Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2231, (2015)] (quoting *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734, 131 S.Ct. 2806, 180 L.Ed.2d 664 (2011)). Narrow tailoring in the strict scrutiny context requires the statute to be 'the least restrictive means among available, effective alternatives.' *Ashcroft v. Am. Civil Liberties Union*, 542 US 656, 666, 124 S Ct 2783, 159 L.Ed.2d 690 (2004). In contrast, content-neutral regulations require a lesser level of justification. These laws do not apply to speech based on or because of the content of what has been said, but instead 'serve[ ] purposes unrelated to the content of expression.' *Ward v. Rock Against Racism*, 491 US 781, 791, 109 SCt 2746, 105 L.Ed.2d 661 (1989). "The principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the context of expression is deemed neutral." *Id*. (citation omitted). Content-neutral restrictions are subject to intermediate scrutiny, which demands that the law be "narrowly tailored to serve a significant governmental interest." *Id*. '[U]nlike a content-based restriction of speech, [a content-neutral regulation] "need not be the least restrictive or least intrusive means of' serving the government's interests." *McCullen v Coakley*, ––– U.S. ––––, 134 S.Ct. 2518, 2535, 189 L.Ed.2d 502 (2014) (quoting *Ward*, 491 U.S. at 798, 109 S.Ct. 2746)."

In evaluating a facial challenge courts "must consider the [municipality's] authoritative constructions of the ordinance, including its own implementation and interpretation of it." *Forsyth County v. Nationalist Movement*, 505 US 123, 131 (1992).

A speech regulation is narrowly tailored if it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (citation omitted). The fact that "the government's interest could be adequately served by some less-speech-restrictive alternative" will not invalidate an otherwise reasonable time, place, or manner restriction "[s]o long as the means chosen are not substantially broader than necessary." *Id*. at 800.

"Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech. That is why the First Amendment expressly targets the operation of the laws

– i.e., the 'abridg[ement] of speech' – rather than merely the motives of those who enacted them. . . . "The vice of content-based legislation . . . is not that it is always used for invidious thought-control purposes, but that it lends itself to use for those purposes." *Reed*, 576 US at ___ (quoting *Hill v Colorado*, 530 US 703, 743 (Scalia, J., dissenting).

2.9.4 Expressive Activity

"The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley v Maynard*, 430 US 705, 714 (1977) (quoting *West Virginia State Board of Educ. v Barnette*, 319 US 624, 637 (1943)). *Stuart v Camnitz*, 774 F3d 238 (4th Cir 2014).

The First Amendment not only protects against prohibitions of speech, but also against regulations that compel speech. "Since all speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say." *Hurley v. Irish–American Gay, Lesbian & Bisexual Grp. of Boston*, 515 US 557, 573 (1995) (citations omitted); *see also Wooley v Maynard*, 430 US 705, 714 (1977) ("[T]he First Amendment includes both the right to speak freely and the right to refrain from speaking at all."). *Stuart v Camnitz*, 774 F3d 238 (4th Cir 2014).

The Ninth Circuit has held that a Los Angeles law requiring porn film actors to use condoms during filming is subject only to First Amendment intermediate scrutiny (rather than strict scrutiny). *Vivid Entertainment, LLC v Fielding*, 774 F3d 566 (9th Cir 2014). The court affirmed the district court's denial of the adult entertainment industry's request for a preliminary injunction on the condom requirement its argument that the law restricted free expression. In so doing, it attempted to address the complex question: When is an activity "expressive"? The *Vivid Entertainment* Court wrote:

> It "'is possible to find some kernel of expression in almost every activity a person undertakes - for example, walking down the street or meeting one's friends at a shopping mall - but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.'" *Barnes v Glen Theatre, Inc.*, 501 US 560, 570 (1991) (quoting *City of Dallas v Stanglin*, 490 US 19, 25 (1989)). To determine whether conduct is protected by the First Amendment, we ask not only whether someone intended to convey a particular message through that conduct, but also whether there is a 'great' likelihood 'that the message would be understood by those who viewed it.' *Spence v Washington*, 418 US 405, 410–11 (1974) (per curiam). Here, we agree with the district court that, whatever unique message Plaintiffs might intend to convey by depicting condomless sex, it is unlikely that viewers of adult films will understand that message. So condomless sex is not the relevant expression for First Amendment purposes; instead, the relevant expression is more generally the adult films' erotic message." ("strict scrutiny is inappropriate because the condom mandate does not ban the relevant expression completely. Rather, it imposes a de minimis restriction.").

2.9.5 What is Not Protected Speech (or Speech Not Subject to Strict Scrutiny)

The First Amendment "has no application when what is restricted is not protected speech." *Nevada Comm'n on Ethics v Carrigan*, 131 S Ct 2343 (2011). Besides "well-defined and narrowly limited classes of speech" such as obscenity, incitement, and fighting words, the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Brown v Entertainment Merchants Ass'n*, 131 S Ct 2729 (2011).

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

"Unlike der Führer, government officials in America occasionally must tolerate offensive or irritating speech. *See Cohen v California*." *Norse v Santa Cruz*, 629 F3d 966 (9th Cir 2010) (en banc) *cert denied*, 132 S Ct 112 (2011) (Kozinski, CJ, concurring) (city council meeting attendee's sarcastic "Nazi" salute given to city council during public comment period of meeting was protected by First Amendment).

Speech that the First Amendment does not protect, or that is not subject to strict scrutiny even if it is within a content-based restriction, includes the following (see *United States v Alvarez*, 132 S Ct. 2537, 2544 (Kennedy, J. for plurality) and at 2553-54 (Breyer, J., concurring) (2012)).

- **Legislators' votes**. A legislator's vote is not protected speech. A legislator's power is not personal to him but belongs to the people. *Nevada Comm'n on Ethics v Carrigan*, 131 S Ct 2343 (2011).
- **Obscenity.** *Brown v Entertainment Merchants Ass'n*, 131 S Ct 2729 (2011) (obscenity, incitement, and fighting words "have never been thought to raise any Constitutional problem"); *Miller v California*, 413 US 15, 23 (1973).
- **Fighting words**. *Chaplinsky v. New Hampshire*, 315 US 568, 571-72 (1942); *United States v Stevens*, 130 S Ct 1577, 1584 (2010) (certain categories of speech fall outside First Amendment protection precisely *because of* their content: obscenity, defamation, fraud, incitement, and speech integral to criminal conduct).
- **Defamation, fraud, and <u>some</u> false statements of facts**. Knowingly communicating an intentional lie *may* be regulated without regard to the substance of that speech as long as the government is not favoring or disfavoring certain messages. *United States v Gilliland*, 312 US 86, 93 (1941); *New York Times v Sullivan*, 376 US 254 (1964) (public official alleging defamation must show "actual malice" that the statement was published with "knowledge that it was false or with reckless disregard of whether it was false or not"); *Gertz v Robert Welch, Inc*., 418 US 323, 340 (1974) (negligence standard for private defamation actions); *R.A.V. v City of St. Paul*, 505 US 377, 391-92 (1992); *United States v Alvarez*, 132 S Ct 2537, 2546-47 (2012). Commercial speech that is false, misleading, or proposes illegal transactions is unprotected, see *Central Hudson Gas & Electric Corp v Pub Serv Comm'n of New York*, 447 US 557, 562, 566-67 (1980). But speech is not unprotected merely because the speaker knows he is lying, *United States v Alvarez*, 132 S Ct 2537, 2545-47 (2012) (plurality struck part of the Stolen Valor Act that had criminalized lying about receiving a military medal).

Opinion on matters of public concern, however, is protected. *Neumann v Liles*, 358 Or 706 (2016).

- **True threats**. *Watts v United States*, 394 US 705, 708 (1969).
- **Advocacy that imminently incites lawless action**. *Brandenburg v Ohio*, 395 US 444, 447-48 (1969); *Hess v Indiana*, 414 US 105, 108 (1973) (but mere advocacy of illegal action at some indefinite future time is not sufficient).
- **Speech Integral to Criminal Conduct.** *Giboney v Empire Storage & Ice Co.*, 336 US 490, 498 (1949).
- **Child Pornography** made with real children. *Ashcroft v Free Speech Coalition*, 535 US 234, 245-46 (2002); *New York v Ferber*, 458 US 747, 764-65 (1982).

2.9.6 Schools

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

Generally. Students' First Amendment claims against public schools start with *Tinker v Des Moines Independent Community School District*, 393 US 503 (1969). Under *Tinker*, schools may prohibit speech or expressive conduct (such as a black armband protesting war) only if that speech might materially disrupt classwork or invade other students' rights to be secure and left alone. *Tinker*, 393 US at 508, 513-14. To limit students' speech, and especially to justify prohibiting expression of a viewpoint, the schools must show that their action was caused by "more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. *Id*. at 509. In *Tinker*, there was no evidence that the students' black armbands protesting war interfered with anything in school and the school failed its burden to show disruption. See also *Dariano v Morgan Hill Unified School District*, 767 F3d 764 (9th Cir 2014), cert denied 2015 WL 1400871 (upholding summary judgment for school that banned clothing with American flags after receiving several threats of race-related violence).

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

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

2.9.7 Signs and Ads

In *Reed v Town of Gilbert*, 135 S Ct 2218 (2015), a sign case, the Court explained that "the crucial first step in the content-neutrality analysis" is to determine whether the law is "content neutral on its face." *Id*. at 2228. A facially content-neutral law will still be categorized as content-based if it cannot be justified without reference to the content of the regulated speech or adopted by the government because of disagreement with the message the speech conveys. *Id*. at 2227 (quoting *Ward v Rock Against Racism*, 491 US 781, 791 (1989)).

"A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech. *Cincinnati v Discovery Network, Inc*, 507 US 410, 429 (1993)." *Reed*, 576 US at __. Strict scrutiny "applies either when a law is content based on its face or when the purpose and justification for the law are content based." *Reed*.

"Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech. That is why the First Amendment expressly targets the operation of the laws – i.e., the 'abridg[ement] of speech' – rather than merely the motives of those who enacted them. . . . "The vice of content-based legislation . . . is not that it is always used for invidious thought-control purposes, but that it lends itself to use for those purposes." *Reed* (quoting *Hill v Colorado*, 530 US 703, 743 (Scalia, J., dissenting)).

2.9.7.A Signs

A government can regulate "size, building materials, lighting, moving parts, and portability," and on public property it may "entirely forbid[] the posting of signs, so long as it does so in an evenhanded, content-neutral manner." *Reed*; see also Justice Alito's concurrence in *Reed*, listing numerous sign restrictions that governments may enact for both private and public property restrictions. See also Justice Breyer's concurrence in *Reed*, raising concerns that "virtually all government activities involve speech" and regulatory programs "almost always require content discrimination." Examples include securities registries, energy conservation labels, prescription drug labels, consumer electronics disclosures, medical records, taxes, airline pilots' disclosures).

2.9.7.B City Buses

In *Lehman v Shaker Heights*, 418 US 298 (1974 (plurality), the Court found that the advertising space on city buses was a "nonpublic forum"); *R.A.V. v St. Paul*, 505 US 377, 390 n 6 (1992) (identifying *Lehman* as a case about a nonpublic forum); *Walker v Texas Div., Sons of Confederate Veterans, Inc*., 576 US __ (2015) (so noting).

See also Seattle Mideast Awareness Campaign v King County, 796 F3d 1165 (9th Cir 2015). A bus district opened its Metro buses to ads from outside (non-government) speakers. Its policy excludes alcohol, tobacco, adult themes, illegal acts, child porn, flashing lights, defamation, deceptive, and "uncivil" ads that incite a response that threatens public safety. It first allowed an anti-Israel ad that said "ISRAELI WAR CRIMES YOUR TAX DOLLARS AT WORK WWW.STOP30BILLION-SEATTLE.ORG"). In response, two pro-Israel groups asked to have

their ad ("PALESTINIAN WAR CRIMES YOUR TAX DOLLARS AT WORK"). Jewish riders reported being concerned about their physical safety, and so many emails came in the Metro director could not use her email system, Metro decided that *no* ads on that content would be on their buses, pursuant to its ad policies that exclude *all* ads that are "so objectionable under contemporary community standards as to be reasonably foreseeable that it will result in harm to, disruption of, or interference with the transportation system."

The district court and appellate court concluded that "the threat of disruption was real rather than speculative." The government "need not wait until havoc is wreaked" before excluding potentially disruptive speech from a limited public forum. *Cornelius v NAACP Legal Def & Education Fund, Inc*., 473 US 788 (1985). *Held*: bus ad program is a limited public forum. This conclusion contrasts with the Second, Third, Sixth, Seventh, and D.C. Circuits that have held that when the government opens a forum and is willing to accept political speech, it creates a designated public forum. In a limited public forum, "any subject-matter or speaker-based limitations must still be reasonable and viewpoint neutral." Here there is no viewpoint discrimination because all ads on the Palestinian conflict are rejected. This is a "viewpoint-neutral content-based limitation."

See also American Freedom Defense Initiative v King County, 796 F.3d 1165 (9th Cir 2015), *cert denied*, __ US __ (2016). King County Metro rejected an advertisement submitted by nonprofit Plaintiff American Freedom Defense Initiative, because Metro concluded that the ad failed to meet its publication guidelines, specifically that the ad was false or misleading, demeaning or disparaging, or harmful or disruptive to the transit system. Plaintiffs' proposed ad states, in prominent text: "The FBI Is Offering Up To $25 Million Reward If You Help Capture One Of These Jihadis." The panel noted that that "statement is demonstrably and indisputably false. The FBI is not offering a reward up to $25 million for the capture of one of the pictured terrorists. The FBI is not offering rewards at all, and the State Department offers a reward of at most $5 million, not $25 million, for the capture of one of the pictured terrorists."

Plaintiffs declined to discuss the rejection with Metro and, instead, filed this 42 U.S.C. § 1983 action, alleging that Metro's rejection violated the First Amendment, and seeking a preliminary injunction requiring Metro to publish the ad. The district court denied the motion, olaintiffs filed this interlocutory appeal, and the Ninth Circuit panel concluded that the district court did not abuse its discretion, and affirmed. The analysis: "Because it has created a nonpublic forum only, Metro's rejection of Plaintiffs' advertisement must be reasonable and viewpoint neutral."

2.9.8 Government Speech

2.9.8.A Permanent Monuments on Public Property

Permanent monuments displayed on public property typically represent government speech, according to the US Supreme Court. Public parks can accommodate only a limited number of permanent monuments. Speakers, no matter how long-winded, eventually come to the end of their remarks; persons distributing leaflets and carrying signs at some point tire and go home; monuments, however, endure. They monopolize the use of the land on which they stand. *Pleasant Grove City v Summum*, 555 US 460 (2009). *Summum* held: The "City's decision to accept certain privately donated monuments while rejecting respondent's is best viewed as a form of government speech. As a result, the City's decision is not subject to the Free Speech Clause."

In *Pleasant Grove City v Summum*, 555 US 460 (2009), a city denied a religious group's request to place a monument of its aphorisms in a public park, despite the existing presence of a Ten Commandments monument in that park. The Court held that although a park is a traditional public forum for speeches and other transitory expressive acts, the display of a permanent monument in a public park is not a form of expression to which forum analysis applies. Placing a permanent monument in a public park is a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause. The Court reasoned:

"The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. *See Johanns v Livestock Marketing Assn*., 544 US 550, 553 (2005) ("[T]he Government's own speech . . . is exempt from First Amendment scrutiny"); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 US 94, 139, n 7 (1973) (Stewart, J., concurring) ("Government is not restrained by the First Amendment from controlling its own expression"). A government entity has the right to "speak for itself." *Board of Regents of Univ. of Wis. System v Southworth*, 529 US 217, 229 (2000). "[I]t is entitled to say what it wishes," *Rosenberger v. Rector and Visitors of Univ. of Va*., 515 U. S. 819, 833 (1995), and to select the views that it wants to express. *See Rust v Sullivan*, 500 U. S. 173, 194 (1991); *National Endowment for Arts v. Finley*, 524 U. S. 569, 598 (1998) (SCALIA, J., concurring in judgment) ("It is the very business of government to favor and disfavor points of view").
In contrast with permanent monuments in public parks, trademarks are not government speech because trademarks "have not traditionally been used to convey a Government message," "the viewpoint expressed by a mark has not played a role in the decision whether to place it on the principal register," and "there is no evidence that the public associates the contents of trademarks with the Federal Government." *Matal v Tam*, 137 S Ct 1744 (2017).

2.9.8.B License Plates

In *Walker v Texas Division, Sons of Confederate Veterans*, 576 US ___ (2015), the Court concluded that Texas did not violate the First Amendment by denying a group's proposed confederate-flag specialty license plates. The proposed plates are at the Appendix, page 22, of the Court's opinion. By issuing license plates,

> "Texas is not simply managing government property, but instead is engaging in expressive conduct. As we have described, we reach this conclusion based on the historical context, observers' reasonable interpretation of the messages conveyed by Texas specialty plates, and the effective control that the State exerts over the design selection process. Texas's specialty license plate designs 'are meant to convey and have the effect of conveying a government message.' [*Pleasant Grove City v Summum*, 555 US 460, 472 (2009)]. They 'constitute government speech.' *Ibid*."

The Court reasoned that the specialty license plates "are similar enough to the monuments in *Summum* to call for the same result." The Court explained "government speech" and the First Amendment. Note: On June 19, 2017, in *Matal v Tam*, a unanimous 8-person US Supreme Court agreed that *Walker* "likely marks the outer bounds of the government-speech doctrine." *Matal v Tam*, 137 S Ct 1744 (2017).

The *Walker* Court explained that forum analysis does not apply to government speech:

"When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says. *Pleasant Grove City v Summum*, 555 US 460, 467–468 (2009). That freedom in part reflects the fact that it is the democratic electoral process that first and foremost provides a check on government speech. *See Board of Regents of Univ. of Wis. System v Southworth*, 529 US 217, 235 (2000). Thus, government statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas. *See Johanns v Livestock Marketing Assn*., 544 US 550, 559 (2005). Instead, the Free Speech Clause helps produce informed opinions among members of the public, who are then able to influence the choices of a government that, through words and deeds, will reflect its electoral mandate. *See Stromberg v California*, 283 US 359, 369 (1931) (observing that 'our constitutional system' seeks to maintain 'the opportunity for free political discussion to the end that government may be responsive to the will of the people').

"* * * * *

"We have therefore refused '[t]o hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals." *Rust v Sullivan*, 500 US 173, 194 (1991). We have pointed out that a contrary holding "would render numerous Government programs constitutionally suspect." *Ibid. Cf. Keller v. State Bar of Cal*., 496 US 1, 12– 13 (1990) ("If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed"). And we have made clear that 'the government can speak for itself.' *Southworth, supra*, at 229. That is not to say that a government's ability to express itself is without restriction. Constitutional and statutory provisions outside of the Free Speech Clause may limit government speech. *Summum, supra*, at 468. And the Free Speech Clause itself may constrain the government's speech if, for example, the government seeks to compel private persons to convey the government's speech. But, as a general matter, when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position. In doing so, it represents its citizens and it carries out its duties on their behalf."

"* * * * *

"We have previously used what we have called 'forum analysis' to evaluate government restrictions on purely private speech that occurs on government property. *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 US 788, 800 (1985). But forum analysis is misplaced here. Because the State is speaking on its own behalf, the First Amendment strictures that attend the various types of government-established forums do not apply."

2.9.9 Defamation & Opinion

New York Times v Sullivan, 376 US 254, 280 (1964) "held that when a public official seeks damages for defamation, the official must show 'actual malice' – that the defendant published the defamatory statement 'with knowledge that it was false or with reckless disregard of whether it was false or not.'" *Obsidian Finance Group et al v Cox*, 740 F3d 1284, slip op 8-9 (9th Cir), *cert denied*

134 S Ct 2680 (2014). And *Gertz v Robert Welch, Inc*., 418 US 323, 350 (1974) "held that the First Amendment required only a 'negligence standard for private defamation actions." *Id*. at slip op 9.

In *Obsidian Finance Group et al v Cox*, 740 F3d 1284 (9th Cir), *cert denied* 134 S Ct 2680 (2014) defendant, via blog posts, accused plaintiffs of fraud and crimes. The district court had decided that plaintiffs were not required to prove either negligence or actual damages because defendant did not submit evidence that she was a journalist, and also neither of the plaintiffs were "all-purpose public figures" or "limited public figures" or that the blog post referred to a matter of public concern. In short the district court concluded that "a showing of fault was not required to establish liability" and presumed damages. The jury found for plaintiffs, awarding $2.5 million in compensatory damages.

The Ninth Circuit panel in *Obsidian Finance* concluded that the "district court should have instructed the jury that it could not find [defendant blogger] liable for defamation unless it found that she acted negligently." The Ninth Circuit panel held that the district court also should have instructed the jury that it could not award presumed damages unless it found that [defendant] acted with actual malice." *Obsidian Finance* involved the internet, which was "entirely unknown at the time of [the *New York Times v Sullivan* and *Gertz*] decisions." Also, the writer in *Obsidian Finance* was an individual speaker rather than "the institutional press." The Ninth Circuit panel held "that the *Gertz* negligence requirement for private defamation actions is not limited to cases with institutional media defendants." "We hold that liability for a defamatory blog post involving a matter of public concern cannot be imposed without proof of fault and actual damages."

In *Neumann v Liles*, 358 Or 706 (2016), the Oregon Supreme Court adopted the Ninth Circuit test most recently cited in *Obsidian Finance Group, LLC v Cox*, 740 F3d 1284 (9th Cir 2014) *cert den*, 134 S Ct 2680 (2014). That is: "to determine whether a reasonable factfinder could conclude that a statement implies an assertion of objective fact," courts decide: "(1) whether the general tenor of the entire work negates the impression that the defendant was asserting an objective fact; (2) whether the defendant used figurative or hyperbolic language that negates that impression; and (3) whether the statement in question is susceptible of being proved true or false." *Id*. at 717.

Eugene Register Guard article on this case is here. The Court applied *Milkovich v Lorain Journal Co*., 497 US 1 (1990) and *Gertz v Robert Welch, Inc.* 418 US 323 (1974) for the principle that the First Amendment protects the "uninhibited, robust, and wide-open" debate on public issues." *Id*. at 714. "Under that existing doctrine, full constitutional protection is afforded to statements regarding matters of public concern that are not sufficiently factual to be capable of being proved false and statements that cannot reasonably be interpreted as stating actual facts." *Id*.

The *Neumann* Court wrote "because, if false, [defendant's] defamatory statements were written and published—and therefore libelous—they are actionable *per se*." *Id*. at 720. The Court concluded that "if false, several of 'defendant's] statements are capable of a defamatory meaning." *Id*. at 719. The issue then is "whether they are nevertheless protected under the First Amendment. To resolve that question, we must first determine, by examining the content, form, and context of [defendant's] statements, whether those statements involve matters of public concern." *Id*. at 720.

The Court concluded that defendant's "statements involve matters of public concern." Defendant's "review was posted on a publicly accessible website, and the content of his review related to matters of general interest to the public, particularly those members of the public who are in the market for a wedding venue." *Ibid*.

As for the three-part test: First, the general tenor of the entire work negates the impression that defendant is asserting objective facts. The word "disaster" at the beginning sets that in motion. *Id*. at 720. Standing alone, several sentences state objective fact, but "in the context of the entire review," those "sentences do not leave such an impression." The "review as a whole reveals" that defendant was an "attendee" and "he did not himself purchase wedding services" and the "general tenor" reflects his "personal and subjective impressions," thus his "reactions as a guest" negate the impression of facts.

As for the second part, defendant used "figurative or hyperbolic language that negates the impression that he was asserting objective facts." *Id*. at 721. Again, the word "disaster" and its "histrionic series of exclamation marks" is "hyperbolic and sets the tone for the review." That includes "the exaggerative statements" such as "The worst wedding experience of my life!"

As for the third part, defendant's statements "generally reflect a strong personal viewpoint as a guest at the wedding venue, which renders them not susceptible of being proved true or false." *Id*. Viewed in the "context" of the whole, and because defendant used the words "in my opinion," the court concluded that the review is not susceptible of being proved true or false.

In sum, "a reasonable factfinder could not conclude that [defendant's] review implies an assertion of objective fact." *Id*. at 722. The trial court did not err. Reversed and remanded to determine attorney fees. *Id*. at 724.

For additional anti-SLAPP defenses, see *Yes on 24-367 Committee v Deaton*, 276 Or App 347, 355 (2016), *Robinson v DeFazio*, 286 Or App 709 (2017) and *Bryant v Recall for Lowell's Future Committee*, 286 Or App 691 (2017).

Chief Aircraft, Inc. v Grill, 288 Or App 729 (11/08/17) (Josephine) (Aoyagi, Tookey, Hadlock)
Defendant, a pilot, was angry with an aircraft-parts company. Defendant posted on his Twitter account: "Do not order from chiefaircraft.com they are completely unreliable and unhelpful, will post more later on the details." He also posted on a website called Ripoff Report, www.ripoffreport.com:

> "**Chiefaircraft.com Has so many chargebacks on their merchant account credit card companies will flag deland, Florida** "Ordered a preheater for my airplane was told I would receive it on Thursday. It never came and then I was told that my credit card company would not authorize the charge. Since I have never had a problem with my credit card like this before I called them and because chiefaircraft.com has so many customer service issues and charge backs they flag it. "When I tried to call the company there [sic] voicemail system doesn't work, it wasn't until I tried over and over that I spoke with someone and was told tough luck and there was nothing they could do about it." (Bold in original.)

The company filed an action against defendant, asserting claims for defamation per se, defamation, and another tort. Defendant filed a special motion to strike under Oregon's anti-SLAPP statute, ORS 31.150 to 31.155, seeking dismissal of all of plaintiff's claims. The trial court denied the motion, concluding that, while plaintiff's complaint is susceptible to an anti-SLAPP motion, plaintiff met its burden to survive the motion. Defendant appealed.

The Court of Appeals affirmed. Per *Neumann v. Liles*, 358 Or 706 (2016), to determine if the statements are opinion (protected by the First Amendment) or false statements of objective fact (not protected by the First Amendment), the courts now "follow a three-part inquiry to make that determination: (1) whether the general tenor of the entire publication negates the impression that the defendant was asserting an objective fact; (2) whether the defendant used figurative or hyperbolic language that negates that impression; and (3) whether the statement at issue is susceptible of being proved true or false. Id. at 719. Words should not be considered in isolation, but, rather, "the work as a whole, the specific context in which the statements were made, and the statements themselves" must be analyzed "to determine whether a reasonable factfinder could conclude that the statements imply a false assertion of objective fact and therefore fall outside the protection of the First Amendment." Id. (quoting *Partington v Bugliosi*, 56 F3d 1147, 1153 (9th Cir 1993))."

The "statement is susceptible of being proved true or false with respect to the credit card company that defendant called. That credit card company either does or does not 'flag' charges because plaintiff has exceeded its threshold for customer service issues and charge backs. Thus, although defendant's statements regarding a credit card company policy or practice of 'flagging'" charges run by plaintiff are somewhat vague in nature, they are susceptible of being proved true or false. Neither the statements nor the posting as a whole use hyperbolic or figurative language, except for the pluralization of 'credit card companies' that has already been addressed and does not meaningfully negate the impression that defendant was asserting an objective fact. The general tenor of the publication also does not meaningfully negate the impression that defendant was asserting an objective fact."

"Applying the test adopted in *Neumann*, we therefore conclude that the two statements at issue in the Ripoff Report posting, if false, are not protected by the First Amendment."

2.9.10 Parades, Rallies, and Public Speaking

"This [U.S. Supreme] Court has held time and again: 'Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.'" *Forsyth County, Georgia v Nationalist Movement*, 505 US 123, 135 (1992) (citations omitted).

An "ordinance requiring a permit and a fee before authorizing public speaking, parades, or assemblies in 'the archetype of a traditional public forum,' *Frisby v Schultz,* 487 US 474, 480, 108

S.Ct. 2495 2500, 101 L.Ed.2d 420 (1988), is a prior restraint on speech. . . . Although there is a 'heavy presumption' against the validity of a prior restraint . . . the Court has recognized that government, in order to regulate competing uses of public forums, may impose a permit requirement on those wishing to hold a march, parade, or rally . . . Such a scheme, however, must meet certain constitutional requirements. It may not delegate overly broad licensing discretion to a government official. * * * Further, any permit scheme controlling the time, place, and manner of speech must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication." *Forsyth County, Georgia v Nationalist Movement*, 505 US 123, 130 (1992) (internal citations omitted) (county's $1,000 assembly-permit fee is "invalid because it unconstitutionally ties the amount of the fee to the content of the speech and lacks adequate procedural safeguards"). A "law subjecting the exercise of First Amendment freedoms to the prior restraint of a license" must contain "narrow, objective, and definite standards to guide the licensing authority." *Id*. at 131 (citation omitted).

2.9.11 Reasonable Time, Place, and Manner

"Even protected speech is not equally permissible in all places and at all times." *Frisby v Schultz*, 487 US 474, 479 (1988) (quoting *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc*., 473 US 788, 799 (1985)). A group's "choice of where and when to conduct its [protected speech, here it was] picketing is not beyond the Government's regulatory reach—it is 'subject to reasonable time, place, or manner restrictions' that are consistent with the standards announced in this Court's precedents. *Clark v Community for Creative Non-Violence*, 468 US 288, 293 (1984)." *Snyder v Phelps*, 562 US 443 (2011), slip op at 10.

Chapter 3: Religion, Love, and Family

3.1 Religion

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

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

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

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

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

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

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

3.1.1 Origins

Maryland's Act Concerning Religion (Maryland's Toleration Act of 1649) was the first colonial law to use the phrase "free exercise of religion," later embodied in the First Amendment. Leonard W. Levy, *Origins of the Bill of Rights* p. 6 (1999). The full text of Maryland's Toleration Act of 1649 is reprinted in Bernard Schwartz, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY (1971) Vol. I p. 91-94. Rhode Island, Pennsylvania, Delaware, and New Jersey also granted freedom of religion in their colonies before 1776. Levy at p. 6.

In other words, Maryland was the first American colony to recognize a measure of freedom of conscience for Christians (Catholics and Protestants included). Bernard Schwartz, THE BILL OF

RIGHTS: A DOCUMENTARY HISTORY (1971) Vol. I p. 90. "Although the Toleration Act was limited in its protection to Christians, there was not, so far as we know, any persecution of Jews or others in the colony." *Id*. at 91. Note: Maryland's Act of 1649 also required punishment by "death and confiscation or forfeiture of all his or her lands and goods" if a person should "blaspheme God, that is Curse him, or deny our Saviour Jesus Christ to bee the sonne of God". *Id*. at 91. Using "reproachfull words or Speeches concerning the blessed Virgin Mary" or any "Apostles" resulted in forfeiture of all of the speaker's lands and goods, or, if the speaker lacked such property, then he would be "publiquely whipt and bee ymprisoned [sic]." *Ibid*.

The Rhode Island Charter of 1663 was the first charter to contain a grant of religious freedom in all-inclusive terms. *Id*. at 96.

Maryland's Declaration of Rights of 1776 (note that this is after the Toleration Act of 1649) provided: "as it is the duty of every man to worship God in such manner as he thinks most acceptable to him; all persons, professing the Christian religion, are equally entitled to protection in their religious liberty; wherefore no person ought by any law be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice; unless, under colour of religion, any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others, in their natural, civil, or religious rights; nor ought any person to be compelled to frequent or maintain, or contribute, unless on contract, to maintain any particular place of worship, or any particular ministry: yet the Legislature may, in their discretion, lay a general and equal tax, for the support of the Christian religion; leaving to each individual the power of appointing the payment over of the money, collected from him, to the support of any particular place of worship or minister, or for the benefit of the poor of his own denomination, or the poor in general of any particular county: but the churches, chapels, glebes, and all other property now belonging to the church of England, ought to remain to the church of England forever. . . . ." *Id*. at 283. It further required: "no other test or qualification ought to be required, on admission to any office of trust or profit, then [sic] such oath of support and fidelity to this State . . . and a declaration of a belief in the Christian religion." *Id*. at 284.

New Jersey's Constitution of 1776 was the first American constitution to recognize that religious freedom has two aspects (as later protected in the First Amendment to the United States Constitution). *Id*. at 256. One of its constitutional articles provides that "no person shall ever, within this Colony, be deprived on the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience." *Id*. at 260. Another provides: "there shall be no establishment of an one religious sect." *Id*. On that anti-establishment clause, Professor Schwartz wrote: "This is the first prohibition against an established Church in an American constitutional provision (almost a decade before Jefferson's famous Bill for Establishing Religious Freedom was enacted in Virginia)." *Id*. at 256.

In contrast with Maryland and Rhode Island, some other colonies excluded non-Christians before *and after* the First Amendment's ratification. For example, a charter existing in Connecticut from 1662 to 1818 declared that maintaining Christianity "is the only and principal end of this plantation." Jacob Rader Marcus, EARLY AMERICAN JEWRY, VOL. I (1649-1794) 161 (1951).

The Northwest Ordinance of 1787, section 13, provided for the extension of "the fundamental principles of civil and religious liberty" in the Territories Northwest of the Ohio River. Its first article provided: "No person, demeaning himself in a peaceable and orderly manner, shall ever

be molested on account of his mode of worship or religious sentiments, in the said territory." Northwest Ordinance of 1787, section 14, art. 1.

Regarding the Northwest Ordinance of 1787, "it is not accurate to assume that the first Federal Government was wholly inactive in protecting personal liberties. While the Congress had no power in the matter within the several states, the same was not true of the vast territories which came within congressional jurisdiction upon the cession of state claims. The congressional attempt to provide for the government of those territories resulted in the Northwest Ordinance of 1787. . . . The Northwest Ordinance contained the first Bill of Rights enacted by the Federal Government." Bernard Schwartz, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY, Vol. 1, p. 385 (1971).

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

See Charles Hinkle, *The Religion Clauses*, OREGON CONSTITUTIONAL LAW MANUAL (2013), www.osbar.org/secured/barbooks/viewchapter.asp?bid=85&cid=2334.

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

An Oregon commentator finds a "secularizing impulse" in the framers' religion clauses of the Oregon Constitution. Charlie Hinkle, *Article I, Section 5: A Remnant of Prerevolutionary Constitutional Law*, 85 OR L REV 541, 553 (2006). The convention's history, including [one framer's stated] desire for a "complete divorce of church and state," "shows that a majority of the members of the constitutional convention favored a more explicit separation of church and state than could be found in any other state constitution of the time." *Id*. at 559.

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

- The provision is "a bill of wrongs!" "It is a disregard of the injunctions of the New Testament". (Campbell).

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

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

> "The late constitutions of the western states have, step by step, tended to a more distinct separation of church and state, until the great state of Indiana, whose new constitution has been most recently framed, embraced very nearly the principle contained in this section * * * Let us take the step farther, and declare a complete divorce of church and state." (Grover).

3.1.2 Interpretation – Oregon Constitution

"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).

3.1.2.A Neutral versus Targeting Laws

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

"[W]hen analyzing freedom of religion claims under Article I, sections 2 and 3, this court has distinguished between applying rules that expressly target religion, on the one hand, and applying generally applicable and neutral rules to religiously motivated conduct, on the other hand. With regard to rules that specifically target religion, we apply 'exacting' scrutiny to ensure that they comport with the commands of Article I, sections 2 and 3." *State v Brumwell*, 350 Or 93, 108 (2011) (citing *Cooper v Eugene Sch Dist No 4J*, 301 Or 358, 369, 372 (1986)). "With regard to rules that are generally applicable and neutral toward religion, however, the only issues for us to consider are whether there was 'statutory authority to make such a regulation,' or whether we should grant 'an individual claim to exemption on religious grounds.' *Cooper*, 301 Or at 368-69." *State v Hickman*, 358 Or 1, 15-16 (2015).

3.1.2.B Religions

The Oregon Supreme Court has assumed that Article I, section 3, of the Oregon Constitution extends protection to nontraditional religious practices, such as satanism, under *Cooper v Eugene School District No. 4J*, 301 Or 358, 371 (1986). *State v Brumwell*, 350 Or 93 (2011), *cert denied* 132 S

Ct 1028 (2012). The US District Court for the District of Oregon has assumed that the Oregon Constitution also protects the Wiccan religion. *Luke v Williams*, No. CV 09-CV-307-MO (D Or 2010).

3.1.2.CMedical Treatment

The United States Supreme Court has long held that regulating health is within the States' police powers: "The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." *Prince v Massachusetts*, 321 US 158, 166-67 (1944) (compulsory vaccinations did not violate Free Exercise Clause of the U.S. Constitution). *See also Jacobson v Massachusetts*, 197 US 11 (1905) and *Zucht v King*, 260 US 174 (1922) (mandatory vaccinations are within the States' police power).

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

A leading recent case on medical treatment and the religion clauses is *State v Hickman*, 358 Or 1 (2015), see www.youtube.com/watch?v=IP8t9bpUOgE14T and www.youtube.com/watch?v=AlYOsA5tn38

The two defendants, husband and wife, are members of the Followers of Christ Church in Oregon City. Defendant Shannon Hickman became pregnant on a date unknown to her. Pursuant to their religion, the defendants never went to a doctor or had any prenatal care. Shannon went into labor about two months prematurely. Defendants chose to have the baby in a family member's home. At birth, the baby weighed 3 pounds, 7 ounces, but was breathing and pink. The baby began turning grey struggled to breathe. Rather than call a doctor, or 911, Dale or the midwives put olive oil on him and prayed, per their religious beliefs. The baby died nine hours after his birth. If defendants had taken the baby to the hospital, experts testified that he had a 99% chance of surviving what an autopsy determined to have been treatable staph pneumonia.

Defendants were charged with second-degree manslaughter for neglect or maltreatment, which includes "a failure to provide adequate medical care," see ORS 163.115. Criminal negligence means that a person fails to be aware of a substantial and unjustifiable risk that the result will occur, see ORS 161.085.

Defendants argued that the second-degree manslaughter statute should apply to them differently because their conduct was religiously motivated. They contended that under *Meltebeke v BOLI*, 322 Or 132 (1995), the state should be held to the higher burden of proving that they as religious practitioners "knew" their baby would die if they relied on faith healing alone and failed to seek treatment for him – rather than being held to a negligence *mens rea* that non-religious defendants are held to under state law.

The jury instruction stated that to act with criminal negligence, the person fails to be aware of a substantial and unjustifiable risk that the death of the baby would occur. Defendants objected

and sought an alternative jury instruction that the jury had to find defendants "acted with knowledge" that their actions "would bring about the death" of the baby.

A jury convicted them of second-degree manslaughter. They were sentenced to six years in jail. The Court of Appeals summarily affirmed.

The Oregon Supreme Court affirmed. Under *State v Brumwell*, 350 Or 93, 108 (2011), cases involving freedom of religion claims under Article I, sections 2 and 3, of the Oregon Constitution require separating "rules that expressly target religion" from "generally applicable and neutral rules to religiously motivated conduct." *Id*. at 15. Rules that specifically target religion are subjected to "'exacting' scrutiny to ensure that they comport with the commands of Article I, sections 2 and 3." On the other hand, "rules that are generally applicable and neutral toward religion" are assessed to determine "whether there was 'statutory authority to make such a regulation,' or whether we should grant 'an individual claim to exemption on religious grounds.'" *Id*. at 15-16.

The second-degree manslaughter statute does not discriminate against or target religion or any sect. It applies on equal terms and with equal force to any parent or guardian who fails to be aware of a substantial and unjustifiable risk that withholding basic necessities form a child will result in that child's death. The statutes do not mention religion. Defendants do not even dispute that the statutes are generally applicable and neutral.

The state did not have to prove a higher *mens rea* of "knowing" that the baby would die, as defendants contend. The Court agreed with the state that *Meltebeke* should not control the outcome of this case because the "knowledge" requirement that *Meltebeke* adopted "derives from the court's faulty interpretation" of *Smith v Employment Division*, 301 Or 209 (1986), rather than "from the text of Article I, sections 2 and 3, itself." *Id*. at 21.

Meltebeke held that an employer, faced with violating a BOLI rule prohibiting harassment based on religion by making unwelcome religious advances, was entitled to a defense based on Article I, sections 2 and 3. That means: "A person against whom a sanction is to be imposed for conduct that constitutes a religious practice must *know* that the conduct causes an effect forbidden by law." *Meltebeke*, 322 Or at 151. But the *Hickman* Court here concluded that *Meltebeke* "simply got *Smith* wrong" when it concluded that *Smith* required the decision in *Meltebeke*. *Id*. at 23. The Court disavowed its holding in *Meltebeke* to the extent it relied on *Smith*. *Id*. at 24. The Court did not "decide whether or under what circumstances the religious nature of a person's conduct may provide either an absolute or a qualified defense to a civil or criminal law that, on generally applicable and neutral terms, forbids the conduct or the effect of the conduct." *Id*. The Court held that the state was not "required by free exercise principles to prove that defendants acted or failed to act with a knowing, rather than criminally negligent, mental state." *Id*. at 25. No error in the jury instruction given.

3.1.3 First Amendment

3.1.3.A Anti-Establishment Clause

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

"The touchstone * * * is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'" *McCreary County, Ky. v ACLU*, 545 US 844, 860 (2005) (quoting *Epperson v Arkansas*, 393 US 97, 104 (1968)). Establishment Clause violations are determined according to the three-pronged test articulated in *Lemon v Kurtzman*, 403 US 602, 612–13 (1971) ("*Lemon* test"). A statute or regulation will survive an Establishment Clause attack if (1) it has a secular legislative purpose, (2) its primary effect neither advances nor inhibits religion, and (3) it does not foster excessive government entanglement with religion. *Id*. *See Williams v California*, _ F3d __ (9th Cir 2014) (12-55601) (so noting).

<u>**Affirmative Defenses**</u>

A. Ministerial Defense

The ministerial exception is an affirmative defense to claims that impinge on protected employment decisions regarding "a religious organization and its ministers" . . . and when applicable, it flatly prohibits courts from "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so," *Puri v Khalsa*, __ F3d __ (9th Cir 2017) (citations omitted). *Puri* is a dispute over seats on boards of corporate entities that are affiliated with a church, but are not themselves churches. In *Puri*, the pleadings did not allege the board members had any ecclesiastical duties or privileges, and for that reason and several others, the court declined to apply the ministerial defense based on the pleadings. The *Puri* court explained the ministerial exception as follows:

"The Supreme Court has long recognized religious organizations' broad right to control the selection of their own religious leaders. *See, e.g., Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929). Recently, the Court 'confirm[ed] that it is impermissible for the government to contradict a church's determination of who can act as its ministers,' and formally recognized 'a "ministerial exception," grounded in the First Amendment, that precludes application of [employment discrimination laws] to claims concerning the employment relationship between a religious institution and its ministers.' *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 704–05 (2012). This ministerial exception "ensures that the authority to select and control who will minister to the faithful – a matter 'strictly ecclesiastical' – is the church's alone." *Id*. at 709 (citation omitted) (quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am*., 344 U.S. 94, 119 (1952)). The Court explained:

> 'Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted

minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.' *Id*. at 706.

"Although the Supreme Court has not articulated the scope of the ministerial exception beyond employment discrimination claims, see *id*. at 710, our court has framed the exception as applicable 'to any state law cause of action that would otherwise impinge on the church's prerogative to choose its ministers or to exercise its religious beliefs in the context of employing its ministers.' *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 950 (9th Cir. 1999); *see also Werft v. Desert Sw. Annual Conference of United Methodist Church*, 377 F.3d 1099, 1100 n.1 (9th Cir. 2004). Thus, any claim 'with an associated remedy [that] would require the church to employ [a minister]' would 'interfer[e] with the church's constitutionally protected choice of its ministers,' and thereby 'would run afoul of the Free Exercise Clause.' *Bollard*, 196 F.3d at 950. The ministerial exception also bars relief for 'consequences of protected employment decisions,' such as damages for 'lost or reduced pay,' because such relief 'would necessarily trench on the Church's protected ministerial decisions.' *Elvig*, 375 F.3d at 966; *see also Hosanna-Tabor*, 132 S. Ct. at 709 ('An award of such relief would operate as a penalty on the Church for terminating an unwanted minister, and would be no less prohibited by the First Amendment than an order overturning the termination.')."

B. Ecclesiastical Abstention

The "doctrine of ecclesiastical abstention" has been set out in *Paul v Watchtower Bible & Tract Soc'y of New York, Inc*., 819 F2d 875, 878 n 1 (9th Cir. 1987). Federal courts prefer to apply neutral principles to enforce secular rights where possible, and Oregon has adopted the neutral-principles approach as well. In *Puri v Khalsa*, __ F3d __ (9th Cir 2017), the court set out its understanding of "ecclesiastical abstention" in concluding that ecclesiastical abstention does not apply in that case:

"Long before it formally recognized a ministerial exception, the Supreme Court developed a doctrine, grounded originally in common law but later in the First Amendment, 'limiting the role of civil courts in the resolution of religious controversies that incidentally affect civil rights.' *Serbian Eastern Orthodox Diocese for U.S. & Can. v Milivojevich*, 426 US 696, 710 (1976). Under this doctrine of ecclesiastical abstention, 'a State may adopt any one of various approaches for settling church disputes so long as it involves no consideration of doctrinal matters.' *Jones v Wolf*, 443 U.S. 595, 602 (1979) (quoting *Md. & Va. Eldership of Churches of God v Church of God at Sharpsburg, Inc*., 396 US 367, 368 (1970) (Brennan, J., concurring)). The Supreme Court has recognized two principal approaches to deciding church disputes without 'jeopardiz[ing] values protected by the First Amendment.' *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 US 440, 449 (1969).

The first, derived from *Watson v Jones*, 80 U.S. (13 Wall.) 679 (1872), and its progeny, is simply to "accept[ ] the decision of the established decision-making body of the religious organization." *Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v Kianfar*, 179 F.3d 1244, 1248 (9th Cir. 1999).

[W]here resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall

not disturb the decisions of the highest ecclesiastical tribunal within a church but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them. *Milivojevich*, 426 US at 709. But, recognizing that deference can sometimes lead to entanglement of civil courts in ecclesiastical issues and that some church disputes can be resolved by application of solely secular legal rules, the Court has also articulated an alternative to the *Watson* approach it has termed the "neutral principles of law" approach. *See Jones*, 443 US at 602, 605.

. . .

"Unlike the ministerial exception, which completely bars judicial inquiry into protected employment decisions, the ecclesiastical abstention doctrine is a qualified limitation, requiring only that courts decide disputes involving religious organizations 'without resolving underlying controversies over religious doctrine.' *Kianfar*, 179 F3d at 1248 (quoting *Presbyterian Church*, 393 US at 448)."

. . .

"Property disputes have proved especially amenable to application of the neutral-principles approach. *See Kianfar*, 179 F3d at 1249. But we are unaware of any authority or reason precluding courts from deciding other types of church disputes by application of purely secular legal rules, so long as the dispute does not fall within the ministerial exception and can be decided 'without resolving underlying controversies over religious doctrine.' *Presbyterian Church*, 393 U.S. at 449; *see also Milivojevich*, 426 US at 710 ('This principle applies with equal force to church disputes over church polity and church administration.'). Indeed, 'we must be careful not to deprive religious organizations of all recourse to the protections of civil law that are available to all others,' because '[s]uch a deprivation would raise its own serious problems under the Free Exercise Clause.' *Kianfar*, 179 F3d at 1248."

. . .

"The Supreme Court has made clear that 'a State may adopt any one of various approaches for settling church disputes so long as it involves no consideration of doctrinal matters.' *Jones*, 443 U.S. at 602 (quoting *Md. & Va. Eldership*, 396 US at 368 (Brennan, J., concurring)). It is thus constitutionally permissible for a court to apply either the *Watson* approach (deferring to a church's highest ecclesiastical authority) or the neutral-principles approach to such disputes, as long as the court decides the dispute 'without resolving underlying controversies over religious doctrine.' *Kianfar*, 179 F3d at 1248 (quoting *Presbyterian Church*, 393 US at 449)."

3.1.3.B Free Exercise Clause

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

"The First Amendment's Free Exercise Clause, which applies to the states via the Fourteenth Amendment, *Cantwell v. Connecticut*, 310 US 296, 303 (1940), provides that 'Congress shall make no law prohibiting the free exercise [of religion].' U.S. Const. amend. I. The right to exercise one's religion freely, however, 'does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' *Emp't Div. v. Smith*, 494 US 872, 879 (1990) (internal quotation marks omitted); *see also United States v. Lee*, 455 U.S. 252, 261 (1982) ('When followers of a particular sect enter into commercial activity as a matter of choice, the

limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.'). Under the rule announced in *Smith* and affirmed in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* ("*Lukumi*"), 508 US 520, 531 (1993), a neutral law of general application need not be supported by a compelling government interest even when 'the law has the incidental effect of burdening a particular religious practice.' Such laws need only survive rational basis review. *Miller v. Reed*, 176 F.3d 1202, 1206 (9th Cir 1999). For laws that are not neutral or not generally applicable, strict scrutiny applies. *See Lukumi*, 508 US at 531–32 ("A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.")." *Stormans Inc. v Wiesman*, 794 F 3d 1064 (9th Cir 2015).

To establish a violation of the Free Exercise Clause, a plaintiff must show that the challenged conduct resulted in an impairment of the plaintiff's free exercise of genuinely held beliefs. *United States v Lee*, 455 US 252, 256–57 (1982). In other words, to state a claim, the plaintiff must show that his proffered belief is sincerely held and is "rooted in religious belief, not in purely secular philosophical concerns." *Malik v Brown*, 16 F3d 330, 333 (9th Cir 1994). For a case where a court concluded that beliefs were not sincerely held, see *Phillips v City of New York*, 755 F3d 538 (2d Cir 2015) (parents' violation of New York's vaccination law was not based on any sincerely held religious beliefs).

The "sincerity" element of a person's religious belief tends to be presumed. "So long as one's faith is religiously based at the time it is asserted, it should not matter, for constitutional purposes, whether that faith derived from revelation, study, up-bringing, gradual evolution, or some source that appears entirely incomprehensible." *Hobbie v Unemployment Appeals Comm'n*, 480 US 136, 144 n 9 (1987).

The "deeply rooted" element of a religious exercise claim does not need to be compelled by a person's religion. "It is not within the judicial ken to question the centrality of particular beliefs or practices to the faith, or the validity of particular litigants' interpretation of those creeds." *Hernandez v C.I.R.*, 490 US 680, 699 (1989). "A religious belief can appear to every other member of the human race preposterous, yet merit the protection of the Bill of Rights." *Callahan v Woods*, 658 Fd 679, 685 (9th Cir 1981). The "deeply rooted" element needs only to be related to a person's sincerely held religious belief. *Malik v Brown*, 16 F3d 330, 333 (9th Cir 1994).

But "every person cannot be shielded from all burdens incident to exercising every aspect of the right to practice religious beliefs." *Id*. at 261. "[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Employment Division v Smith*, 494 US 872, 879 (1990); *see also Christian Legal Soc. Chapter v Martinez*, 561 US 661 (2010) ("[T]he Free Exercise Clause does not inhibit enforcement of otherwise valid regulations of general application that incidentally burden religious conduct."). *Williams v California*, __ F3d __ (9th Cir 2014) (2014 WL 4090545).

The free exercise of religion means the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment prohibits all "governmental regulation of religious beliefs as such." *Sherbert v Verner*, 374 US 398, 402 (1963). Further, the government may not compel affirmation of religious belief, *Torcaso v Watkins*, 367 US 488, 496 (1961), punish the expression of religious doctrines it believes to be false, *United States v Ballard*, 322 US 78, 86–88

(1944), impose special disabilities on the basis of religious views or religious status, *McDaniel v Paty*, 435 US 618, 629 (1978), or lend its power to one or the other side in controversies over religious authority or dogma, *Presbyterian Church v Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 US 440, 445–47 (1969). *Williams v California*, __ F3d __ (9th Cir 2014) (2014 WL 4090545).

"In addition to belief, the Free Exercise Clause also protects the performance of (or abstention from) physical acts that constitute the free exercise of religion: 'assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation.' [*Employment Division v Smith*, 494 US 872, 877 (1990).] As the Supreme Court has instructed, however, the Free Exercise Clause 'does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' *Id*. at 879 (quoting *United States v Lee*, 455 US 252, 263 n 3 (1982) (Stevens, J., concurring in the judgment)) (internal quotation marks omitted). Such laws are subject to rational basis review. See *Commack Self–Serv. Kosher Meats, Inc. v. Hooker*, 680 F3d 194,212 (2d Cir 2012). A law burdening religious conduct that is not both neutral and generally applicable, however, is subject to strict scrutiny. [*Church of the Lukumi Babalu Aye, Inc. v City of Hialeah*, 508 US 520, 531-32, 546 (1993)]. 'Neutrality and general applicability are interrelated,' and 'the failure to satisfy one requirement is a likely indication that the other has not been satisfied.' *Id*. at 531." *Central Rabbinical Congress v New York Dep't of Health*, __ F3d __ (2d Cir 2014).

<u>On mandatory children's vaccinations in the Second Circuit</u>: A "parent 'cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.' *Prince v Massachusetts*, 321 US 158, 166–67 (1944). That dictum is consonant with the Court's and our precedents holding that 'a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.' *Church of the Lukumi Babalu Aye, Inc. v City of Hialeah*, 508 US 520, 531 (1993); accord, *Leebaert v Harrington*, 332 F3d 134, 143–44 (2d Cir 2003) (holding that parental claims of free exercise of religion are governed by rational basis test). Accordingly, we agree with the Fourth Circuit, following the reasoning of *Jacobson* [*v Commonwealth of Massachusetts*, 197 US 11 (1905)] and *Prince*, that mandatory vaccination as a condition for admission to school does not violate the Free Exercise Clause. *See Workman v. Mingo County Bd. of Educ*., 419 Fed App'x 348, 353–54 (4th Cir 2011) (unpublished)." *Phillips v City of New York*, __ F3d __ (2d Cir 2015) (14-2156).

On prisoners' religious exercise, see *Ishmael v Oregon Dep't of Corrections*, here.

3.2 Marriage

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

3.2.1 Origins

Article XV, section 5, on married women's property, is part of the original Oregon Constitution of 1857. There was some debate at the constitutional convention about whether married women could own property "in their own individual right." Representatives Matthew Deady and George Williams did not want married women to have that right. In contrast, Representatives Smith, Dryer, Logan, "and others" did want to allow married women that right. The constitutional text was a compromise. See Charles Henry Carey, THE OREGON CONSTITUTION (1926) p. 367-69. Carey writes that the *Statesman* reported this debate on September 22, 1857, excerpted here:

> "Mr. Deady was in favor of striking out. He would not make two persons of the husband and wife – it only tended to family alienation and jars.
>
> "Mr. Williams supported the motion to strike out. In this age of women's rights and insane theories, our legislation should be such as to unite the family circle, and make husband and wife what they should be – bone of one bone, and flesh of one flesh. The provision of our donation law giving the husband and wife separate and distinct estates in the land claim had been the cause of much domestic trouble and many divorces in this country. If we established this provision, we must provide laws by which the husband and wife can sue each other.
>
> "Mr. Boise was in favor of the provision. It was simply declaring that the property of the wife could not be taken to satisfy the husband's debts, and could not be taken from her without her consent. It was the doctrine of the civil law.
>
> * * * * *
> "Mr. Waymire was against striking out. His mother was a woman and his wife was one. If we should legislate for any class it should be the women of this country. They worked harder than anybody else in it. If the gentlemen who were in favor of striking out this provision had girls old enough to marry he thought they would take the other side of the question. How many men had already in this country married girls, used them a year or two, spent all their property, and put off to the states. He didn't want a man to marry a daughter of his, with a large band of cattle, and then skin the cattle, and skin her, and leave her. If men married for money they ought not to have control of it. * * * ." Carey at 368-69.

3.2.2 Same-Sex Marriage

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

"[S]ame-sex sexual relationships were not recognized at common law – and, indeed, some same-sex sexual conduct appears to have been criminalized at the time the Oregon Constitution was enacted. *See, e.g., General Laws of Oregon*, ch 49, § 639, (Deady 1845-1864). In fact, the law contained numerous prohibitions on who could marry. *See id*. at ch 31, §§ 2, 3 (prohibiting marriages between certain kin, and between certain 'white' and 'negro' persons). In short, there was no antecedent omnibus common-law right to marry." *Martinez v Kulongoski*, 220 Or App 142 (2008) *rev den* 345 Or 415 (2008).

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

But Oregon's constitutional ban on same-sex marriage was declared unconstitutional in May 2014 in *Geiger v Kitzhaber* 994 F Supp 2d 1128 (D Or 2014), http://media.oregonlive.com/politics_impact/other/OPINION.pdf. The Court of Appeals for the Ninth Circuit subsequently granted Geiger and Kitzhaber's motions to dismiss, affirming the district court's order. It condensed the district court's order this way: "The district court's summary judgment order enjoined the enforcement of Article 15, § 5A, of the Constitution of Oregon; O.R.S. 106.010; O.R.S. 106.041(1); O.R.S. 106.150(1); and any other state or local law, rule, regulation, or ordinance as the basis to deny marriage or the rights accompanying marriage to same-gender couples otherwise qualified to marry under Oregon law, or to deny recognition of a same-gender couple's marriage leally performed in other jurisdictions and in all other respects valid under Oregon law." The Ninth Circuit Order is here.

Article I, section 1, of the Oregon Constitution provides in part: "We declare that all men, when they form a social compact are equal in right". Article I, section 1 "does not create any individual fundamental or inalienable natural rights." *Martinez v Kulongoski*, 220 Or App 142 (2008), *rev den* 345 Or 415 (2008).

3.2.3 Early Marriage Restrictions (repealed)

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

apparently that number included Hawaiians, Indians, and mixed-race persons; only 55 black persons were estimated in Oregon in 1850. *Id*. at 81.

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

With that backdrop, in 1862, Oregon lawmakers rendered "absolutely void" a marriage "on account of either of them being of one fourth or more of negro blood." Title VII, section 486, THE ORGANIC AND OTHER GENERAL LAWS OF OREGON (1874). Anyone who performed a prohibited marriage ceremony was subject to one year in prison and a $100 fine. *Id*.; *see also* Cheryl A. Brooks, *Race, Politics, and Denial: Why Oregon Forgot to Ratify the Fourteenth Amendment*, 83 OR L REV 731, 740, 743 (2004).

In 1866, the intermarriage ban expanded to forbid marriages with other minorities. See Oregon Historical Society reproduction of the Oregonian's publication of that Act on November 2, 1866, http://ohs.org/education/oregonhistory/historical_records/dspDocument.cfm?doc_ID=16F99FAD-AADF-7E49-C10198BB87555DF6.

In 1951, Oregon repealed its interracial-marriage ban. 1951 Or Laws 792; Brooks at 749-51.

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

Forty-seven of the 60 members of Oregon's constitutional convention had lived in the Middle West before Oregon and 25 men came from southern slave states. Eugene H. Berwanger, THE FRONTIER AGAINST SLAVERY 80 (1967). Thus, the anti-black story was repeated in Oregon. As Ohio, Indiana, Illinois, Michigan, Iowa, and Wisconsin had done before Oregon's constitutional convention in 1857, Oregon (white male) voters decided to keep suffrage to themselves, with 89% voting that "No negro, chinaman, or mulatto shall have the right of suffrage." Article II, section 6, Oregon Constitution (superseded by the Fourteenth Amendment and *The Slaughterhouse Cases*, 16 Wall 36 (1873)); David Alan Johnson, FOUNDING THE FAR WEST 278 (1992); Berwanger, 32-33, 40-41.

Additionally, Article XV, section 8, of the *original* Oregon Constitution had provided: "No chinaman, not a resident of the state at the adoption of this constitution, shall ever hold any real estate or mining claim, or work any mining claim therein. The legislative assembly shall provide

by law in the most effectual manner for carrying out the above provision." That section was repealed on November 5, 1946. S.J.R. 14 (1945).

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

3.2.4 Equal Accommodation

See **Section 2.8**, ante, on public accommodation laws and discrimination.

3.2.5 U.S. Constitution

"A consensual sexual relationship between adults is constitutionally protected. *See, e.g., Eisenstadt v Baird*, 405 US 438, 453 (1972). However, that constitutional protection has not been extended to sexual relationships between adults and children. *See, e.g., Lawrence v Texas*, 539 US 558, 578 (2003) (distinguishing cases involving minors)." *United States v Laursen*, __ F3d __ (9th Cir 2017).

3.3 Family

3.3.1 Children

The "Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v Granville*, 530 US 57, 66 (2000). But a state may act "to guard the general interest in [a] youth's well being." *Prince v Massachusetts*, 321 US 158, 166 (1944). A "state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." *Parham v J.R.*, 442 US 584, 603 (1979).

3.3.2 Fertility

An Oregon statute creates parentage in the husband of a woman who has a baby via artificial insemination. ORS 109.243. To remedy the Article I, section 20, violation in that statute, it statute has been judicially extended to apply when the same-sex partner of the biological mother consented to the artificial insemination. *Shineovich and Kemp*, 229 Or App 670, rev den 347 Or 365 (2009). To determine if ORS 109.243 applies to a particular same-sex couple, the question "is whether the same-sex partners *would have* chosen to marry before the child's birth had they been permitted to". *Madrone and Madrone*, 271 Or App 116, 128 (2015) (emphasis by court).

The purpose of that statute is to protect "the support and inheritance rights of children conceived by artificial insemination." *Madrone and Madrone*, 271 Or App 116, 127 (2015) (no citation).

<u>A historical note</u>: In 1927, the United States Supreme Court held that a state institution could sterilize women with epilepsy or low IQs: "We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all

the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *Jacobson v Massachusetts*, 197 US 11 , 25 SCt 358, 3 Ann. Cas. 765. Three generations of imbeciles are enough." *Buck v Bell*, 237 US 200 (1927) (Holmes, J.).

Chapter 4: 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, Oregon Constitution

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

4.1 Introduction

4.1.1 Origins

The wording of Article I, section 9, is similar to its counterpart, Article I, section 11, of the Indiana Constitution of 1851. WC Palmer, *The Sources of the Oregon Constitution*, 5 Or L Rev 200, 201 (1926). (The Indiana Constitution of 1851 is at www.in.gov/history/2466.htm).

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

Article I, section 9 may – or may not – have been adopted from the Indiana Constitution: "Unfortunately, there is little in the way of an official record of the state constitutional convention. Charles Carey sifted through the many newspaper articles that had been prepared by reporters for the Portland *Oregonian* and the Salem *Statesman* who, as it turned out, were also delegates to the convention. His compilation of those articles often serves as the principal source of information about the debates over the wording of what would become the Oregon Constitution. What Carey reports about article I, section 9, however, is that the provision was adopted without amendment or discussion." Jack Landau, *The Search for the Meaning of Oregon's Search and Seizure Clause*, 87 Or L Rev 819, 836-37 (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). "It has been suggested on the basis of similarity in wording that article I, section 9 was taken from the 1851 Indiana Constitution, as were so many other provisions of the Oregon Constitution. There is no direct evidence of that connection, though, as [Claudia] Burton and [Andrew] Grade suggest, '[t]he evidence is circumstantial, but strong.' One delegate, Delazon Smith, urged the

use of Indiana's recently adopted bill of rights as a model for Oregon's, asserting that the former 'is gold refined; it is up with the progress of the age.' And the wording of article I, section 9 is indeed similar with its counterpart in the 1851 Indiana Constitution. 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 midnineteenth-century constitutional drafting." *Id*. at 837 (footnotes omitted).

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

Oregon judge Matthew Deady was a primary force in the Oregon Constitutional Convention. David Alan Johnson, FOUNDING THE FAR WEST 144 (1992) ("six men stood out"). Deady wrote later that Article I, section 9, of Oregon's Constitution "is copied from the fourth amendment to the constitution of the United States, and was placed there on account of a well-known controversy concerning the legality of general warrants in England, shortly before the revolution, not so much to introduce new principles as to guard private rights already recognized by the common law. * * * The law * * * was put beyond controversy, as to the government of the Union, by this fourth amendment, and from there transferred to the constitution of the states." *Sprigg v Stump*, 8 F 207, 213 (1881) (Deady, J.).

Note: That may just be Deady's backward-looking view as just one of the 60 convention delegates. Among his other reactionary, conservative views, "Deady promoted Southern proslavery views" and "remained committed, to the end of his life, to a complex strain of eighteenth-century ideas." Johnson, FOUNDING THE FAR WEST at 152; David Schuman, *The Creation of the Oregon Constitution*, 74 OR L REV 611, 617 (1995) (noting that as a Constitutional Convention delegate candidate, Deady ran as "an avowed pro-slavery advocate"). As Deady's contemporary and political antithesis, John R. McBride (who was an anti-slavery delegate at the convention), wrote: "I think he divided mankind into two classes – those made to rule and those to be ruled. * * * He was not only a Democrat, but one of the ultra-pro-slavery type, who advocated the adoption of slavery in the new state." Printed in Charles Henry Carey, THE OREGON CONSTITUTION (1926) p. 485.

4.1.2 Interpretation

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

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

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

4.1.3 Burdens of Proof and Standard of Review

The state has the burden of proving by a preponderance of the evidence that a warrantless search or seizure by a state actor falls within an exception to the warrant requirement. *State v Blair*, 361 Or 527, 534- 35 (2017).

But "suppression of evidence obtained through a search is not required under Article I, section 9, unless the search violated the defendant's personal rights by interfering with his or her protected 'privacy interests.' [*State v Tanner*, 304 Or 312, 319-22 (1987)]; *see also State v Makuch/Riesterer*, 340 Or 658, 670, 136 P3d 35 (2006) (defendants could not challenge the searches of their lawyer's home or their lawyer's personal organizer under Article I, section 9, because, even if the searches were unlawful, they had no 'possessory or privacy interest' in either)." *State v Snyder*, 281 Or App 308, 314 (2017).

"Under UTCR 4.060(1), every motion to suppress evidence must 'cite any constitutional provision, statute, rule, case, or other authority upon which it is based' and include a brief that will 'sufficiently apprise the court and the adverse party of the arguments relied upon.'" *State v Jacinto-Leiva*, 287 Or App 574, 576 (2017). "The motion [to suppress] must cite the authority on which it is based and, along with the accompanying brief, must "sufficiently apprise" the court and the state of the "arguments" relied upon by the moving party. [UTCR 4.060(1)] contains no requirement that a suppression motion contain detailed factual arguments." *State v Oxford*, 287 Or App 580, 583 (2017). A "motion that seeks suppression of evidence obtained as the result of a search or seizure that the defendant asserts was conducted without a warrant and was, therefore, *per se* unreasonable, sufficiently apprises the court and the state of the defendant's argument, and shifts the burden to the state to demonstrate the legality of the search." *Id*. (held: "the trial court erred in striking defendant's motion for failure to comply with UTCR 4.060(1)").

A defendant who files a motion to suppress but cites only to one case that "does not provide legal authority for suppression" fails to meet that UTCR requirement:

> "Citation to that case alone, in the absence of any citation of a constitutional provision, statute, case, or other authority providing substantive legal authority supporting

> suppression of evidence in this case, could not constitute the authority on which defendant's motion was based as is required pursuant to UTCR 4.060(1)(a). Furthermore, as noted, defendant's motion was not accompanied by a brief or supporting memorandum providing such authority. Thus, defendant's motion did not satisfy the requirement that any motion to suppress 'must cite any constitutional provision, statute, rule, case, or other authority upon which it is based.'" *Id*. at 578 (held: "because defendant failed to cite the authority upon which his motion to suppress was based as required by UTCR 4.060(1)(a), we agree with the state that the trial court did not err in striking defendant's motion.")

Oregon appellate courts review a trial court's denial of a motion to suppress for legal error. Appellate courts defer to the trial court's findings if they are supported by any evidence in the record. *State v Vasquez-Villagomez*, 346 Or 12, 23 (2009).

Where a "motion to suppress challenges evidence seized as the result of a warrantless search, the burden of proving by a preponderance of the evidence the validity of the search is on the prosecution." *State v Norton*, 270 Or App 584, 588 (2015) (citing ORS 133.693(4) and *State v Sargent*, 323 Or 455, 461 (1986)).

When "the police have acted under the authority of a warrant, the burden is on the defendant to prove the unlawfulness of a search or seizure. *State v Walker*, 350 Or 540, 553 (2011)". *State v Norton*, 270 Or App 584, 588 n 3 (2015).

4.1.4 Fourth Amendment

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

"The text of the [Fourth] Amendment * * * expressly imposes two requirements. First, all searches and seizures must be reasonable. Second, a warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity. See *Payton v New York*, 445 US 573, 584 (1980)." *Kentucky v King*, 563 US __, 131 S Ct 1849 (2011). But "the text of the Fourth Amendment does not specify when a search warrant must be obtained." *Fernandez v California*, 134 S Ct 1126 (2014) (quoting *Kentucky v King*, at slip op 5).

"The Fourth Amendment protects against trespassory searches only with regard to those items ('persons, houses, papers, and effects') that it enumerates." *United States v Jones*, 132 S Ct 945, 953 n 8 (2012). "Private commercial property is not one of the enumerated items that the Fourth Amendment protects." *Patel v City of Montclair*, __ F3d __ (9th Cir 2015) (2015 WL 4899632).

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

question would have constituted a 'search' within the original meaning of the Fourth Amendment." *United States v Jones*, 132 S Ct 945 (2012).

4.2 Probable Cause and Reasonable Suspicion: Article I, Section 9

4.2.1 Probable Cause

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

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

The "probable cause" necessary to conduct a warrantless search and to obtain a warrant to search is the same standard. *See* ORS 131.007(11) (probable cause to arrest); ORS 133.555 (probable cause to issue a search warrant). "The probable cause analysis for a warrantless search is the same as for a warranted one." *State v Foster*, 350 Or 161 (2011) (citing *State v Brown*, 301 Or 268, 274-76 (1986)).

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

Probable cause "does not require certainty" or "that officers limit the place that they search to whatever location may offer the most promising of several possible results." *State v Foster*, 350 Or 161 (2011). "Probable cause depends on whether an incriminating explanation remains a probable one, when all of the pertinent facts are considered." *Id*.

4.2.2 Reasonable Suspicion

The phrase "reasonable suspicion" is not in the state or federal constitutions. An arrest requires probable cause; an investigatory "stop" requires only reasonable suspicion. *State v Acuna*, 264 Or App 158, 167, *rev den*, 356 Or 400 (2014).

"'[R]easonable suspicion' under Article I, section 9, requires that an officer be able to point to specific and articulable facts that support the officer's belief that the person stopped may have committed or may be about to commit a specific crime or specific type of crime, and the key question is whether the officer's subjective belief is objectively reasonable, given the facts in the record." *State v Maciel-Figueroa*, 361 Or 163, 186 (2017). Reasonable suspicion "does not require an officer to *conclude* that the defendant has committed a crime" but "a reviewing court must conclude that the officer's subjective belief could be true, as a matter of logic." *Id*. at 183-84 (emphasis by court). An officer's subjective suspicion of generalized 'criminal activity'" is not "sufficiently specific or objectively reasonable to satisfy Article I, section 9, for a stop of a

particular individual." *Id*. at 179. The "officers must reasonably suspect that the defendant has committed or is about to commit a specific crime or type of crime." *Id*. at 180.

The Oregon Court of Appeals addressed reasonable suspicion for a stop in *State v Washington*, 284 Or App 454, 461-64 (2017):

> Seizures include both stops and arrests. *State v Backstrand*, 354 Or 392, 399, 313 P3d 1084 (2013). A stop is a "'brief, informal' detention for purposes of on-the-scene investigation" of criminal activity, which involves a "more limited intrusion into a person's liberty than an arrest." *State v Watson*, 353 Or 768, 775, 305 P3d 94 (2013) (quoting *State v Cloman*, 254 Or 1, 8-9, 456 P2d 67 (1969)). Further, in contrast to arrests, which require probable cause, stops require only reasonable suspicion that the defendant is engaged in criminal activity. *State v Martin*, 260 Or App 461, 469, 317 P3d 408 (2014) (citing *State v Ashbaugh*, 349 Or 297, 309, 244 P3d 360 (2010)). "Reasonable suspicion of criminal activity exists if [a police] officer subjectively suspects that an individual has committed, or is about to commit, a crime, and that belief is 'objectively reasonable under the totality of the circumstances.'" *State v Huffman*, 274 Or App 308, 312, 360 P3d 707 (2015), *rev den*, 358 Or 550 (2016) (quoting *State v Ehly*, 317 Or 66, 79, 854 P2d 421 (1993)). An officer's suspicion is objectively reasonable if the officer is able to "'identify specific and articulable facts that produce reasonable suspicion, based on the officer's experience, that criminal activity is afoot.'" *State v Sjogren*, 274 Or App 537, 541 (2015) (quoting *State v Mitchele*, 240 Or App 86, 91, 251 P3d 760 (2010)). The facts giving rise to the officer's suspicion must also be "particularized to the person [stopped] and based on the person's conduct." *Martin*, 260 Or App at 469 (citing *State v. Miglavs*, 337 Or 1, 12, 90 P3d 607 (2004)); *State v Kingsmith*, 256 Or App 762, 769, 302 P3d 471 (2013). "'Reasonable suspicion does not require that the articulable facts as observed by the officer conclusively indicate illegal activity but, rather, only that those facts support the reasonable inference that a person has committed a crime.'" *Sjogren*, 247 Or App at 541 (quoting *State v. Hammonds/ Deshler*, 155 Or App 622, 627, 964 P2d 1094 (1998) (emphases in *Hammonds/Deshler*)).
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> * * * * *
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> Although "[t]he fact that there might be innocent explanations for conduct does not mean that the conduct cannot also give rise to reasonable suspicion of criminality, ** * an officer may not stop a person simply because the person's conduct is consistent with criminal conduct; the nature of the conduct matters." *Martin*, 260 Or App at 469- 70 (internal quotation marks omitted). Put another way, an officer must offer something—either by drawing on the officer's training and experience or other specific and articulable facts about the encounter—to show why a defendant's "otherwise innocuous" conduct was, in fact, more suggestive of criminal activity than it appears. *State v. Alvarado*, 257 Or App 612, 631, 307 P3d 540 (2013); *see also Walker*, 277 Or App at 401-02 (explaining that an officer may not stop a person "rely[ing] solely on observing that a person has engaged in a 'not too remarkable action'" (quoting *State v. Valdez*, 277 Or 621, 628, 561 P2d 1006 (1977)))."

Regarding a distinction between "probable cause" and "reasonable suspicion," the Oregon Court of Appeals has footnoted: "The distinction between the two standards lies only in the quantum of evidence that is required to satisfy the particular standard and the contexts to which the standards apply. *See State v Hammonds/Deshler*, 155 Or App 622, 627, 964 P.2d 1094

(1998) (Supreme Court's probable cause reasoning is equally applicable to cases involving the lower standard of reasonable suspicion)." *State v Gilbertz*, 173 Or App 90 n 2, *rev den*, 332 Or 559 (2001).

Despite the Oregon court's statement, that would have to be under the Oregon Constitution, not the United States Constitution, because the United States Supreme Court has a more nuanced distinction:

> "Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause." *Alabama v White*, 496 US 325, 330 (1990).

State v Maciel-Figueroa, 361 Or 163 (3/02/17) (Nakamoto) (Polk) A woman whose home was familiar to police called 911 to report a disturbance. Ten minutes later, two officers arrived investigate the disturbance. They parked a few houses away and walked on the sidewalk toward the home. When they were near the home, they saw defendant walking down the driveway. One officer thought that defendant was walking at a normal pace. The other thought defendant's pace "seemed a little bit rapid." Based on his knowledge of the layout of the home, an officer was certain that defendant had come from the home. An officer called out to defendant and asked to speak to him. Defendant looked toward the officers, put his hands in his pockets, and continued to walk away. At that point, an officer stopped defendant by identifying himself as a police officer and directing defendant to come back and speak with them. The officer told defendant to take his hands out of his pockets. Defendant did, and began to walk faster back towards the house, putting his hands in his pockets again. The officer called out to defendant at least three more times, then defendant stopped at the front porch of the house. The officers asked defendant if he had any weapons or drugs, which defendant denied. With defendant's consent, an officer searched him. Defendant had a meth pipe and someone else's ID. He was charged with identity theft and meth possession. He moved to suppress the evidence on grounds that the officers stopped him without reasonable suspicion.

At the suppression hearing, one officer testified that he believed that defendant might have committed "a crime" in the house. The other officer testified that when he arrived at the residence, he believed "maybe a crime had been committed" and that "there was probably something going on." He was responding to "an unknown type call, but clearly a disturbance" in the house. When responding to a call "that there's somebody in there threatening to start destroying stuff," he would not know specifically what type of crime might have been committed; "it could be anything at that point." The officer proposed that possible crimes could include criminal mischief, menacing, and assault.

The trial court concluded that officers had reasonable suspicion to stop defendant to investigate if he had committed a crime. The Court of Appeals reversed. The Supreme Court affirmed the Court of Appeals. The Court acknowledged that "there has been some variation in this court's articulation of the standard" for reasonable suspicion, but rejected the state's "proposition that an officer need not subjectively suspect the defendant's crimes with any specificity." *Id*. at 179.

The Court explained: "'reasonable suspicion' under Article I, section 9, requires that an officer be able to point to specific and articulable facts that support the officer's belief that the person stopped may have committed or may be about to commit a specific crime or specific type of crime, and the key question is whether the officer's subjective belief is objectively reasonable, given the facts in the record." Reasonable suspicion "does not require an officer to *conclude* that the defendant has committed a crime" but "a reviewing court must conclude that the officer's subjective belief could be true, as a matter of logic." *Id*. at 183-84 (emphasis by court). An officer's subjective suspicion of generalized 'criminal activity'" is not "sufficiently specific or objectively reasonable to satisfy Article I, section 9, for a stop of a particular individual." *Id*. at 179. The "officers must reasonably suspect that the defendant has committed or is about to commit a specific crime or type of crime." *Id*. at 180, 165.

4.3 Probable Cause and Reasonable Suspicion: Fourth Amendment

In *Ornelas v United States,* 517 US 690 (1996), the United States Supreme Court addressed "reasonable suspicion" and "probable cause:"

"Articulating precisely what 'reasonable suspicion' and 'probable cause' mean is not possible. They are commonsense, nontechnical conceptions that deal with "'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.;" *Illinois v Gates*, 462 US 213, 231 (1983) (quoting *Brinegar v United States*, 338 US 160, 176 (1949)); *see United States v Sokolow*, 490 US 1, 7-8 (1989). As such, the standards are 'not readily, or even usefully, reduced to a neat set of legal rules.' *Gates, supra*, at 232. We have described reasonable suspicion simply as 'a particularized and objective basis' for suspecting the person stopped of criminal activity, *United States v. Cortez*, 449 US 411, 417-418 (1981), and probable cause to search as existing where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found, see *Brinegar, supra,* at 175-176; *Gates, supra*, at 238. We have cautioned that these two legal principles are not 'finely-tuned standards,'" comparable to the standards of proof beyond a reasonable doubt or of proof by a preponderance of the evidence. *Gates, supra*, at 235. They are instead fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed. *Gates, supra*, at 232; *Brinegar, supra*, at 175 ('The standard of proof [for probable cause] is . . . correlative to what must be proved'); *Ker v California*, 374 US 23, 33 (1963) ('This Cour[t] [has a] long-established recognition that standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application'; '[e]ach case is to be decided on its own facts and circumstances' (internal quotation marks omitted)); *Terry v Ohio*, *supra*, at 29 (the limitations imposed by the Fourth Amendment 'will have to be developed in the concrete factual circumstances of individual cases').

"The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause. The first part of the analysis involves only a determination of historical facts, but the second is a mixed question of law and fact: "[T]he historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way,

whether the rule of law as applied to the established facts is or is not violated." *Pullman-Standard v Swint*, 456 U. S. 273, 289, n. 19 (1982)."

The *Ornelas* court further stated: "our cases have recognized that a police officer may draw inferences based on his own experience in deciding whether probable cause exists. See, e.g., *United States v. Ortiz*, 422 US 891, 897 (1975).

4.4 Protected Interests

4.4.1 State Action

A privacy or possessory interest under Article I, section 9, is an interest against the state; it is not an interest against private parties. *State v Tanner*, 304 Or 312, 321 (1987*); cf. Lund v Chase Bank*, Case No. 6:14-CV-00448-AA (D Or 2014).

"Whenever the police undertake a search or seizure without a warrant, the state must demonstrate by a preponderance of the evidence that the search or seizure did not violate Article I, section 9. *State v Cook*, 332 Or 601, 608, 34 P3d 156 (2001). One manner in which the state can do so is by showing that the defendant had neither a protected privacy nor possessory interest in the property, which would mean that the state's search or confiscation is not a search or seizure implicating Article I, section 9. *State v Voyles*, 280 Or App 579, 584, 382 P3d 583 (2016)." *State v Lien/Wilverding*, 283 Or App 334, 341 (2017).

The Oregon Supreme Court footnoted that "the acts of Oregon employees or agents can constitute Oregon state action. *See State v Tucker*, 330 Or 85, 90, 997 P2d 182 (2000) (private tow truck operator acting at request of officer must act within bounds of Oregon Constitution); *State v Sines*, 359 Or 41, 51-52, 379 P3d 502 (2016) (private individuals acting as agents of the state engage in state action for purposes of Article I, section 9)." *Barrett v Peters*, 360 Or 445, 456 n 6 (2016).

"[I]f a state officer requests a private person to search a particular place or thing, and if that private person acts because of and within the scope of the state officer's request, then Article I, section 9, will govern the search." *State v Tucker*, 330 Or 85 (2000).

In ***State v Sines***, 359 Or 41 (2016), defendant's housekeeper suspected that defendant was raping his daughter. She called child safety workers, told them she wanted to take the daughter's soiled underwear that contained rape evidence. The child-safety workers told her they could not tell her what to do, but they could arrange for a police officer to meet her in a parking lot with the evidence.. She told took the child's underwear from defendant's house and delivered them to a police officer. Incriminating evidence was identified on the underwear. The Oregon Supreme Court concluded that the housekeeper was not a "state actor" in this case, based on common-law agency principles and remanded to the Court of Appeals, see *State v Sines*, 287 Or App 850 (2017) (held: on remand, state conducted an unconstitutional warrantless search by testing victim's underwear). The Court adopted the *Restatement (Third) of Agency* (2016), specifically citing §§1.01, 1.03, 2.01, 2.03, 3.01, and certain comments, to determine "whether a principal has assented for another to act as its agent." *Id*. at 55 & n 6. The Court wrote:

> "Common-law agency exists where a principal 'manifests assent to another person"—the agent—that the agent "shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.' *Restatement (Third) of Agency* § 1.01 (2006). The considerations relevant to the existence of an agent's actual authority to act on behalf of the principal focus on the 'principal's manifestation to an agent that, as reasonably understood by the agent, expresses the principal's assent that the agent take action on the principal's behalf.' *Id*. § 3.01. Whether the principal 'manifests' assent for the agent to act, and whether the agent manifests assent or otherwise agrees so to act, are determined by 'written or spoken words or other conduct.' *Id*. § 1.03." *Id*. at 55.

In *State v Keller*, 361 Or 566 (2017), the Oregon Supreme Court reiterated "that out-of-state governmental conduct implicates Article, I section 9," citing *State v Davis*, 313 Or 246 (1992) *Id*. at 575. *Keller* concluded that an "extraterritorial" stop "by an out-of-state officer be reasonable" to comport with Article I, section 9. *Id*. at 582 (held: stop did not violate Article I, section 9, despite infraction occurring just over the Oregon-Washington line and stop itself occurring inside Oregon line).

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

4.4.2 Privacy Rights – Search Defined

See also exceptions to warrant requirement section, below, which includes cases that are not searches or seizures. Examples include "plain view" and "abandonment."

4.4.1.A Generally

If government conduct did not invade a protected privacy interest, then no constitutional search occurred and Article I, section 9, is not implicated, and the inquiry ends. *State v Meredith*, 337 Or 299, 303 (2004); *State v Johnson*, 340 Or 319, 336 (2006) (no privacy interest in business records held by a third-party provider such as a phone carrier, internet provider, or a hospital); *State v Newcomb*, 359 Or 756 (2016); (*cf. United States v Miller*, 425 US 435 (1976) (defendant had no Fourth Amendment reasonable expectation of privacy in business records held by bank).

The state conducts a "search" under Article I, section 9, when it invades a protected privacy interest. *State v Brown*, 348 Or 293 (2010). Stated slightly differently: "A search occurs when the government invades an individual's privacy interest." *State v Barnthouse*, 360 Or 403, 413 (2016) (citing *State v Owens*, 302 Or 196, 206 (1986). 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 157, 164 (1988)). A search occurs if the state's action "will significantly impair the peoples' freedom from scrutiny" if the state engages in it "wholly" at its discretion. *Campbell*, 306 Or at 171; *State v Holiday*, 258 Or App 601 (2013).

The "right to privacy that Article I, section 9, protects is the freedom from scrutiny as 'determined by social and legal norms of behavior, such as trespass laws and conventions against eavesdropping.'" *State v Newcomb*, 359 Or 756, 764 (2016) (quoting *State v Campbell*, 306 Or 157, 170 (1988) (no protected privacy interest in blood withdrawn and tested from a lawfully seized dog).

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

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

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

Despite the Court of Appeals’ assertion in *Mast* that “the focus tends to be on the place,” that place-focused analysis may be shifting with increasing use of electronics, surveillance, and third-party records. A test of “whether police were able to obtain information that was materially different from information the defendant made available to others and whether the police conduct swept so broadly that it amounted to pervasive surveillance of the defendant’s daily life.” *State v Combest*, 271 Or App 38, 56 (2015). In *State v Combest*, 271 Or App 38 (2015), police used software called Shareaza LE to access shared online network files (eMule and eDonkey) that police suspected contained child porn. The Court of Appeals affirmed the trial court’s denial of defendant’s motion to suppress on grounds that there was no search, because “officers obtained the same information with Shareaza LE that was available to other network users,” particularly defendant’s IP address. *See also State v Ghim*, 360 Or 425, 438-44 (2016) (assuming that “defendant has a protected privacy interest” his bank records that the state subpoenaed ORS 192.596, “the administrative subpoenas issued by DCBS did not violate defendant’s Article I, section 9, rights. We leave for another day the question whether and in what circumstances a defendant will have a protected privacy interest in information that a third party maintains, a question that can arise in differing factual circumstances which can have a bearing on its resolution.”).

Note that “suppression of evidence obtained through a search is not required under Article I, section 9, unless the search violated the defendant’s personal rights by interfering with his or her protected ‘privacy interests.’ [*State v Tanner*, 304 Or 312, 319-22 (1987)]; *see also State v Makuch/Riesterer*, 340 Or 658, 670, 136 P3d 35 (2006) (defendants could not challenge the searches of their lawyer’s home or their lawyer’s personal organizer under Article I, section 9, because, even if the searches were unlawful, they had no ‘possessory or privacy interest’ in either).” *State v Snyder*, 281 Or App 308, 314 (2017).

4.4.1.B Persons, Houses, Papers, and Effects

Effects: The cigarette pack is an "effect" protected from unreasonable search and seizure under Article I, section 9. *State v Linville*, 190 Or App 185 (2003), *rev den* 337 Or 34 (2004). Dirty laundry is, too. *State v Sines*, 287 Or App 850, 862 (2017) ("defendant's privacy interest was *in the underwear*, which he owned. A privacy interest in an item of personal property can exist regardless of the current condition of the property—regardless of what is in or on it") (emphasis by court).

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

Garbage AFTER it has been picked up at the curb: When a trash company takes garbage, the garbage owners "retain[] no more right to control the disposition of the garbage" than if they had abandoned it. *State v Howard/Dawson*, 342 Or 635, 643-44 (2007). A "person retains no constitutionally protected privacy interest in abandoned property." *Id*. at 641-42. "The possessory interest in the garbage is lost * * * upon retrieval by the sanitation company on the regularly scheduled day." *State v Lien/Wilverding*, 283 Or App 334, 342 (2017). Also "defendants abandoned their property to the sanitation company without retaining any contractual right to it." *Id*. at 343. Fourth Amendment to the United States Constitution does not prohibit the police from searching a person's garbage after the sanitation company has collected it. *California v Greenwood*, 486 U.S. 35 (1988).

GPS: A nonconsensual satellite-based GPS monitoring of a person's body to track movement is a search under the Fourth Amendment. *Grady v North Carolina*, 575 US __ (2015). Installation of a GPS device on a target's vehicle to monitor vehicle movements is a search under the Fourth Amendment. *United States v Jones*, 565 US __ (2012).

Text Messages: When a text message arrives at another person's phone, the sender "lost all ability to control who saw that message. As a result, under Article I, section 9," the sender "had no protected privacy interest in the digital copy of the message." *State v Carle*, 266 Or App 102 (2014). A detective (using an abandoned phone) and defendant, a drug dealer, texted back and forth for several hours. Held: defendant did not retain any protected privacy in the text message that she sent to the other phone. The searched phone was not defendant's phone. Text messages are akin to garbage one sends to a sanitation company. Once a trash company takes garbage, the garbage owner "retained no more right to control the disposition of the garbage" than if they had "abandoned it" under *State v Howard/Dawson*, 342 Or 635, 643-44 (2007). *State v Carle*, 266 Or App 102 (2014).

Data online: No search using Shareaza LE software of defendant's online files because "officers obtained the same information with Shareaza LE that was available to other network users," particularly defendant's IP address. "When defendant made files available for download on the eDonkey network, defendant made the IP address and [Globally Unique Identifier] associated with those files available to other users." *State v Combest*, 271 Or App 38, 56, *rev den* (2015).

License Plates: No specific privacy right exists in license plates when on public ways: A person's "driver's license and car registration records were created by the state for its own purposes, just as in *Johnson,* where the cellular telephone provider's records were created for the provider's own purposes. The state has a substantial administrative interest in confirming that only licensed persons drive properly registered vehicles on public roads. ORS 803.300 requires vehicles to be registered. ORS 803.540 requires vehicles to display registration plates, in part, as confirmation that the vehicles are registered. ORS 803.550 prohibits obscuring registration plates. The state can access a person's driving records by observing a driver's registration plate that is displayed in plain view and looking up that registration plate number in the state's own records. *See Higgins v DMV*, 335 Or 481, 487 (2003) ("The characters that the state assigns to a vehicle's registration plates facilitate the prompt identification of the vehicle for law enforcement purposes."). Indeed, the state has created an electronic system that allows authorized agencies and government entities to access the driving records of individuals and vehicles. *See* ORS 181.730 (establishing the Law Enforcement Data System). *State v Davis*, 237 Or App 351, 356-57 (2010), *aff'd by an equally divided court*, 353 Or 166 (2013) (defendant did not have an inherent privacy interest in his driving records and the state did not create such an interest); *see also State v Gibbons*, 263 Or App 587 (2015) (same).

Vehicles, Tents, & Tarps: To determine if a space is private, courts consider if the "space is a place that legitimately can be deemed private." *State v Smith*, 327 Or 366, 372-73 (1998). A lawfully rented campsite might be a residence. *State v Wolf*, 260 Or App 414, 425 (2013). A truck may be a place of residence if the person regularly eats, drinks, and sleeps in the truck, to fit the "place of residence" exception to the unlawful possession of a firearm statute. *State v Leslie*, 204 Or App 715, *rev den*, 341 Or 245 (2006). A pickup truck or a stand-alone awning next to a residential driveway may be a place of residence, but was not here. *State v Clemente-Perez*, 357 Or 745 (2015). A homeless person's tarp over a grocery cart protruding onto the sidewalk from a private business's alcove is not a constitutionally protected space. *State v Tegland*, 269 Or App 1 (2015).

Field Sobriety Test: Nystagmus: Testing for nystagmus is a "search" that requires a warrant or an exception to the warrant requirement under Article I, section 9. *State v McCrary*, 266 Or App 513 (2014). "A search does not occur in readily apparent observations of an individual's physical appearance." "To constitute a search, the examination requires something more than observation of a physical characteristic that a person plainly manifests to the public." Examples of private conditions are "one's pulse or the content of one's breath, blood, and urine." Similarly, "[r]evealing the presence of nystagmus implicates potential medical facts that an individual may well wish to keep private."

Living Animals: In ***State v Newcomb***, 359 Or 756 (2016), the Court did not expressly assess whether an animal is an "effect." It held that a person has no protected privacy interest in a "living animal * * * not an inanimate object or other insentient physical item of some kind" that "the state has *lawfully* seized * * * on probable cause to believe the animal has been neglected or otherwise abused." *Id*. at 765-66, 773 (emphasis by court). The only issue before the Court was whether a vet's blood testing was a "search." The Court reiterated that "the privacy protected by Article I, section 9, is not the privacy that one reasonably *expects* but the privacy to which one has a *right*." *Id*. at 764 (quoting *State v Campbell*, 306 Or 157, 164 (1988)).

State v Sines, 287 Or App 850 (9/20/17) (Deschutes) (Duncan pro tem, Armstrong, Shorr) This case is on remand from the Oregon Supreme Court, ***State v Sines***, 359 Or 41 (2016). Defendant adopted two young children. His housekeeper believed he was raping one or both. She stole a child's underwear from the laundry. She brought it to a police officer, who observed dried fluid contained on/in the underwear, and he immediately brought it to a lab. A lab tech cut up the underwear and tested the cloth for evidence of rape. Spermatazoa was in the underwear. Authorities then obtained and executed a warrant to search defendant's house. Defendant was arrested, and police seized other evidence, including the daughter's nightgown, pajama pants, bathing suit, and jeans. Tests conducted on those items revealed additional evidence of spermatozoa and seminal fluid. Defendant moved to suppress all evidence resulting from the warrantless search and seizure.

The trial court denied defendant's motion to suppress, concluding that stealing the underwear was not state action. Defendant was convicted of multiple crimes. The Court of Appeals reversed. The Oregon Supreme Court reversed the Court of Appeals, holding that no state action occurred when the laundress stole the soiled underwear, and remanded to the Court of Appeals.

In this 2017 case, the Court of Appeals reversed two of defendant's convictions, concluding that the underwear examination was a warrantless search:

"Lawful possession of an item of personal property by a law enforcement agency does not automatically extinguish the owner's privacy interest in the item." *Id*. at 876. A "defendant can retain a privacy interest in one of his effects taken from a laundry hamper in his home by a third party and turned over to the police." *Id*. at 864. The Court of Appeals felt that the part of *State v Lumen*, 347 Or 487 (2009), was just dicta, when the *Lumen* Court stated: "once a law enforcement agency accepts the fruits of a private search, it has unfettered authority to examine them however it chooses 'for criminal investigatory purposes.' *Id*. at 496 (emphasizing that third parties' delivery of a videotape belonging to the defendant to the sheriff's office gave a deputy sheriff 'lawful possession of that evidence for criminal investigatory purposes')." *Id*. at 865 n 9.

"Cutting pieces from underwear, chemically testing some of the pieces, extracting the contents of one piece into liquid, and examining the liquid under a microscope would certainly be 'searches' under ordinary circumstances. *See, e.g., State v. Rhodes*, 315 Or 191, 196-97, 843 P2d 927 (1992) (officer's act of moving vehicle's door from a few inches open to all the way open constituted a search because the officer's 'action permitted him to observe *** what he otherwise could not have seen *** from a lawful vantage point'); *accord State v. Louis*, 296 Or 57, 61, 672 P2d 708 (1983) ('[a] determined official effort to see or hear what is not plain to a less determined observer may become an official 'search,'" but photographs of the naked defendant taken across the street from his bedroom window with a telephoto lens "merely recorded what could be seen and had been seen without the camera')." *Id*. at 876.

The Court of Appeals wrote that *State v Owens*, 302 Or 196, 206 (1986) "reasons that testing contraband is not a search when it is to determine 'whether or not [the contraband] is a controlled substance' and 'to confirm the presence of whatever the

police have probable cause to believe is present in that item.' The 'police already know exactly what they will find; they are merely "confirming" information that is no longer secret and, consequently, no longer protected by Article I, section 9.'" *Id*. at 879-80.

Here, though, "the test for spermatozoa heads was not merely a confirmatory test. It involved the extraction and microscopic examination of substances on the underwear, through which different types of cells—including yeast, vaginal, skin, and spermatoza cells—could be discovered. We have held that, under the reasoning in the first part of *Owens*, a privacy interest remains in the contents of a container and, thus, opening the container is a search, unless it is apparent 'that contraband is [its] sole content.' *State v. Kruchek*, 156 Or App 617, 621-23, 969 P2d 386 (1998), *aff'd by an equally divided court*, 331 Or 664 (2001) (emphasis in original). That is so because '[t]he rationale in *Owens* and its progeny is confined to situations in which there is no reason to believe that opening the container will result in any greater intrusion into a person's privacy than has already occurred through viewing or smelling the container.' *Id*. at 622-23. '[U]nless it is apparent that the container at issue holds nothing other than contraband,' opening the container does 'constitute a search, because it [opens] to scrutiny contents that [are] not then known.' *Id*. at 622-23; *cf. Jacobsen*, 466 US at 119 (examination of an item turned over by a third party after a private search must be virtually certain not to reveal anything more than the officer has already learned through the private search). For the same reason, *Owens* requires the same limitation on the warrantless testing of a substance of contraband: The testing must be such that it will not reveal any information other than whether or not the substance is contraband; otherwise, it will reveal secret information and, consequently, it will be a search." *Id*. at 878-79.

The "test for spermatozoa heads could reveal information that, until the test, was unknown and unobservable, including information about [the daughter] and defendant. Consequently, it did not merely confirm what police already knew, and *Owens* does not apply. Thus, the testing for spermatozoa heads was a search for purposes of Article I, section 9." *Id*. at 880.

The error was not harmless: "Defendant proved that [officer's] decision to apply for a warrant was prompted by the test results; thus, if the test results were illegally obtained, the warrant, and the evidence obtained pursuant to it, was 'come at by exploitation of that illegality.' [citation omitted]. Equally, the state had the opportunity to show that [the officer] would have sought, and obtained, a warrant even in the absence of the test results. However, it did not do so. Although the state elicited testimony to support the view that there might have been probable cause to support the warrant application even absent the test results, it did not present any evidence that [the officer] would have sought a warrant even in the absence of the test results." *Id*. at 881-82.

4.4.3 Possessory Rights – Seizure Defined

4.4.3.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 Barnthouse*, 360 Or 403, 413 (2016); *State v Whitlow*, 241 Or App 59 (2011). "The term 'possessory interest' does not appear in the text of Article I, section 9; rather, it is a term that this court and other courts (usually interpreting the Fourth Amendment) have used to determine whether an item of property has been seized for constitutional purposes." *Barnthouse*, 360 Or at 414.

If an intrusion is a seizure, "it requires probable cause and a search warrant or separate justification under one of the few, carefully circumscribed exceptions to the warrant requirement of Article I, section 9, of the Oregon Constitution." *State v Kosta*, 304 Or 549, 553 (1987).

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).

"Plainly, an arrest and concomitant taking of the arrestee's personal property (whether or not that taking constitutes a seizure) does not fully and permanently divest the arrestee of his or her interest in that property: unless it is contraband or otherwise subject to forfeiture, the police will have to give it back eventually." *State v Olendorff*, 267 Or App 476 (2014). "Once defendant asked the officers to release her purse to [another person], the officers could deny that request – thereby either effecting or continuing a seizure – only if the denial was justified by some exception to the search warrant requirement." *Id*.

(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).

4.4.3.B Seizure of Persons

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

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

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

The Oregon Supreme Court divides state-citizen encounters into three categories. *State v Hall*, 339 Or 7, 16-17 (2005), *State v Amaya*, 336 Or 616, 627 (2004), and *State v Holmes*, 311 Or 400, 410 (1991).

4.4.3.B.1 "Mere Conversation"

"A question is not a search." *State v Jimenez*, 357 Or 417, 434 (2015) (Kistler, J., concurring).

Mere conversations between officer and citizen that are free from coercion or interference with liberty are not "seizures" and thus do not require any justification to occur. No suspicion is required if the encounter is just "mere conversation." What constitutes "mere conversation," particularly of people on foot, in parked cars, or as passengers in traffic-stopped cars, remains an interesting area of law. *See State v Beasley*, 263 Or App 29 (2014) (a reasonable person like defendant -- asleep in his lawfully parked car, awakened by officer by knocking on the car window, asking for defendant's ID and his criminal status, retaining his ID, and asking to run a records check – "would not have felt that the officer was exercising his authority to significantly restrain defendant's liberty or freedom," thus they engaged in mere conversation).

The bottom line: "A mere request for identification made by an officer in the course of an otherwise lawful police-citizen encounter does not, in and of itself, result in a seizure." *State v Backstrand*, 354 Or 392, 410-11 (2013) (shoppers in store). "Thus, we agree with the United States Supreme Court, which has held for purposes of the Fourth Amendment that an officer's questions related to identity or a request for identification do not result in a seizure unless the circumstances of the encounter are 'so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded.' *INS v Delgado*, 466 US 210, 216-17 (1984).'" *Id*. at 410. "[V]erbal police inquiries are not, by themselves, seizures. * * * 'Something more' is required. * * * That something more can be 'the content or manner of questioning, or the accompanying physical acts by the officer, if those added factors would reasonably be construed as

"threatening or coercive" show of authority requiring compliance with the officer's request. * * * If an officer does not, by words or conduct, convey such a show of authority, the officer remains free to contact or otherwise engage a citizen to request information and cooperation or to impart information without justification." *State v Anderson*, 354 Or 440, 450-51 (2013) (quoting *Backstrand* and *Ashbaugh*) (passenger in parked car); *see also State v Highley*, 354 Or 459 (2013) (officer did not seize defendant, who was a passenger in a car, by asking for his identification and checking his probation status based on that ID; requests did not implicate Article I, section 9).

4.4.3.B.2 Stops

See also **Section 4.5.3**, *post*.

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

(i). Nontraffic criminal 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).

"Article I, section 9, requires the police, before stopping an individual, to have reasonable suspicion that the individual is involved in criminal activity." *State v Unger*, 356 Or 59, 71 (2014); *State v Maciel-Figueroa*, 273 Or App 298, 302 (2015) (state's assertion that officer had reasonable suspicion of "a number of possible crimes" – without having information about a specific crime – is not objectively reasonable suspicion that a crime had been committed).

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

During the course of a nontraffic stop that is supported by reasonable suspicion of criminal activity, an officer may inquire whether the stopped person is carrying weapons or contraband. *State v Simcox*, 231 Or App 399, 403 (2009) (stop in a city park); *State v Hemenway*, 232 Or App 407 (2009) (state must prove that deputies had "reasonable suspicion of criminal activities" to block defendant's parked truck with

their cars). See also ORS 131.615(1) ("A peace officer who reasonably suspects that a person has committed or about to commit a crime may stop the person and, after informing the person that the peace officer is a peace officer, make a reasonable inquiry.").

(ii). Traffic Stops: Pedestrians, bicyclists, and motorists may be stopped based on traffic code violations, such as crossing against a "Don't Walk" signal. A traffic stop is not an ordinary police-citizen encounter because, in contrast to a person on the street who "may unilaterally end" the encounter "at any time," a motorist stopped for an infraction is not free to end the encounter when he chooses. *State v Rodgers/Kirkeby*, 347 Or 610, 623 (2010). But even if a person is walking or biking – not driving – the person comes within the ambit of the traffic stop. Thus a person on foot or biking who is traffic stopped has Article I, section 9, rights of a motorist who is traffic stopped. *State v Jimenez*, 263 Or App 150 (2014), *aff'd* 357 Or 417 (2015) (when officer asked the traffic-stopped, jaywalking defendant if he was carrying any weapons, his inquiries unrelated to the traffic violation violated defendant's rights under Article I, section 9, because the officer did not attest to why the circumstances of this stop concerned him and just attesting that "officer safety" concerns justified his concern is insufficient without facts).

On February 19, 2016, the Oregon Supreme Court footnoted this legal standard in a traffic stop case: "Constitutionally, an officer needs reasonable suspicion to stop a defendant. See *State v Musser*, 356 Or 148, 158, 335 P3d 814 (2014) (reasonable suspicion required for investigatory stop). Statutorily, an officer must have "probable cause to believe" that a traffic violation has occurred when the officer stops a driver "based on a description of the vehicle or other information received from [another] police officer who observed the traffic violation." ORS 810.410(2)(b)." *State v Suppah*, 358 Or 565, 568 n 2 (2016). *Musser*, however, is not a traffic-stop case.

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

Similarly, "[s]topping a vehicle and detaining its occupants is a 'seizure' of the person within the meaning of the Fourth Amendment to the Constitution of the United States, 'even though the purpose of the stop is limited and the resulting detention quite brief.' *Delaware v Prouse* 440 US 648, 653, 59 L Ed 2d 660, 667 (1979)." *State v Tucker*, 286 Or 485, 492 (1979).

4.4.3.B.3 Arrests

Arrests are defined in ORS 133.005(1). An arrest -- placing a person under actual or constructive restraint – requires probable cause to believe the person has committed a crime. *State v Alexander*, 238 Or App 597, 604 n 1 (2010) *rev den* 349 Or 654 (2011) (ORS 133.005(1) (defining "arrest")); *cf. Papachristou v City of Jacksonville*, 405 US 156, 169 (1972)

("We allow our police to make arrests only on 'probable cause'" under the Fourth and Fourteenth Amendments); *cf. Cook v Sheldon*, 41 F3d 73, 78 (2d Cir 1994) ("It is now far too late in our constitutional history to deny that a person has a clearly established right not to be arrested without probable cause.").

"An order to stop is not necessarily equivalent to placing a person under arrest. The former entails a 'temporary restraint on a person's liberty'" while, as we have noted above, the latter involves a more significant 'restraint[] on an individual's liberty that [is a] step[] toward charging that individual with a crime.'" [*State v Ashbaugh*, 349 Or 247, 308-09 (2010)]; *see also State v. Rodgers/ Kirkeby*, 347 Or 610, 621-22, 227 P3d 695 (2010) (explaining distinctions between different police encounters, including 'stops' and 'arrests')." *State v Davis*, 360 Or 201, 210 (2016).

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

Under ORS 131.615(1) and 131.605(6), an officer may stop a person if he reasonably suspects criminal conduct under the totality of the circumstances. ORS 131.615 was legislative codification of *Terry* stops. And "an analysis of a defendant's rights under ORS 131.605 to 131.625 is substantially the same as an analysis of a defendant's rights under the search and seizure provisions of the Oregon and federal constitutions" per *State v Kennedy*, 290 Or 493, 497 (1981) and *State v Toevs*, 327 Or 525, 534 (1998). *State v Holdorf*, 355 Or 812 (2014). Because ORS 136.432 limits courts' authority to exclude evidence based on statutory violations, the Court's review "is limited to whether Article I, section 9, of the Oregon Constitution requires exclusion of the evidence identified in defendant's motion to suppress." *Id*.

Officer Intuition: "The standard of 'reasonable suspicion' justifying a police intrusion" is less than probable cause to arrest. "Officer intuition and experience alone are not sufficient to meet that objective test. However, if an officer is able to point to specific and articulable facts that a person has committed or is about to commit a crime, the officer has a 'reasonable suspicion' and may stop the person to investigate." *State v Holdorf*, 355 Or 812 (2014).

Shared Knowledge: Officers "often reasonably rely on information provided to them by other officers to determine whether to stop a suspect." This "shared knowledge" is deemed "the collective knowledge doctrine" by the Court, citing *State v Soldahl*, 331 Or 420, 427 (2000). "We hold that the collective knowledge doctrine also applies when a police officer reasonably relies on information from other officers in making a determination that a stop is justified based on articulable facts that criminal activity is afoot." *State v Holdorf*, 355 Or 812 (2014).

4.5 Persons, Papers, Effects: Public and Private

The Oregon Court of Appeals has stated: To determine "what constitutes a protected privacy interest, the focus tends to be on the place." *State v Mast*, 250 Or App 605 (2012). The focus, however, isn't just where, but what, how, and *why* the search occurs. This is becoming increasingly important in mobile phone, computer, GPS, and internet searches, and body

searches. *See, e.g.*, *State v Burshia,* 201 Or App 678, 682 (2005) (a breath test is a search and a seizure); *State v Nix*, 236 Or App 32 (2010) (mobile phone searched as part of a lawful arrest); *Grady v North Carolina*, 575 US __ (2015) (a nonconsensual satellite-based GPS monitoring of a person is a search); *Riley v California*, 573 US __ , slip op at 21 (2014) ("a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is.").

See Section 4.6 on Houses and Commercial Premises.

In *State v Dixson*, 307 Or 195, 207 (1988) the Oregon Supreme Court noted that "persons, houses, papers, and effects" are not the only things protected, quoting the United States Supreme Court: "Neither a public telephone booth nor a conversation conducted therein can fairly be described as a person, house, paper, or effect; yet we have held that the Fourth Amendment forbids the police without a warrant to eavesdrop on such a conversation." *Oliver v United States*, 466 US 170, 185 (Marshall, J., dissenting) (footnote omitted) (citing *Katz v United States*, 389 US 347 (1967)). In *Dixon*, the Oregon Supreme Court declined to accept an "open fields" exception to Article I, section 9:

> "We conclude that we cannot rely on a literal reading of Article I, section 9. To hold that the provision applies only to those items specifically enumerated therein would undermine the rationale that we have identified as the touchstone of Article I, section 9--the right to be free from intrusive forms of government scrutiny--and would open up prior decisions of this court, such as *State v. Campbell, supra*, to serious question. We decline to take that step. Article I, section 9, protects the privacy of the individual from certain kinds of governmental scrutiny. If the individual has a privacy interest in land outside the curtilage of his dwelling, that privacy interest will not go unprotected simply because of its location." *Id*. at 208.

4.5.1 Generally

A "search" occurs when the government invades a protected privacy interest. *State v Meredith*, 337 Or 299 (2004). A "seizure" of property occurs when there is a significant interference, even a temporary one, with a person's possessory or ownership interests in a piece of property. *State v Juarez-Godinez*, 326 Or 1, 6 (1997); *State v Owens*, 302 Or 196, 207 (1986). "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 and footnote omitted).

The Fourth Amendment and Article I, section 9, expressly protect "persons, houses, papers, and effects." The Oregon Supreme Court follows the United States Supreme Court by distinguishing searches and seizures based on place: "We note first that the Supreme Court distinguished early between the constitutional protections afforded a dwelling or other building and those afforded an automobile in transit on a public street." *State v Davis*, 295 Or 227, 242 (1983) (motel room +

reasonable suspicion). The *Davis* Court did not address the text of the Fourth Amendment and Article I, section 9, of the Oregon Constitution. But it followed federal precedent by separating a home from a street encounter with police: "we have never held, and decline to hold here, that a reasonable suspicion sufficient to support a temporary detention of a citizen during investigation suffices to legalize entry into one's premises without probable cause, without a warrant, without exigent circumstances and over one's protests." *Id*. at 242.

4.5.2 Traffic Stops

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

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

4.5.2.A The Initial Traffic Stop

This section includes only stops for traffic-code violations. It does not include stops of people (in cars or not in cars) for reasons *other than* traffic violations.

Note: Sometimes the Court of Appeals conflates the standards for traffic stops with the standards for investigatory nontraffic stops. *See, e.g., State v Berg*, 281 Or App 101, 105 (2016), in which the court addressed the validity of a traffic stop of a vehicle, but used the legal standard to stop a person. In *Berg*, the court wrote: "It is well-established under Oregon law that a 'stop' of a car is a seizure for purposes of Article I, section 9." *Id*. at 106. The problem is that the Court of Appeals cited *State v Ashbaugh*, 349 Or 297, 308-09 (2010) for that tenet, but *Ashbaugh* was not a traffic stop. It was a stop of people in a park.

4.5.2.A.(i) Traffic Stop Defined

When a pedestrian, a bicyclist, or a motorist is stopped by an officer for a traffic code violation, that is a traffic stop. *State v Jimenez*, 263 Or App 150 (2014), *aff'd* 357 Or 417 (2015). A traffic stop is a temporary seizure that occurs when an officer restrains an individual's liberty or freedom of movement. *State v Hendon*, 222 Or App 97, 102 (2008). It is the state's burden to establish the lawfulness of a warrantless traffic stop. *State v Ordner*, 252 Or App 444, 447 (2012), *rev den* 353 Or 280 (2013); *State v Anderson*, 259 Or App 448, 453 (2013).

4.5.2.A.(ii) Suspicion Required To Traffic Stop

ORS 810.410(3)(b) allows an officer to stop a person if the officer has probable cause to believe that person committed a traffic violation. *State v Dawson*, 282 Or 355, 339 (2016).

Pretext stops, if justifiable traffic stops, are not unlawful. *State v Westcott*, 282 Or App 614, 617 (2016) (pretext stop occurred when officers followed a car until its driver commits a traffic violation so they could lawfully stop it).

Note: Fourth Amendment and Oregon law differs on the suspicion level required to stop a vehicle and whether the passengers in a stopped vehicle are seized due to the traffic stop.

Under the Fourth Amendment, a "traffic stop for a suspected violation of law is a 'seizure' of the occupants of the vehicle and therefore must be conducted in accordance with the Fourth Amendment. *Brendlin v California*, 551 U.S. 249, 255–259, 127 S Ct 2400, 168 L.Ed.2d 132 (2007)." *Heien v North Carolina*, 135 S Ct 530, 536 (2014). To "justify this type of seizure, officers need only 'reasonable suspicion'—that is, 'a particularized and objective basis for suspecting the particular person stopped' of breaking the law." *Ibid*. (citing *Prado Navarette v. California*, 134 S Ct 1683, 1687–88 (2014)).

Oregon appellate courts contradicted themselves on whether Article I, section 9, requires reasonable suspicion or instead probable cause for an initial traffic stop. In 2010, the Oregon Supreme Court wrote that police have authority to stop a car when there is probable cause to believe that the driver has committed a traffic infraction. *State v Rodgers/Kirkeby*, 347 Or 610, 623 (2010). In 2016, the Court of Appeals recited that standard in *State v Hanussak*, 280 Or App 161, 162 (2016). In 2015, the Court of Appeals was clear that traffic stops require probable cause – only probable cause:

> "Under Article I, section 9, of the Oregon Constitution, a traffic stop is lawful only if the officer who stops the vehicle has probable cause to believe that a traffic violation has occurred. *State v Matthews*, 320 Or 398, 403, 884 P2d 1224 (1994). In the context of a traffic stop, probable cause is established "if, at the time of the stop, the officer subjectively believes that the infraction occurred and if that belief is objectively reasonable under the circumstances." State v. Isley, 182 Or App 186, 190, 48 P3d 179 (2002); *see also State v Tiffin*, 202 Or App 199, 121 P3d 9 (2005)." *State v Gordon*, 273 Or App 495, 500 (2015).

Similarly, in 2017, the Court of Appeals cited its own case law that traffic stops require law enforcement to have probable cause to believe the traffic infraction occurred:

> "*See State v Stookey*, 255 Or App 489, 491, 297 P3d 548 (2013) (where facts perceived by officer do not constitute an offense, officer lacks probable cause to conduct a stop under Article I, section 9)." ***State v Jones***, 286 Or App 562, 565 & n 1 (2017) (held: facts constituted a traffic violation, trial court properly denied motion to suppress, and declining to "abandon our rule of law" that "the facts perceived by the officer must, in fact, constitute a violation of the law").

But in 2016, in a footnote in a traffic stop case, the Oregon Supreme Court wrote that the constitutional level is to traffic stop is only reasonable suspicion. And it cited a non-traffic stop case:

> "Constitutionally, an officer needs reasonable suspicion to stop a defendant. See *State v. Musser*, 356 Or 148, 158, 335 P3d 814 (2014) (reasonable suspicion required for investigatory stop). Statutorily, an officer must have "probable cause to believe" that a traffic violation has occurred when the officer stops a driver "based on a description of the vehicle or other information received from [another] police officer who observed the traffic violation." ORS 810.410(2)(b)." *State v Suppah*, 358 Or 565, 568 n 2 (2016).

Musser, on which *Suppah* relied, is not a traffic-stop case. Does *Suppah* end the courts' confusion, or add to it?

Almost always, Oregon appellate courts assert that **probable cause** is required to stop a person or vehicle for a traffic-code violation. That is, probable cause to believe the person committed a traffic-code violation. For example: "Article I, section 9, requires that an officer who stops a person for a traffic infraction have probable cause to believe that the person has committed the infraction. *State v Matthews*, 320 Or 398, 403 (1994)." *State v De La Rosa*, 228 Or App 666, 671 (2009). Similarly: "It is the state's burden to establish that a traffic stop is supported by probable cause. *State v Matthews*, 320 Or 398, 403 (1994)." *State v Jackson*, 268 Or App 139, 149-50 (2014). *See also State v Heilman*, 268 Or App 596, 603 (2015) (with no citation, concluding: "Because the officer lacked probable cause to stop defendant, the stop violated defendant's Article I, section 9, rights, the evidence resulting from it should have been suppressed.")
Matthews is a statutory case, not a constitutional case.

Court of Appeals cases bridge *Matthews'* statutory probable-cause requirement to Article I, section 9, for example: *State v Isley*, 182 Or App 190 (2002) (the state may meet its burden of demonstrating a lawful warrantless seizure by proving that the officer who seized the defendant had probable cause to believe that the defendant had committed a traffic offense); *State v Anderson*, 259 Or App 449, 451 (2013) ("to stop and detain a person for a traffic violation, an officer must have probable cause to believe that the person has committed a violation.") (quoting *State v Stookey*, 255 Or App 489, 491 (2013)).

In a few cases, however, the Court of Appeals requires only **reasonable suspicion** for traffic stops. Consider these statements in three cases:

> "The parties do not dispute the basic legal standards governing the required basis for the stop. When [officer] seized defendant under Article I, section 9, of the Oregon Constitution by stopping his car, [officer] had to have a basis for the stop that, in this case, at least amounted to reasonable suspicion. Under ORS 131.605(6), 'reasonably suspects' means . . ." *State v Eastman*, 269 Or App 503, 506 (2015) (the Court of Appeals cited to nothing to support its adoption of that standard, and moreover used only a statutory reference for reasonable suspicion). However, in *Eastman*, the basis for the stop was the *crime* of throwing a cigarette out of his car window rather than a traffic infraction. That was a stop of a moving vehicle for an alleged crime committed while driving rather than a traffic infraction.

> Consider another case: "Traffic stops must be supported by reasonable suspicion that the person stopped has committed a traffic infraction." *State v Broughton*, 221 Or App 580, 587 (2008), *rev dismissed*, 348 Or 415 (2010) (citing *State v Amaya*, 176 Or App 35, 43 (2001), *aff'd on other grounds*, 336 Or 616 (2004) which stated: "To be reasonable, traffic stops must be supported by reasonable suspicion that the defendant has engaged in criminal activity.")
>
> And in 2015: "To be reasonable, a traffic stop 'must be supported by reasonable suspicion that the defendant has engaged in criminal activity. Once the traffic stop ends, the authority to detain the defendant ends.'" *State v Ferguson*, 270 Or App 58, 62-53 (2015) (quoting *State v Amaya*, 176 Or App 35, 43 (2001), *aff'd on other grounds*, 336 Or 616 (2004)).

Other times, the Court of Appeals appears to mix traffic with nontraffic stops. For example, in *State v Pichardo*, 263 Or App 1 (2014), *adh'd on remand*, 275 Or App 49 (2016), *aff'd* 360 Or 754. A police officer testified at a suppression hearing that he stopped defendant's car because it was parked and idling in a traffic lane in violation of ORS 811.130, which is a traffic offense. Defendant contended that the police lacked probable cause to meet the elements of ORS 811.130. The trial court denied the motion. On appeal, however, the state argued that the officer stopped defendant for an entirely separate reason: the officer had objective reasonable suspicion that defendant was attempting to help another man evade the police, which is a crime under ORS 162.325 and ORS 162.247. The Court of Appeals did not mention that switch in theories or describe how significant it is. Instead, the Court of Appeals simply stated: "We first consider whether the initial stop was supported by reasonable suspicion. *State v Rodgers/Kirkeby*, 347 Or 610, 621 (2010)." The problem is that the Court of Appeals did not identify the basis for the stop – is it a traffic stop or a nontraffic stop? The Court of Appeals concluded "that the initial stop was lawful" because the officer "believed he had lawful authority to stop defendant based on a traffic violation." But a traffic stop requires probable cause, not reasonable suspicion. The Court of Appeals parenthetically cited *State v Miller*, 345 Or 176, 186 (2008), "explaining that an officer's expressed reason for making a stop does not control a court's determination of the legality of that stop."

In 2013, the Oregon Supreme Court contended that it was waiting to weigh in on the standard of proof for traffic stops: "The requirement that an officer have probable cause to believe that a driver committed a traffic violation is a statutory requirement. Whether that requirement also is found in Article I, section 9, is a question that this court has reserved. *State v Matthews*, 320 Or 398, 402 n 2 (1994). We need not decide that question in this case." *State v Watson*, 353 Or 768, 774 n 7 (2013).

However, as noted, in 2016, in *State v Suppah*, the Oregon Supreme Court footnoted its answer which did not mention its link between traffic and non-traffic stop standards:

> "Constitutionally, an officer needs reasonable suspicion to stop a defendant. See *State v Musser*, 356 Or 148, 158, 335 P3d 814 (2014) (reasonable suspicion required for investigatory stop). Statutorily, an officer must have "probable cause to believe" that a traffic violation has occurred when the officer stops a driver "based on a description of the vehicle or other information received from

[another] police officer who observed the traffic violation." ORS 810.410(2)(b)."
State v Suppah, 358 Or 565, 568 n 2 (2016).

4.5.2.A.(iii) Drivers

Oregon courts assess separately whether a passenger, as opposed to a driver, has been unlawfully stopped during a traffic stop. "A passenger is not automatically seized during a stop" under Article I, section 9. *State v Sherman*, 274 Or App 764, 770-71 (2015) (and cases cited therein).

ORS 810.410(3) requires officers to have probable cause to believe that a driver has committed a traffic infraction to stop the driver. The Oregon Supreme Court has interpreted that statute: an "officer who stops and detains a person for a traffic infraction must have probable cause to do so, *i.e.*, the officer must believe that the infraction occurred, and that belief must be objectively reasonable under the circumstances." *State v Matthews*, 320 Or 398, 403 (1994) (*held*: ORS 810.410(3)(b) requires that "a traffic stop must be based on probable cause"). (But note that the Court of Appeals subsequently may have interpreted Article I, section 9, as requiring only reasonable suspicion, despite that statute, see e.g., *State v Pichardo*, 263 Or App 1 (2014), *vac'd and rem'd*, 356 Or 574 (2014), *aff'd on remand*, 275 Or App 49 (2016), *aff'd* 360 Or 754 (2017)).

State v Jones, 286 Or App 562, 565 & n 1 (7/06/17) (Linn) (Lagesen, Egan, Schuman) Defendant pulled out of a Dari Mart parking lot without stopping in the lot but instead stopped on the sidewalk before turning. He was stopped for drunk driving and driving with a revoked license. He challenged the objective basis for the stop, specifically whether the parking lot was a driveway under ORS 811.505 (the basis for the stop). The trial court denied the motion to suppress.

The Court of Appeals affirmed. If driving out of the parking lot was not a violation of ORS 811.505, then the officer "lacked probable cause to stop defendant." The court cited *State v Stookey*, 255 Or 489, 491, 496 (2013) multiple times as holding "where facts perceived by officer do not constitute an offense, officer lacks probable cause to conduct a stop under Article I, section 9" and "where conduct perceived by officer did not constitute a violation of law, officer lacked probable cause to stop the defendant."

The court concluded that defendant had violated the statute. In a footnote, the court wrote:

> "The state challenges our prior holdings (1) that an officer must have probable cause to initiate a traffic stop; and (2) that the facts perceived by the officer must, in fact, constitute a violation of the law. On the latter point, the state argues that we should abandon our rule of law in favor of the Fourth Amendment rule adopted by the U.S. Supreme Court in *Heien v. North Carolina*, 574 US ___, 135 S Ct 530, 190 L Ed 2d 475 (2014) (holding that, under Fourth Amendment, reasonable suspicion for a traffic stop can rest on a reasonable mistake of law). We decline the state's invitation to revisit our prior holdings."

Contrast with Fourth Amendment: "The Fourth Amendment permits brief investigative stops--such as the traffic stop in this case [an anonymous 911 caller was run off the road by a possibly intoxicated driver]--when a law enforcement officer has 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.' *United States* v *Cortez*, 449 US 411,

417-18 (1981); *see also Terry* v *Ohio*, 392 US 1, 21-22 (1968). The 'reasonable suspicion' necessary to justify such a stop 'is dependent upon both the content of information possessed by police and its degree of reliability.' *Alabama* v *White*, 496 US 325, 330 (1990). The standard takes into account 'the totality of the circumstances--the whole picture.' *Cortez*, *supra*, at 417. Although a mere 'hunch' does not create reasonable suspicion, *Terry*, *supra*, at 27, the level of suspicion the standard requires is 'considerably less than proof of wrongdoing by a preponderance of the evidence,' and 'obviously less' than is necessary for probable cause, 8T*United States*8T v 8T*Sokolow*8T, 490 US 1, 7 (1989)." *Prado Navarette v California*, 134 S Ct 1683 (2014) (30 pounds of marijuana properly was admitted into evidence over defendants' motion to suppress based on a stop; reasonable suspicion established after anonymous 911 caller recited defendants' truck's make and model and license plate number in a precise location and that defendant's driving had run the caller off the road).

Under the Fourth Amendment, a "traffic stop for a suspected violation of law is a 'seizure' of the occupants of the vehicle and therefore must be conducted in accordance with the Fourth Amendment. *Brendlin v California*, 551 U.S. 249, 255–259, 127 S Ct 2400, 168 L.Ed.2d 132 (2007)." *Heien v North Carolina*, 135 S Ct 530, 536 (2014). To "justify this type of seizure, officers need only 'reasonable suspicion'—that is, 'a particularized and objective basis for suspecting the particular person stopped' of breaking the law." *Ibid*. (citing *Prado Navarette v. California*, 134 S Ct 1683, 1687–88 (2014)).

4.5.2.A.(iv) Passengers

Passengers have some protected privacy interests in another person's car and the contents of that car ("searches"). *State v Snyder*, 281 Or App 308 (2016); *State v Silva*, 170 Or App 440 (2000); *State v Tucker*, 330 Or 85 (2000); *State v Herrin*, 323 Or 188 (1996).

There is a distinction between the Fourth Amendment and Article I, section 9, regarding whether passengers in a traffic stopped vehicle are seized.

A passenger is not "seized" under Article I, section 9, just because an officer stops a car. Even a passenger who owns the stopped car is not "seized" under Article I, section 9, just because an officer stops the car. "Under Article I, section 9, passengers in a stopped vehicle – whether lawfully or unlawfully stopped – are not seized merely by virtue of their status as passengers." *State v Thompkin*, 341 Or 368, 377 (2006). "A passenger is not automatically seized during a stop" under Article I, section 9. *State v Sherman*, 274 Or App 764, 770-71 (2015) (and cases cited therein); State v Stevens, 286 Or App 306, 312 (2017).

In contrast with "traffic stops under Article I, section 9, under the Fourth Amendment, a police officer 'effectively seizes everyone in the vehicle, the driver and all passengers' for the duration of the traffic stop." *State v Evans*, 284 Or App 806, 814 (2017) (quoting *Arizona v Johnson*, 555 US 323, 327 (2009)).

Under Article I, section 9, a "passenger is seized only when there is the imposition, either by physical force or through some show of authority, of some restraint on that individual's liberty." *State v Sexton*, 278 Or App 1, 5 (2016); *State v Graves*, 278 Or App 126, 132 (2016) ("For a passenger

to be stopped, some further show of authority directed at the passenger is required.") (citations omitted).

An officer may "stop" (temporarily seize) a passenger only on reasonable suspicion of criminal activity. *State v Jones*, 245 Or App 186 (2011); *State v Ayles*, 348 Or 622, 628 (2010). The reasonable suspicion must be "particularized to the individual based on the individual's own conduct." *State v Farrar*, 252 Or App 256, 260 (2012) (quoting *State v Miglavs*, 337 Or 1, 12 (2004); *State v Martinez*, 275 Or App 645, 650 (2015)

The Court of Appeals has written that an officer may smell drugs on a passenger in a stopped car, form a reasonable inference of illegal activity by the passenger, and investigate. "The smell of drugs can support reasonable suspicion sufficient to make an investigatory stop." *State v Vennell*, 274 Or App 94, 98 (2015) (citing *State v Johnson*, 120 Or App 151, 157 n 5, *rev den*, 318 Or 26 (1993)). However, the Court of Appeals also has stated that "the general odor of marijuana in a vehicle does not give rise to objectively reasonable suspicion that a passenger possessed marijuana. *State v Martinez*, 275 Or App 645, 650 (2015) (citing *State v Tovar*, 256 Or App 1, 13 n 2, *rev den*, 353 Or 868 (2013).

In contrast, under "the Fourth Amendment, 'for the duration of a traffic stop, a police officer effectively seizes 'everyone in the vehicle,' the driver and all passengers." *State v Bailey*, 356 Or 486, 507 (2014) (quoting *Arizona v Johnson*, 555 US 323, 327 (2009) and *Brendlin v California*, 551 US 249, 255 (2007)). "An officer may ask passengers questions during a traffic stop that are unrelated to a lawful purpose for the stop, but only if the inquiry does not measurably extend the stop." *Bailey*, 356 Or at 507; *see also* *State v Clemons*, 267 Or App 695, 699-700 (2014). Under the Fourth Amendment, an officer must have reasonable suspicion to justify an investigative traffic stop. *State v Sexton*, 278 Or App 1, 9-10 (2016) (citing *United States v Lopez-Soto*, 205 F3d 1101, 1105 (9th Cir 2000) ("Because the officers failed to articulate facts to establish objective, reasonable suspicion to justify the initial stop of the car, defendant was unlawfully seized under the Fourth Amendment, and the evidence obtained as a result of the stop of the car must be suppressed.").

But under Article I, section 9, "[p]assengers in a stopped vehicle – whether lawfully or unlawfully stopped – are not seized merely by virtue of their status as passengers. Instead, a passenger is only seized when there has been the 'imposition, either by physical force or through some "show of authority," of some restraint on the individual's liberty.' *Ashbaugh*, 349 Or at 309." *State v Ross*, 256 Or App 746, 765 (2013); *State v Stevens*, 286 Or App 306, 312 (2017); *State v Leahey*, 272 Or App 766, 769 (2015) ("passengers in a stopped vehicle are not seized for purposes of Article I, section 9, merely by virtue of their status of passengers").

Also, a "person's mere association with a location of suspected drug activity is insufficient to support an objective, reasonable belief that that person is engaged in drug activity." *State v Sexton*, 278 Or App 19 (2016) (Fourth Amendment).

Under ORS 131.615(1) and 131.605(6), an officer may stop a person if he reasonably suspects criminal conduct under the totality of the circumstances. ORS 131.615 was legislative codification of *Terry* stops. An "analysis of a defendant's rights under ORS 131.605 to 131.625 is substantially the same as an analysis of a defendant's rights under the search and seizure provisions of the Oregon and federal constitutions" per *State v Kennedy*, 290 Or 493, 497 (1981) and *State v Toevs*, 327 Or 525, 534 (1998). Because ORS 136.432 limits courts' authority to exclude evidence based on

statutory violations, the Court's review "is limited to whether Article I, section 9, of the Oregon Constitution requires exclusion of the evidence identified in defendant's motion to suppress." "The standard of 'reasonable suspicion' justifying a police intrusion" is less than probable cause to arrest. "Officer intuition and experience alone are not sufficient to meet that objective test. However, if an officer is able to point to specific and articulable facts that a person has committed or is about to commit a crime, the officer has a 'reasonable suspicion' and may stop the person to investigate." Officers "often reasonably rely on information provided to them by other officers to determine whether to stop a suspect." This "shared knowledge" is deemed "the collective knowledge doctrine" by the Court, citing *State v Soldahl*, 331 Or 420, 427 (2000). "We hold that the collective knowledge doctrine also applies when a police officer reasonably relies on information from other officers in making a determination that a stop is justified based on articulable facts that criminal activity is afoot." An officer's observation and suspicion that a defendant was "tweaking" "together with other information" may be sufficient to establish a reasonable suspicion that a defendant had or was about to commit a crime when an officer testifies about his knowledge and training. *State v Holdorf*, 355 Or 812 (2014).

> ***State v Sexton***, 278 Or App 1 (2016) The Court of Appeals reversed the trial court's denial of defendant's motion to suppress. Defendant was a passenger in a car that she owned. Police stopped the car after observing drug activity at defendant's home, and defendant leaving her home in that car. An officer stopped the car for "a traffic violation" and for an "equipment violation." An officer approached defendant and asked if he could search the car with his drug dog. She refused. The driver refused. The officer then "started a drug-sniff walk of the dog around the car." The dog alerted to drugs. An officer asked defendant to get out of the car. As she did, the officer heard something hit the ground, and saw a syringe at her feet that hadn't been there before she got out, and she said "it's not mine." Meth was on the syringe.
>
> Defendant moved to suppress all evidence obtained after the stop. The officer testified about his stop of defendant's car, but "he did not testify about factual the basis for his stop of defendant's car, except to confirm that the traffic violations were the only basis for the stop." The trial court denied the motion, concluding that the officers had probable cause to stop the car under Article I, section 9, and the Fourth Amendment.
>
> The Court of Appeals reversed and remanded: "defendant was not seized under Article I, section 9, when [the officer] stopped the car by reason of her being a passenger in the car of her being the owner of the car pulled over for an equipment violation. Under Article I, section 9, passengers in a car stopped by police 'without more, have not been "seized" as a constitutional matter.'" *Id*. at 5. "A passenger is seized only when there is an imposition, either by physical force or through some show of authority, of some restraint on that individual's liberty." *Id*. "Here, there was no such show of authority toward defendant at the time of the initial stop." *Ibid*. Police "inquiries or requests for cooperation, by themselves, are not searches or seizures under Article I, section 9." *Id*. at 6.
>
> "An exterior dog sniff of a car in a public place is not a search and does not require constitutional justification." *Id*. at 7 n 1.

However, under the Fourth Amendment, a passenger in a stopped car is "seized for the duration of the stop." Id. at 9. The inquiry therefore is whether the stop was lawful. That is, "an officer must have reasonable suspicion to justify an investigative traffic stop." *Id*. In this case, the officer "did not testify what the traffic violation and the equipment violation were." Thus "the record is devoid of the necessary facts to support a conclusion that [the officer] had objective, reasonable suspicion to stop the car in which defendant was traveling."

4.5.2.A.(v) Blocking vehicles

If an officer "boxes in" a person's car, so that the person is "physically prevented from driving away," that is a restraint on liberty and freedom of movement and is a stop for Article I, section 9. For example, a defendant was stopped when an officer entered her driveway and blocked her from leaving. *State v Thacker*, 264 Or App 150, 157 (2014).

4.5.2.A.(vi) Parked cars

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

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

4.5.2.B Prolonging a Stop – Oregon law

Prolonging a stop involves an analysis applicable to both traffic stops and nontraffic stops. *State v Kimmons*, 271 Or App 592, 599 (2015) (principles apply across the infinite variety of encounters).

A stop can be prolonged permissibly due to an "unavoidable lull" or due to an officer's reasonable suspicion of criminal activity.

Unavoidable Lull: An unavoidable lull during an investigation may occur while a person looks for his ID, registration, or insurance, or while police are running warrants checks. *State v Nims*, 248 Or App 708, 713, *rev den* 352 Or 378 (2012). 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). Requesting consent to search while waiting for a driver to produce insurance, thereby effectively redirecting the driver from looking for insurance, creates an avoidable lull. *State v Reich*, 287 Or App 292, 301-02 (2017). This rule on lulls has been stated as follows:

> "Under the unavoidable lull rule, whether an officer's inquiry about a matter unrelated to the reasons for the traffic stop unlawfully extends the stop depends on whether the officer makes the inquiry instead of expeditiously proceeding with the steps necessary to complete the stop." *State v Nims*, 248 Or App 708, 713, *rev den* 352 Or 378 (2012); *State v Reich*, 287 Or App 292, 301-02 (2017) (so quoting). An officer may not inquire into matters unrelated to the stop as an alternative to going forward with the next step in processing the stop. *Nims*, 248 Or App at 713; *Reich*, 287 Or App at 301.

Reasonable Suspicion of a Crime: An officer can prolong a stop only if she has reasonable suspicion of a specific crime and only for that crime. *State v Ashbaugh*, 349 Or 297, 309 (2010); *State v Maciel*, 254 Or App 530, 537 (2013). Reasonable suspicion about one crime does not justify prolonging a stop to investigate a separate crime unless the officer has reasonable suspicion about that separate crime. *State v Kentopp*, 251 Or App 527, 534 (2012); *State v Watson*, 353 Or 768, 781 (2013).

In forming reasonable suspicion, an officer may reasonably rely on information communicated from another officer; this has been called the "collective knowledge doctrine." *State v Holdorf*, 355 Or 812, 825 (2014); *State v Barber*, 279 Or App 84, 90 & n 5 (2016).

During a traffic stop, if "officers extend the encounter by beginning to investigate another crime, Article I, section 9, requires that they have reasonable suspicion that the motorist has committed, is committing, or is about to commit that crime." *State v Reich*, 287 Or App 292, 298 (2017) (quoting *State v Westcott*, 282 Or App 614, 618 (2016), *rev den*, 361 Or 486 (2017).

When an officer has reasonable suspicion that a crime is occurring (ie. possession of heroin), the officer can detain a suspect "for some period of time to investigate that suspicion." *State v Barber*, 279 Or App 84, 96 (2016) (detaining a defendant "for a reasonable amount of time to bring a drug dog to the scene" is among the steps that an officer may take to investigate); *see also State v Craig*, 284 Or App 786 (2017) (defendant driver stopped and investigated for a suspected car crash;

during that investigation she had glassy eyes, the car smelled of alcohol, and she popped a peppermint in her mouth; the stop was prolonged for DUII investigation; thus trooper had reasonable suspicion to extend the stop to investigate for DUII).

(i) Generally

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

An "officer may not extend the duration of a traffic stop by interposing a series of unrelated questions or actions constituting another investigation, without reasonable suspicion of another offense. *State v Rodgers/Kirkeby*, 347 Or 610, 626-28 (2010). During a lawful stop, officers may nonetheless make an inquiry into unrelated matters during an 'unavoidable lull' in the investigation. *State v Dennis*, 250 Or App 732, 737 (2012) * * *. An unavoidable lull occurs in a period of time in which the officer cannot proceed with the investigation, such as while awaiting record check results or while awaiting the driver's identification. *State v Nims*, 248 Or App 708, 713, *rev den*, 352 Or 378 (2012). If an officer has initiated an unrelated inquiry, then it is the state's burden to prove that an officer did so during an unavoidable lull. *Dennis*, 250 Or App at 737; *State v Berry*, 232 Or App 612, 616-17, *rev dismissed*, 348 Or 71 (2010)." *State v Peters*, 262 Or App 124, 127 (2014). During an "unavoidable lull" the officer is not "free to question the motorist 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." *Dennis*, 250 Or App at 734; *State v Dawson*, 282 Or App 335, 340 (2016) (so quoting).

"An extension of an otherwise lawful stop to investigate matters unrelated to the initial basis for the stop must be justified anew by reasonable suspicion of criminal activity in order to be lawful under ORS 131.615 and Article I, section 9, of the Oregon Constitution." *State v Heater*, 263 Or App 298, 303 (2014). Stated differently, to justify an extension of a stop, the state must identify an "independent constitutional justification" for questioning on an unrelated matter. *State v Dawson*, 282 Or App 335, 341 (2016) (quoting *State v Watson*, 353 Or 768, 796 (2013)). An officer's extension of a traffic stop to conduct a criminal investigation must be supported by reasonable suspicion to be lawful. *Id*. (citing *State v Barber*, 279 Or App 84, 89 (2016)).

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

1. There is nothing inherently suspicious about being pulled over by police.
2. Evasiveness, even taking an exit ramp off the highway while being followed by a police vehicle, is not inherently suspicious.
3. Not making eye contact with a police officer passing a person on the highway at 2:00 a.m. is not suspicious.
4. Evasiveness, even avoiding questions that a person is not required to answer, does not support objective reasonable suspicion.
5. The absence of visible luggage is not entitled to any weight because luggage can be not visible, such as in a trunk or under a seat.

6. Driving a vehicle that the driver recently purchased for cash, and has no registration or insurance, is not sufficient to justify extension of a traffic stop.

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

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

In *State v Reich*, 287 Or App 292, 299 (2017) the court overturned a denial of a suppression motion, writing: "We have repeatedly stated that nervous behavior adds little to the reasonable suspicion inquiry. *State v Dawson*, 282 Or App 335, 342, 386 P3d 165 (2016); *see, e.g.*, *State v Bray*, 281 Or App 435, 447, 380 P3d 1245 (2016) (explaining that 'nervousness alone is entitled to little weight when evaluating reasonable suspicion') (quoting *State v Huffman*, 274 Or App 308, 314, 360 P3d 707 (2015), *rev den*, 358 Or 550 (2016)); *State v Alvarado*, 257 Or App 612, 629, 307 P3d 540 (2013) (concluding that 'defendant's anxious behaviors contribute very little to our reasonable suspicion calculus')." Further, in *Reich*: "The fact that defendant became nervous and unresponsive when asked if there was anything illegal in the pickup—a vehicle he was driving, but did not own—combined with the fact that the owner of the vehicle, who was the passenger, had previously been arrested for possession of methamphetamine, does not support an objectively reasonable suspicion that defendant possessed methamphetamine on his person and does not justify a warrantless pat-down. Viewing the totality of the circumstances, something more is needed before defendant's nervousness in such company amounts to [objectively] reasonable suspicion." *Id*. at 300.

(ii) Inquiries, Consent, & Patdowns

This principle applies to people stopped for suspected crimes as well as traffic stops. *State v Hendon*, 222 Or App 97 (2008); *State v Kimmons*, 271 Or App 592, 599 (2015).

"During a traffic stop an officer may inquire about issues related to that stop; however, police inquiries unrelated to the traffic violation may violate Article I, section 9, of the Oregon

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

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

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

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

(iii) Drivers

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

"Absent reasonable suspicion of other crimes, an officer's authority to detain a motorist ceases 'when the investigation reasonably related to that traffic infraction, the identification of persons, and the issuance of a citation (if any) is completed or reasonably should be completed." *State v Ferguson*, 270 Or App 58, 63 (2015) (quoting *State v Rodgers/Kirkeby*, 347 Or 610 (2010)).

An unavoidable lull during an investigation may occur while a person looks for his ID or registration, or while police are running warrants checks. *State v Nims*, 248 Or App 708, 713, *rev den* 352 Or 378 (2012). Questioning that <u>either:</u> (1) causes an extension of the stop or (2) detains a defendant beyond a completed traffic stop must be supported by reasonable suspicion that the defendant is engaged in criminal activity. *State v Rodgers*, 201 Or App 366, 371 (2008), *aff'd*, 347 Or 610 (2010).

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

(iv) Passengers

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

A "passenger is only seized when there has been the imposition, either by physical force or through some show of authority, of some restraint on the individual's liberty." Where the officer obtained identifying information from driver and passengers, ran a warrants check, learned that a passenger had an outstanding warrant, asked for defendant's consent to pat him down for weapons in a non-coercive tone of voice, defendant was not seized. *State v Parker*, 266 Or App 230 (2014).

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

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

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

(v) Bicycles

When a pedestrian, a bicyclist, or a motorist is stopped by an officer for a traffic code violation, that is a traffic stop. *State v Jimenez*, 263 Or App 150 (2014) (it's a "traffic stop," not a "traffic conversation"), *aff'd,* 357 Or 417 (2015). 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).

(vi) Pedestrians

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

A "traffic stop" is not "a traffic conversation." Under *State v Rodgers/Kirkeby*, 347 Or 610 (2010), "when a person is approached by a police officer – whether the person is in an automobile, on a bicycle, or on foot – for committing a noncriminal traffic violation, and the police officer and the person know that is the basis of the stop, then the officer who has approached the person must proceed to process the traffic violation, and may not launch an investigation into unrelated matters unless [1] the inquiries are justified by reasonable suspicion of the unrelated matter; [2] the inquiry occurred during an unavoidable lull in the citation-writing process; or [3] some exception to the warrant requirement applies." *State v Jimenez*, 263 Or App 150 (2014), *aff'd*, 357 Or 417 (2015).

"There are two situations in which questioning unrelated to the initial basis for a stop can constitute an unlawful extension of a stop. First, an officer might conclude a lawful stop (for example, by telling a person that he or she is free to leave) and then initiate a second stop by inquiring about other matters without reasonable suspicion. *State v Huggett*, 228 Or App 569, 574 (2009). [Second], an officer might detain a person beyond the time reasonably required to investigate the initial basis for the stop, without telling the person expressly or by implication that he or she is free to leave and without the requisite reasonable suspicion to support a *new* basis for a stop." *State v Heater*, 263 Or App 298 (2014).

(vi) **Fourth Amendment**

In *Rodriguez v United States*, 135 S. Ct. 1609, 1614-15 (2015), the United States Supreme Court summarized its standard on the lawful duration of traffic stops in this block quotation (with citations and internal quotations omitted):

> A seizure for a traffic violation justifies a police investigation of that violation. A relatively brief encounter, a routine traffic stop is more analogous to a so-called '*Terry* stop' ... than to a formal arrest. Like a *Terry* stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's "mission"— to address the traffic violation that warranted the stop . . . and attend to related safety concerns. Because addressing the infraction is the purpose of the stop, it may "last no longer than is necessary to effectuate th[at] purpose." Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed."
>
> [In two prior cases], "we concluded that the Fourth Amendment tolerated certain unrelated investigations that did not lengthen the roadside detention. [*Arizona v. Johnson*, 555 US 323, 327-28 (2009) (questioning); *Illinois v Caballes*, 543 US 405, 406-08 (2005) (dog sniff)]. In *Caballes*, however, we cautioned that a traffic stop 'can become unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission' of issuing a warning ticket. 543 US, at 407. And we repeated that admonition in *Johnson*: The seizure remains lawful only 'so long as [unrelated] inquiries do not measurably extend the duration of the stop.' 555 US, at 333. *See also Muehler v Mena*, 544 U.S. 93, 101, 125 S.Ct.

1465, 161 L.Ed.2d 299 (2005) (because unrelated inquiries did not 'exten[d] the time [petitioner] was detained[,] ... no additional Fourth Amendment justification ... was required'). An officer, in other words, may conduct certain unrelated checks during an otherwise lawful traffic stop. But . . . he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." (Held: "We hold that a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures. A seizure justified only by a police-observed traffic violation, therefore, "become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission" of issuing a ticket for the violation.").

4.5.2.C Prolonging a Stop – Fourth Amendment

In *Davis v United States* (9th Cir 2017), a Section 1983 case, the Ninth Circuit summarized Fourth Amendment analysis regarding a prolonged warranted *non*traffic stop involving an elderly widow in a parking lot:

> Under the Fourth Amendment, "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Michigan v Summers*, 452 U.S. 692, 705 (1981). Nevertheless, "special circumstances, or possibly a prolonged detention, might lead to a different conclusion in an unusual case." *Id.* at 705 n.21; *see also Muehler v Mena*, 544 U.S. 93, 101 (2005) ("[A] lawful seizure can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." (internal quotation marks omitted)). For instance, search-related detentions that are "unnecessarily painful [or] degrading" and "lengthy detentions[ ] of the elderly, or of children, or of individuals suffering from a serious illness or disability raise additional concerns." *Foxworth*, 31 F.3d at 876. Thus, a "seizure must be 'carefully tailored' to the law enforcement interests that justify detention while a search warrant is being executed." *Meredith v Erath*, 342 F.3d 1057, 1062 (9th Cir. 2003) (citing *Summers*, 452 U.S. at 699–705).

4.5.3 Nontraffic Stops of Persons Generally

4.5.3.A What is required to stop?

A person can be constitutionally stopped:

> (1) On probable cause for violating a traffic code provision **or**
> (2) On reasonable suspicion that the person has engaged in "past, current, or imminent criminal activity." *State v Walker*, 277 Or App 397, 401 (2016); *State v Oller*, 277 Or App 529, 534 (2016) ("has committed or is about to commit a crime"); *State v Hall*, 339 Or 7, 17 (2005); *State v Acuna*, 264 Or App 158, 167, *rev den*, 356 Or 400 (2014); *State v McHaffie*, 271 Or App 379, 384 (2015) (reasonable suspicion "that criminal activity is afoot").

Police may not "interfere with the person's liberty based only on intuition or a hunch." *State v Walker*, 277 Or App 397, 401 (2016) (citing *State v Holdorf*, 355 Or 812, 823 (2014)). "instincts or gut

reactions" are inadequate; the officer must articulate "observable facts" that form the basis for the suspicion. *Id*.

On pedestrians committing traffic code violations (such as crossing against a "Don't Walk" signal under ORS 814.020), see *State v Jimenez*, 357 Or 417 (2015) and **Section 4.5.2**.

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

Officers legally may "stop" a person under Article I, section 9, if the stop is supported by the officer's reasonable suspicion that the stopped person has a "connection with criminal activity." *State v Worthington*, 265 Or App 368, 371 (2014) (quoting *State v Jones*, 245 Or App 186,192 (2011) quoting *State v Cloman*, 254 Or 1, 6 (1969)). For example, an officer legally may stop a person if she smells drugs on/around a person and forms a reasonable inference of illegal activity by the person. *State v Vennell*, 274 Or App 94, 98 (2015); *State v Watson*, 353 Or 768, 784-85 (2013); *State v Derrah*, 191 Or App 511, 518, *rev den*, 337 Or 84 (2004); *State v Johnson*, 120 Or App 151, 157 (1993).

"Article I, section 9, requires the police, before stopping an individual, to have reasonable suspicion that the individual is involved in criminal activity." *State v Unger*, 356 Or 59, 71 (2014)

Sometimes the Court of Appeals conflates the standards for traffic stops with the standards for investigatory nontraffic stops. *See, e.g., State v Berg*, 281 Or App 101, 105 (2016), in which the court addressed the validity of a traffic stop of a vehicle, but used the legal standard to stop a person. In *Berg*, the court wrote: "It is well-established under Oregon law that a 'stop' of a car is a seizure for purposes of Article I, section 9." *Id*. at 106. The problem is that the Court of Appeals cited *State v Ashbaugh*, 349 Or 297, 308-09 (2010) for that tenet, but *Ashbaugh* was not a traffic stop. It was a stop of people in a park.

See **Section 4.5.2.B on Prolonging a Stop** of either a traffic stop or a nontraffic stop.

4.5.3.B Stop Versus <u>Not</u> a Stop

Police questions for information or for cooperation do not implicate Article I, section 9 – they are not "stops" -- if the officer does no more than seek the individual's cooperation through noncoercive, nonthreatening questioning and conduct. *State v Backstrand*, 354 Or 392, 417 (2013). *Backstrand*, 354 Or at 399-401, sets the principles for "mere conversation" into "stops:"

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

In other words: no "stop" occurs if police officers initiate "mere conversation" with a person. *State v Backstrand*, 354 Or 392 (2013); *State v Highley*, 354 Or 459 (2013); *State v Anderson*, 354 Or 440 (2013); *see also State v Kinkade*, 247 Or App 595 (2012) (on foot); *State v Soto*, 252 Or App 50, *rev den* 353 Or 127 (2013) (on foot); *State v Dierks*, 264 Or App 443 (2014) (parked car).

This idea of "mere conversation" traces at least to *State v Rodgers/Kirkeby*, 347 Or 610 (2010) which contained the statement that "verbal inquiries are not searches and seizures."

Backstrand, *Highley*, *and Anderson* "repeatedly emphasized that neither briefly holding a person's identification card, nor calling in the person's identification information to check for warrants, necessarily and always meant that the person was stopped." *State v Thompson*, 264 Or App 754, 759 (2014) (citing *Backstrand*, *Highley*, *and Anderson*). Likewise, a police officer in a marked police car, wearing a uniform, who even offensively asks a person about drugs is not *per se* a "stop." *State v Acuna*, 264 Or App 158, *rev den*, 356 Or 400 (2014) (those facts are not sufficiently a "show of authority" to convert "mere conversation" into a "stop; however, persisting in questioning a person after he denies having drugs, calling for backup, and increasing the aggression level of the questions then did convert the conversation into a "stop" on those facts).

But whether an encounter is a "stop" almost always requires a fact-specific inquiry. And courts fact-match.

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

Place, among other things, matters in the determination of whether a stop occurred. In *State v K.A.M.*, 361 Or 805 (2017), a police officer walked into a person's bedroom uninvited, did not explain why he was there, told a young woman to stay off the meth, then asked for her name and if she had anything illegal on her, while four other officers searched the rest of the house. That was a stop. The Court differentiated that scene from "a case in which an officer asked a person for identification for the apparent purpose of getting the person to leave a place where he or she was not authorized to be." *Id*. at 811 (referencing *State v Backstrand*, 354 Or 392 (2013)). The Court also differentiated that scene from "a case in which an officer approached a person who had arrived at a house being searched by the police, explained to the person why the officer had approached him, and then asked the person his name and connection to the house." *Id*. at 812 (referencing *State v Anderson*, 354 Or 440 (2013)).

Note that a question is whether officers could engage in "mere conversation" with a person when entering a teenager's bedroom uninvited. See below under "Case Examples."

Case Examples:

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

When an officer directs a person to use his hands in a specific way, the encounter can become a stop. *State v Najar*, 287 Or App 98 (2017) (defendant seized when officer directed him to remove his wallet with one hand and keep his hands where officer could see them); *State v Ruiz*, 196 Or App 324 (2004) *rev den* 338 Or 363 (2005) (defendant seized when officer told him to remove his hand from his pocket); *State v Shaw*, 230 Or App 257, *rev den*, 347 Or 365 (2009) (defendant seized when officer ordered defendant to show him his hands); *State v Rudnitskyy*, 266 Or App 560, *rev den*, 357 Or 112 (2015) (defendant seized when deputy ordered him and his passenger to place their hands on the dashboard).

An officer stops a person when he or she communicates that he or she is conducting an investigation that could result in the person's citation or arrest at that time and place. *State v Morfin-Estrada*, 251 Or App 158, 164, *rev den*, 352 Or 565 (2012); *State v Williams*, 271 Or App 481, 486 (2015); *State v Jackson*, 268 Or App 139, 145 (2014) (unambiguously informing defendant that he'd committed a traffic infraction and that the officer wanted to talk with defendant was a stop).

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

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

See *State v Sjogren*, 274 Or App 537 (2015) on lack of reasonable suspicion to stop for trespassing on tribal lands.

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

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

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

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

-But refer to *State v K.A.M.*, 361 Or 805 (2017), where a police officer walked into a person's bedroom uninvited, did not explain why he was there, told a young woman to stay off the meth, then asked for her name and if she had anything illegal on her, while four other officers searched the rest of the house. That was a "stop."

Statute. ORS 131.615(1) gives police officers authority to stop a person if the officer reasonably believes the person has, or is about to, commit a crime. Under ORS 131.605(5), "reasonable suspicion" exists when an officer holds a belief "that is reasonable under the totality of the circumstances existing at the time and place" that s/he acts. "Thus, the reasonable suspicion involves both a subjective and objective component." *State v Wiseman*, 245 Or App 136 (2011)

(citing *State v Belt*, 325 Or 6, 11 (1997) ("subjective belief must be objectively reasonable under the totality of the circumstances")). These stops require reasonable suspicion that the person was engaged in criminal activity. *See, e.g.*, *State v Morfin-Estrada*, 251 Or App 158 (2012) ("A stop must be supported by reasonable suspicion.").

Constitution. ORS 131.605(5) is a codification of both state and federal constitutional standards. *State v Valdez*, 277 Or 621, 625-26 (1977). An "officer's stop of a person must be justified by reasonable suspicion of criminal activity. The standard has objective and objective components. An officer must subjectively believe that the person stopped is involved in criminal activity * * *. Reasonable suspicion is established when an officer forms an objectively reasonable belief under the totality of the circumstances that a person may have committed or may be about to commit a crime * * *. An officer must identify specific and articulable facts that produce a reasonable suspicion, based on the officer's experience, that criminal activity is afoot." *State v Mitchele*, 240 Or App 86 (2010); *State v Wiseman*, 245 Or App 136 (2011).

4.5.3.C Extensions of Stops

In *State v Pichardo*, 360 Or 754 (2017), the Court addressed extensions of nontraffic stops. The "state must be able to point to a 'reasonable, circumstance-specific' relationship between the inquiry and the purpose of the detention, even though the circumstance-specific relationship need not rise to the level of reasonable suspicion of other criminal activity." *Id*. at 760 (quoting *State v Jimenez*, 357 Or 417, 429 (2015). That "reasonable relationship test . . . is not a demanding one." *Id*. at 762. In a 62-word sentence, the Court attempted to explain:

> "We agree with the state that an investigation to determine whether criminal activity has occurred or is occurring—in this case, whether defendant intentionally attempted to prevent law enforcement officers from performing their duties—can entail a broader range of questions than an investigation to determine whether a defendant has committed a traffic violation, such as failing to signal a lane change." *Id*. at 760.

4.5.4 Public Parks, Parking Lots, and Sidewalks

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

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

4.5.5 Restrooms

A search occurs when the government invades a protected privacy interest under *State v Meredith*, 337 Or 299 (2004). The focus is on the government's conduct rather than on a defendant's subjective expectations. In *State v Holiday*, 258 Or App 601 (2013), an officer in a public park knew that the defendant was on probation and had violated terms of his probation. Officer trotted his horse over to defendant, who quickly moved 50 feet away and entered a one-stall public restroom and locked the door. Officer pounded on the door, yelled at defendant to come out, and a few minutes later, another officer unlocked the door. Officer arrested defendant and found a crack pipe inside a box in his bag. The Court of Appeals held that unlocking and opening the door to the public restroom is a search because a "restroom is a place where a person has a protected privacy interest" regardless of what he is using it for.

See *State v Lange*, 264 Or App 126 (2014).

4.5.6 Parking Lots and Roadsides

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

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

"Reasonable suspicion," requires the officer to prove that when he stopped the person, he had an objectively reasonable belief, based on specific and articulable facts, that the person committed or is about to commit a crime." *State v Martin*, 260 Or App 461, 469-70 (2014); *State v Wiggins*, 262 Or App 351 (2014). The officer's suspicion is evaluated based on the totality of the circumstances. *State v Clink*, 270 Or App 646, 650 (2015) (reasonable suspicion supported by totality of factors that included: named informant gave details about the location, meth smoking, and the vehicle; the call to police was atypical for the place and usually reliable; defendant made furtive movements toward the car console when approached; and officer knew the passenger was a meth user from his prior experience with her.

4.5.7 Hospitals

4.5.7.A Observations

Emergency Departments: 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).

Hospital Rooms: A hospital room may be deemed a more private place than an emergency department. Although the Court of Appeals did not address that distinction, in *State v Lowell*, 275 Or App 365 (2015), the court concluded that the immediate overwhelming smell of marijuana in a defendant's hospital room, leading to an officer's search of a backpack, was "a significant intervening event that attenuated any potential prior police activity." *Id*. at 376. The court also deemed it to be an "independent basis to question defendant about possible criminal behavior." *Id*. at 376-77.

4.5.7.B Body Searches

(i). Fourth Amendment. *George v Edholm*, 752 F3d 1206 (9th Cir 2014): "The Fourth Amendment requires that a nonconsensual physical search of a suspect's body, like any other nonconsensual search, be reasonable. See *Winston v Lee*, 470 US 753, 759–60 (1985). A body search, however, requires 'a more substantial justification' than other searches. *Id*. at 767. In *Winston*, the Supreme Court rejected the state's request for a court order requiring a suspect to undergo surgery to remove a bullet from the suspect's chest. *Id*. at 755. In holding that the forced surgery would be unconstitutional, the Court identified three primary factors courts should weigh in deciding the reasonableness of a body search. Those factors are (1) "the extent to which the procedure may threaten the safety or health of the individual," (2) "the extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity," and (3) "the community's interest in fairly and accurately determining guilt or innocence." *Id*. at 761–62.

"The failure to obtain a warrant, while not necessarily fatal to a claim of reasonableness, is also relevant. See *id*. at 761; *United States v Cameron*, 538 F2d 254, 259 (9th Cir 1976). The foundational case is *Rochin v California*, 342 US 165 (1952), in which police officers entered Rochin's house and saw him swallow two capsules of morphine. *Id*. at 166. The officers took Rochin to a hospital, where "[a]t the direction of one of the officers a doctor forced an emetic solution through a tube into Rochin's stomach against his will." *Id*. Rochin vomited up the morphine capsules, which the prosecution then introduced as evidence at trial. *Id*. The Court reversed, holding that the forcible stomach-pumping "shock[ed] the conscience" and was "too close to the rack and the screw" to survive constitutional scrutiny. *Id*. at 172. Though Rochin was decided under the Due Process Clause of the Fourteenth Amendment, the Court has made clear it would now 'be treated under the Fourth Amendment, albeit with the same result.' *Cnty. of Sacramento v Lewis*, 523 US 833, 849 n. 9 (1998)." *George v Edholm*, 752 F3d 1206 (9th Cir 2014).

(i). Eighth Amendment. See *Chappell v Mandeville*, 706 F3d 1052, 1057–1065 (9th Cir 2013) on prisoner contraband watch, also known as "body cavity search."

(ii). Article I, section 9. Breath tests are searches and seizures under Article I, section 9. *State v Burshia*, 201 Or App 678, 682 (2005).

4.5.7.C DUII blood draws

"A blood draw conducted by the police is simultaneously a search of a person and a seizure of an 'effect' – that person's blood." *State v Perryman*, 275 Or App 631, 633 (2015) (citing *State v Milligan*, 304 Or 659, 664 (1988)).

Under the Oregon Constitution, where probable cause exists to arrest for a crime involving the blood alcohol content of a suspect, a warrantless blood draw *at a hospital* is permissible under Article I, section 9, due to the "exigent circumstance" that is "the evanescent nature of a suspect's blood alcohol," except in "the rare case that a warrant could have been obtained and executed *significantly* faster" than the process used. *State v Machuca*, 347 Or 644, 657 (2010) (emphasis in original); *State v Moore*, 354 Or 493, 498 n 5 (2013) ("That holding remains good law.") But *Machuca* involved alcohol, not other drugs, the *Moore* Court footnoted, post-*Missouri v McNeely*, 133 S Ct 1552 (2013) (alcohol's metabolism rate in blood does not justify a per se exigency).

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

Note: If police officers incorrectly inform a DUII suspect that his refusal to give a blood or breath sample is not a freestanding crime – when it actually is – then Fifth Amendment due process is violated. *United States v Harrington*, __ F3d __ (9th Cir 2014) (12-10526).

4.5.7.D Breath and Other Drug Testing

Subjecting a person to a breath test is a search and seizure that requires a warrant or an exception under Article I, section 9. *State v Burshia*, 201 Or App 678, 682 (2005); *State v Lopez-Lopez*, 271 Or App 817, 822 (2015). It also is a search requiring a warrant under the Fourth Amendment. *Lopez-Lopez*, 271 Or App at 824 (citing *Skinner v Railway Labor Executives' Ass'n*, 489 US 602, 616-17 (1989)). **See Consent Exception to Warrant Requirement at Section 4.8.5.F**.

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

In *Ferguson v City of Charleston*, 532 US 671 (2001), the Court held that a public hospital's policy of identifying and testing mothers whose children tested positive for drugs at birth was not justified under the "special needs" exception to (or carve-out from) the Fourth Amendment, because "the immediate objective of the searches was to generate evidence *for law enforcement purposes." Id.* at 83 (emphasis in original). The Court explained that the "central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment," and concluded that "the purpose actually served by the [ ] searches is ultimately indistinguishable from the general interest in crime control." *Id.* at 81.

4.5.8 Public Schools

See Section 4.8.10.

4.5.9 Jails and Juvenile Detention

See Section 4.8.11.

4.5.10 Airport and Border Searches

This category is usually governed by federal law.

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

TSA searches may be "special needs" or "administrative" searches: "The Fourth Amendment provides that '[t]he 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.' US Const. amend. IV. In most cases, reasonableness 'requires a showing of probable cause,' but that standard 'is peculiarly related to criminal investigations and may be unsuited to determining the reasonableness of administrative searches where the Government seeks to prevent the development of hazardous conditions.' *Bd. of Educ v Earls*, 536 US 822, 828–29 (2002) (citations and internal quotation marks omitted); *see also Vernonia School Dist. 47J v Acton*, 515 U.S. 646, 652–53 (1995) (warrantless searches may be justified by needs beyond ordinary law enforcement); *Nat'l Treas. Emps. Union v Von Raab*, 489 U.S. 656, 667–68 (1989). The courts of appeals treat transit security screenings as 'administrative' or 'special needs' searches, which may be conducted, at least initially, without individualized suspicion, a warrant, or probable cause." *Ruskai v Pistole*, 775 F3d 61 (1st Cir 2014) ("the Fourth Amendment does not prevent TSA from searching for both metallic and nonmetallic weapons on passengers who trigger WTMD alarms just as it does on passengers who decline to pass through AIT scanners. Accordingly, Ruskai's Fourth Amendment claim fails.").

4.5.11 Boats

See State v Paskar, 271 Or App 826 (2015). The trial court correctly suppressed evidence of illegal fishing 28 miles off the Newport coast. Troopers came to about 5-10 feet of defendants' vessel, said, "we'd like to look at your tags; please get them out for us," with the tone of a command as opposed to a mere question. Troopers pulled closer and grabbed defendants' vessel.

4.5.12 Electronic Data & Mobile Devices

One of the primary cases on electronic search protocols under the Fourth Amendment is *United States v Comprehensive Drug Testing, Inc.*, 621 F3d 1162 (9th Cir 2010). But "the CDT III electronic search protocols, while helpful, are not required in every case." *United States v Ford*, (D Or 2016) (citing *United States v Hill*, 459 F3d 966, 978 (9th Cir 2006)). On the *Ford* case, see the Oregon Live publication here.

"A personal computer is often a repository for private information the computer's owner does not intend to share with others." *United States v Andrus*, 483 F3d 711, 718 (10th Cir 2007), *reh'g den*, 499 F3d 1162, *cert den*, 552 US 1279 (2008).

"The sum of an individual's private life can be reconstructed" from cell phone data. *Riley v. California*, 134 S Ct 2473, 2489 (2014).

Under the Fourth Amendment, a warrant is generally required before a search of data on a cell phone "even when a cell phone is seized incident to arrest." *Riley v California,* 134 S Ct 2473, 2493 (2014). In *State v Lowell*, 275 Or App 365 (2015), the court concluded that an officer's warrantless search of a defendant's mobile-phone data must be suppressed under *Riley*, and did not reach an Article I, section 9, analysis, as the parties had not briefed the state constitutional analysis.

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

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

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

In *State v Bray*, 352 Or 24 (2012), the criminal defendant sought an order requiring a rape victim to provide the court with a sealed clone of her hard drive so that it would be available if defendant's appeal were to succeed. The court granted defendant's motion. The Supreme Court affirmed, ruling that the victim had to turn over the clone.

Regarding subpoenas to Google or to a crime victim, see *State v Bray*, 281 Or App 584, 600 (2016) ("we have found no authority for the proposition that the prosecution's *Brady* obligation to disclose material exculpatory evidence extends to evidence in the hands of a private entity such as Google. In fact, we have found significant, albeit indirect, authority for the proposition that the obligation does not extend that far.") Further, the court rejected the state's argument that a crime victim "has a constitutional right to withhold material that might contain relevant, exculpatory, unprivileged evidence on the ground that the she has a privacy interest in that material." *Id*. at 612. "If defendant had sought unlimited access to the contents of [the rape victim's] computer, we would readily conclude that the request was an overbroad, unreasonable, oppressive, and imprecise invasion of [her] privacy."

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

4.5.13 Records Subpoenaed

4.5.13.A Hospital Records

No privacy or possessory interest in subpoenaed hospital records including blood alcohol test results. *State v Gonzalez*, 120 Or App 249, *rev den* 318 Or 661 (1993). The records the state subpoenaed "were owned, made, kept and guarded by the hospital." *Id*. at 256.

4.5.13.B Mobile Phone Records

No privacy interest in cell phone records subpoenaed from provider. *State v Johnson*, 340 Or 319 (2006); *State v Magana*, 212 Or App 553, *rev den*, 343 Or 363 (2007) (statutes did not create a privacy interest in records of mobile phone providers when records were created in the course of the regular operations of cell phone providers).

4.5.13.C Internet Service Records

No privacy interest in internet service records. *State v Delp*, 218 Or App 17, *rev den* 345 Or 317 (2008). The records independently maintained by the internet service provider included name, address, telephone number, subscriber number, local and long distance telephone billing records, length of service, and types of services used.

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

4.5.13.D Utility Records

No privacy interest in electric utility records. *State v Sparks*, 267 Or App 181 (2014).

4.5.13.E Bank Records

State v Ghim, 360 Or 425 (2016) The Oregon Division of Finance and Corporate Securities subpoenaed defendant's bank records. It issued the subpoena ORS 192.596, which allows financial institutions to disclose customer records to a state or local agency pursuant to a subpoena or warrant. The Oregon Supreme Court held that defendant had no constitutionally protected privacy interest in the bank records held by a third party, similar to records kept by phone, internet service, mobile phone, and medical providers. No "search" occurred. Assuming that "defendant has a protected privacy interest" his bank records that the state subpoenaed ORS 192.596, "the administrative subpoenas issued by DCBS did not violate defendant's Article I, section 9, rights." The Court also noted that it "has long recognized that an administrative subpoena issued as part of a civil investigation will comply with Article I, section 9, as long as the subpoena is 'relevant to a lawful investigatory purpose and * * * no broader than the needs of the particular investigation." *Id*. at 439 (quoting *Pope & Talbot, Inc. v State Tax Com*., 216 Or 605, 614-15 (1959) (which had quoted *United States v Morton Salt Co*., 338 US 632, 652-53 (1950)).

4.5.13.F U.S. Mail

If a state agent removes mail while it is in transit, the state may violate Article I, section 9, by significantly interfering with the addressee's right to receive delivery of the mail. *State v Barnthouse*, 360 Or 403, 418 n 8 (2016). That is because an addressee of U.S. mail has "a contract-based possessory interest in [a] package while it was in transit that, at a minimum, included the right to receive delivery of it by its guaranteed delivery time. * * * [T]hat possessory interest was protected under Article I, section 9." *Id*. at 418. "[W]here, having physical control of the package, the officers curtailed its guaranteed delivery to defendant," "the officers significantly interfered

with defendant's possessory interest in the package and, therefore, seized it." *Id*. at 419. That *Barnthouse* seizure was "unreasonable," which apparently has become an element in suppression analysis, because "only seizures that are 'unreasonable' violate Article I, section 9." *Id*. at 420, 413.

In ***State v Barnthouse***, 360 Or 403 (2016), an inter-agency drug interdiction team regularly examines in-transit US mail at a post office sorting facility near PDX airport. They look for drugs and drug money. A team looks for mail with certain indicators: overtaping, handwritten shipping information, delivery from a person to a person rather than businesses, variation in zip codes from the sending post office and the return address, origination from a non-medical-marijuana state, no signature required for delivery, incomplete sender information, and cash paid for shipping. Regardless if their drug detection do alerts, mail with indicators is set aside and has "no chance" of getting back into regular mail. The team does about 30-40 of these packages per day. They do not bother to get search warrants because it can take 2-4 hours and it's understood that voluntary consent is an exception to the warrant requirement.

The team found a package addressed to "Maxi-pad Barnt" that was paid for with cash or debit card, no phone number was listed, it was mailed from a zip code in Newark, Delaware but had a return address for Wilmington, Delaware, and it had a handwritten label. Those factors indicated contraband. Police removed it, the dog alerted, and a police officer then "took custody of the parcel." The officers decided to contact "Maxi-pad Barnt" at that address and get his consent to search the package, rather than attempt to obtain a search warrant.

Police went to defendant's residence with the package, over 3.5 hours later without attempting to get a search warrant. They met with two of his roommates who laughed at the "Maxi-pad Barnt" name and said the package must be for their roommate, and they gave his full name and phone number. Police asked a roommate to use the phone to call defendant and called defendant. Defendant answered and said he's not expecting the package. Although he was hesitant to give consent to open the package, the officer said he would get a warrant, and defendant consented. Several "stacks of currency" were wrapped in a t-shirt inside. Defendant said the money wasn't his. The officer then obtained defendant's consent to search his bedroom, again after stating that he would get a warrant. The bedroom contained "a large amount of marijuana" and other evidence such as a vacuum sealer, packing material, unused postal boxes, and money-bundling wrappers.

The trial court suppressed, ruling that the officers' seizure of the package was unreasonable, because it was not supported either by reasonable suspicion or by probable cause and a warrant. The state appealed. The Court of Appeals and the Oregon Supreme Court affirmed. Significantly, the Court stated its Article I, section 9, analysis focusing on a "reasonableness" standard:

> "Article I, section 9, does not protect against every search or seizure by the government, but only against those that are arbitrary, oppressive, or otherwise 'unreasonable.' *State v Fair*, 353 Or 588, 602, 302 P3d 417 (2013). Subject to certain limited exceptions, a search or seizure is unreasonable and, therefore, unlawful under Article I, section 9, unless it is supported by probable cause and a warrant. *State v Rodgers/Kirkeby*, 347 Or 610, 624, 227 P3d 695 (2010)." *Id*. at 413-14.

Defendant challenged only the "seizure—not a search—of the package." He was the package's addressee, so the first issue is whether he "had a protected possessory interest in the package while it was in the stream of mail." *Id*. at 414. The court cited the same Manual that the Court of Appeals had cited, stating: "at minimum, as a third-party beneficiary of the agreement between the sender and USPS, defendant had the right—a property-based right—to have the package delivered to him by its guaranteed delivery time. See USPS Domestic Mail Manual § 113 (setting out guaranteed delivery standards for priority mail express); *see also United States v. LaFrance*, 879 F2d 1, 7 (1st Cir 1989) (addressee's possessory interest in FedEx package while in transit derives from contract; possessory interest at stake was contract-based expectancy that package would be delivered to designated address by guaranteed day and time)." *Id*. at 415.

The Court wrote: "The fact that Article I, section 9, emphasizes property law concepts in determining what qualifies as a protected possessory interest supports the conclusion that that possessory interest was protected under the Oregon Constitution. * * * So, too, does the existence of defendant's accompanying constitutionally protected privacy interest in the package while it was in the stream of mail." *Id*. at 414-15. Further, "the issue here is not whether defendant possessed the package; rather it is whether defendant had a protected possessory interest in it. The difference matters because not all constitutionally protected possessory interests in property are necessarily accompanied by possession, whether actual or constructive." *Id*. at 417. This "defendant had a contract-based possessory interest in the package while it was in transit that, at a minimum, included the right to receive delivery of it by its guaranteed delivery time. * * * we conclude that that possessory interest was protected under Article I, section 9." *Id*. at 418.

Next, the Court concluded that "where, having physical control of the package, the officers curtailed its guaranteed delivery to defendant—the trial court did not err in concluding that the officers significantly interfered with defendant's possessory interest in the package and, therefore, seized it." *Id*. at 419.

Finally, "the state contends on review that any seizure in this case was justified on the ground that a brief warrantless investigative detention of property is lawful if police officers have reasonable suspicion that the property is associated with criminal activity." *Id*. at 420. The Court concluded that that "reasonable suspicion" issue is unpreserved. The Court affirmed the trial court's and Court of Appeals' decisions.

The Court did not address "the merits of the Court of Appeals' analysis of defendant's possessory interest" based on the Domestic Mail Manual. *Id*. at 418 n 8.

4.5.13.G Pets

Household pets are "effects" under the Fourth Amendment. "In line with every other circuit that has addressed this issue, we hold that a dog is property, and the unreasonable seizure of that property is a violation of the Fourth Amendment." *Brown v Battle Creek Police Department*, __ F3d __ (2017) (unreasonably shooting Plaintiffs' dogs would constitute the "seizure" of an "effect" within the meaning of the Fourth Amendment but officers are protected by qualified immunity for reasonably killing dogs). "The emotional attachment to a family's dog is not comparable to a

possessory interest in furniture." *San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose*, 402 F3d 962, 975 (9th Cir 2005).

4.6 "Houses" and Commercial Premises

> "The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement." William Pitt, Speech to Parliament, 1763 (reprinted in Leonard W. Levy, ORIGINS OF THE BILL OF RIGHTS 151 (2001)).
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> "A man's house is regarded as his castle, to which he may flee for safety and protection, and which affords him and his family a 'city of refuge'; and, if a person unlawfully intrude, the householder, after having warned him to depart, if he do not obey within a reasonable time, may employ sufficient force to expel him; but the immunity pertaining to the defense of a habitation does not extend beyond the limits of the dwelling and the customary outbuildings." *State v Clemente-Perez*, 357 Or 745 (2015) (quoting *State v Bartmess*, 33 Or 110, 129–30 (1898) (emphasis added)).

4.6.1 Commercial Premises

The Fourth Amendment and Article I, section 9, list four things protected from unreasonable searches and seizures: "persons, houses, papers, and effects." Both also have been extended protect other containers: sheds, trucks, offices, storage units, and the like. See for example *State v Michel*, 264 Or App 259 (2014).

See **Section 4.8.3** on body searches and exigent circumstances.

The Fourth Amendment's protections apply to "commercial premises, as well as to private homes." *New York v Burger*, 482 US 691, 699 (1987); *see also Marshall v Barlow's Inc*., 436 US 307, 312 (1978) ("warrantless searches are generally unreasonable, and [] this rule applies to commercial premises a well as homes."); *City of Los Angeles v Patel*, 135 S Ct 2443, 2452 (2015) (same); *Mancusi v Forte*, 392 US 364, 367 (1968) ("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.").

In 1921, the U.S. Supreme Court stated: "whether entrance to the home or office of a person suspected of crime be obtained by a representative of any branch or subdivision of the government of the United States by stealth, or through social acquaintance, or in the guise of a business call, and whether the owner be present or not when he enters, any search and seizure subsequently and secretly made in his absence, falls within the scope of the prohibition of the Fourth Amendment." *Gouled v United States*, 255 US 298, 306 (1921).

Oregon courts have conflated "houses" with other "premises" in several cases. For example, the court used the general word "premises" when describing a search of a *residence*: "Under Article I, section 9, warrantless entries and searches of premises are *per se* unreasonable unless falling

within one of the few "specifically established and well-delineated exceptions" to the warrant requirement. *State v Davis*, 295 Or 227, 237 (1983) (citing *Katz v United States*, 389 US 347, 357 (1967)." *State v Baker*, 350 Or 641, 647 (2011). The Court of Appeals has applied rules on third-party consent of "*premises*" searches to a third-party consent of a *vehicle* search in *State v Kurokawa-Lasciak*, 249 Or App 435, 439-40, *rev den* 352 Or 378 (2012). The Court of Appeals also has linked businesses with residences: The "businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property," *See v City of Seattle*, 387 US 541, 543 (1967) (citing Fourth Amendment as being consistent with Article I, section 9, on this point). *State v Mast*, 250 Or App 605 n 6 (2012).

Despite indicating similarity of analysis in all premises searches, the Oregon Supreme Court has differentiated houses from other places. *See State v Fair*, 353 Or 588 (2013) (emphasizing the sanctity of the home). In *State v Michel*, 264 Or App 259 (2014), the Court of Appeals concluded that a renter of a single unit in a Tote & Stow storage facility was "much like the emergency room" that offers its services to the public, and is not private, and thus no search occured. That is in contrast with tenants in a multi-unit residence, who may have a privacy interest in common areas. *Id*., citing *State v Larson*, 159 Or App 34, 40-41, *rev den*, 329 Or 318 (1999).

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

4.6.2 Homes; Motels; Hotels; Living Quarters

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

In deciding whether a "stop" occurred under Article I, section 9, the "location of an encounter with the police can affect how a reasonable person would view the encounter." *State v K.A.M.*, 279 Or App 191, 196 (2016), *rev'd*, 361 Or 805 (2017) ("Ordinarily police officers do not walk into a person's bedroom uninvited or, if they do, not without some explanation as to why they are there") (held: officer's "unexplained entry into that private space and his accusation that the young woman was using [meth] created a coercive atmosphere.")

"[T]o justify a warrantless home entry," the courts require "some showing [by the state] as to how long it would have taken to obtain a warrant under the circumstances." *State v Hermanson*, 278 Or App 570, 575 (2016) (quoting *State v Sullivan*, 265 Or App 62, 78 (2014)).

For a Fourth Amendment analysis of a search of a Portland Hampton Inn hotel room used by a notorious sex trafficker, and electronic-data search, see *United States v Ford*, (D Or 2016).

State v K.A.M., 361 Or 805 (9/14/17) (Kistler) (Brewer not participating) (Jackson) This is only an Article I, section 9, case; not a Fourth Amendment case. Five Medford police officers conducted a parole sweep of a dumpy dilapidated drug house. Four officers scruffed around the house while the fifth – Schwab – went into a back bedroom in his plainclothes and a "raid vest" on. He found defendant (17 years and 9 months old youth) and a girl, both apparently on meth and homeless and waiting to see if they could stay at that house. Schwab said "stay off the meth." He did not explain why he, or the others, were in the house. He asked for their names and if they had anything illegal on them. Youth said he had a pipe, which he produced, and it had meth on it. Charged with what would be possession of meth if youth had been an adult, he moved to suppress the pipe. The trial court denied the motion, concluding that the officer engaged in mere conversation: there was no "coercion" and nothing indicated that "the parties were not free to leave," thus the officer had not stopped youth,. The Court of Appeals affirmed, concluding that youth was not stopped when the officer asked to see his ID and if youth and the girl had anything illegal on them.

The Oregon Supreme Court reversed both lower courts. First, it did not consider youth's age as part of the Article I, section 9, "reasonableness inquiry." *Id*. at 809. The Court noted that in *J.D.B. v North Carolina*, 564 US 261 (2011), the US Supreme Court has told courts to consider a youth's age when "determining a Fifth Amendment *Miranda* issue." *Ibid*. But "this is hardly the case in which to resolve that question under Article I, section 9" for "at least three reasons." *Ibid*. Those are: (1) no preservation; (2) youth was almost 18, and under *J.D.B.*, he would be regarded as an adult as the US Supreme Court wrote that teenagers nearing the age of majority are likely to react to an interrogation as would a typical 18 year old in similar circumstances; and (3) circumstances other than youth's age show that he reasonably perceived that he was not free to leave.

Turning to that decisive issue of whether a reasonable person would have felt free to leave or instead coerced, the Court wrote:

> "Ordinarily, police officers do not walk into a person's bedroom uninvited or, if they do, not without some explanation as to why they are there. That is, however, precisely what Detective Schwab did. He simply walked into the bedroom where youth and the young woman were, and the first words out of his mouth were to tell the young woman, 'You need to stay off the meth.' Both Schwab's unexplained entry into that private space and his accusation that the young woman was using or had recently used methamphetamine created a coercive atmosphere that reasonably conveyed that she and youth were suspected of illegal drug use and were not free to leave until Schwab had completed his inquiry. Two other circumstances support that understanding. Schwab asked whether youth and the young woman had anything illegal on them, a question that, given Schwab's prior accusation of methamphetamine use, reasonably added to the coercive pressure. And the young woman was aware (and so presumably was youth) that, although Schwab was the only officer who had come into the bedroom, other officers were searching through the house. The officers' unexplained presence in the house added to the coercive effect of Schwab's presence in the bedroom." *Id*. at 811.

The Court twice emphasized "two other circumstances" that factor into its conclusion that the encounter was not mere conversation but instead was a stop. The first circumstance is that the officer "accus[ed]" the two of using meth, then asked if youth and the girl had anything illegal on them, which "reasonably added to the coercive pressure." *Id*. The other circumstance is that the girl "was aware (and so presumably was youth) that * * * other officers were searching through the house. The officers' unexplained presence in the house added to the coercive effect of Schwab's presence in the bedroom." *Ibid*.

The Court wrote further: "As explained above, two circumstances combine in this case to reinforce the conclusion that the detective's actions constituted a stop." *Id*. at 812. But the Court then brought in *another* circumstance than it had not mentioned "above." The two circumstances it mentioned later in the opinion are: (1) "the place where the encounter occurred" matters; here a bedroom, regardless if the two teenagers "were not yet residents of the house" because "their right to privacy was derivative of the person who had rented the home" and (2) the officer told the girl that "she needed to 'stay off the meth.'" *Id*. When he "effectively accused her" of being on meth, "a reasonable person" would conclude that he or she was not free to leave until Schwab had finished his inquiry." *Id*. at 813.

The Court differentiated this case from several others where the court concluded that no stop/seizure had occurred. This "is not a case in which an officer asked a person for identification for the apparent purpose of getting the person to leave a place where he or she was not authorized to be." *Id*. at 811 (citing *Backstrand*). This is not "a case in which an officer approached a person who had arrived at a house being searched by the police, explained to the person why the officer had approached him, and then asked the person his name and connection to the house." *Id*. at 812 (citing *State v Anderson*, 354 Or 440 (2013)). And "this is not a case in which an officer approached the driver of a parked car while his passengers (the defendant and a companion) walked away, later returned of their own accord, and responded to the officer's request for identification after returning." *Id*. (citing *State v Highley*, 354 Or 459 (2013)).

The was a stop. The Court remanded to the trial court to determine "whether the stop was justified – namely, whether Schwab reasonably suspected that youth and the young woman had engaged or were engaging in criminal activity." *Id*.

4.6.2.A Campsites, Tarps, Vehicles

The "touchstone, for purposes of Article I, section 9, is whether the space is 'a place that legitimately can be deemed private.'" *State v Smith*, 327 Or 366, 372-73 (1998).

An illegal makeshift tarp-and-grocery-cart shelter in a private building's outdoor alcove is not a constitutionally private space under Article I, section 9). *State v Tegland*, 269 Or App 1 (2015).

A lawfully rented campsite can be a residence. *State v Wolf*, 260 Or App 414, 425 (2013).

A truck under stand-alone awning near a house is not a residence where there is no evidence that a defendant lived in the truck and "there was no evidence that defendant's pickup truck, or the awning beneath which it was parked, could be considered a customary outbuilding of his house. Nor was there any evidence that defendant used the truck or the stand-alone awning for domestic purposes to such an extent that either should be considered part of the house." *State v Clemente-Perez*, 357 Or 745 (2015) (concealed weapons statute, not an Article I, section 9, case).

See generally *State v Davis*, 281 Or App 855 (2016) regarding a boat as a dwelling in a burglary case that did not involve Article I, section 9.

See Section 4.6.2.B, *post*, on Tents.

4.6.2.B Fourth Amendment

"Privacy and security in the home are central to the Fourth Amendment's guarantees as explained in our decisions and as understood since the beginning of the Republic." *Hudson v Michigan*, 547 US 586, 603 (2006) (Kennedy, J., concurring). Physical entry into the home is "the chief evil against which the working of the Fourth Amendment is directed." *United States v U.S. District Court*, 407 US 297, 313 (1972).

"The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion. *Entick v Carrington*, 19 Howell's State Trials 1029, 1066 [1795]; *Boyd v United States*, 116 US 616, 626-630." *Silverman v United States*, 365 US 505, 511 (1961).

United States Supreme Court "cases establish that a warrant is generally required for a search of a home, *Brigham City v Stuart*, 547 US 398, 403 (2006), but 'the ultimate touchstone of the Fourth Amendment is 'reasonableness.''" *Fernandez v California*, 134 S Ct 1126 (2014); *see also* *Florida v Jimeno*, 500 US 248, 250 (1991) ("The touchstone of the Fourth Amendment is reasonableness.") (citing "*Katz v United States*, 389 US 347, 389 US 360 (1967)").

"The Fourth Amendment protection against unreasonable searches and seizures is not limited to one's home, but also extends to such places a hotel or motel rooms." *United States v Cormier*, 220 F3d 1103, 1108-09 (9th Cir 2000). Under the Fourth Amendment, "an overnight guest in a home may claim the protection of the Fourth Amendment, but one who is merely present with the consent of the householder may not." *Minnesota v Carter*, 535 US 83, 90 (1988). Being evicted from a premises may end a person's "reasonable expectation of privacy" under the Fourth Amendment. *United States v Cunag*, 386 F3d 888, 895 (9th Cir 2004).

A Ninth Circuit panel summarized searches of the *interiors* of tents, trailers, or non-traditional houses: In *United States v. Gooch*, 6 F.3d 673 (9th Cir.1993), we held that a warrantless search of the interior of a tent on a public campground violated the Fourth Amendment. *Id*. at 677. In *LaDuke v. Nelson*, 762 F.2d 1318 (9th Cir.1985), we held that "LaDuke's privacy was violated by a flashlight search of his tent." Id. at 1332 n. 19. In *United States v. Sandoval*, 200 F.3d 659 (9th Cir. 2000), we held that a search of the interior of a makeshift tent violated the appellant's reasonable expectation of privacy even though he was camped illegally on Bureau of Land Management property. *Id*. at 661. *U.S. v Barajas-Avalos*, 359 F.3d 1204, 1210 (9th Cir. 2004), *cert denied* 543 US 1188 (2005) (no case demonstrates a "protected right to privacy in the open area surrounding his

or her sleeping quarters. Mr. Barajas-Avalos has not demonstrated that the officers violated his Fourth Amendment rights by viewing the interior of the travel trailer through a window.").

4.6.2.C Oregon Constitution

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). (Note: lawfully rented campsites can be a "house" but illegal makeshift tarps generally are not a "house.").

But as of August 2014, under *State v Unger*, 356 Or 59 (2014), if a person voluntarily (even if not knowingly) relinquishes his privacy rights during a police trespass by consenting to a search of his private living quarters, the search and seizure may be valid and the evidence not suppressed. If police obtain a person's voluntary consent to enter, "the court must address whether the police exploited their prior illegal conduct to obtain the evidence." *Id*. at 86. Before *Unger*, "the only considerations" to determine if "police had exploited their illegal conduct to obtain consent were the temporal proximity between the illegal police conduct and the consent and the presence of any intervening or mitigating circumstances." *Ibid*. Now, under *Unger*, the Court has "explained" and "identified" more "considerations." *Ibid*. Those are: the nature, extent, and severity of the constitutional violation" and "the purpose and flagrancy of the misconduct" and also (block quoting from a treatise):

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

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

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

> No "stop" or "seizure" generally occurs when: (a) an officer approaches and knocks on a citizen's front door, *State v Portrey*, 134 Or App 460, 464 (1995); (b) an officer asks a

person to come out of a residence to talk to the officer, *State v Shaw*, 230 Or App 257, 262-63, *rev den*, 347 Or 365 (2009); or (c) an officer suggests that a person walk together with the officer, *State v Crandall*, 197 Or App 591, 595 (2005), *rev'd on other grounds*, 340 Or 645 (2006). *State v Charles*, 263 Or App 578 (2014).

4.6.3 Curtilage & Beyond

"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).

In addition to that curtilage, "a person has a protected privacy interest in property outside the curtilage of a residence if the person manifests an intention to exclude the public from the property," such as with No Trespassing signs and/or barriers to entry. *State v Dixon/Digby*, 307 Or 195, 211-12 (1988); *State v McKee*, 272 Or App 372, 377 (2015). But a "No Trespassing" sign may be reasonably read to exclude only some people but not visitors thus "insufficient to put members of the public on notice that they were prohibited from traveling on [a] road to approach the residences along it." *State v Wilson*, 285 Or App 296, 300 (2017)

Dilapidated wooden shacks, barns, sheds, and outbuildings can be included in curtilage for Fourth Amendment purposes. *Mendez v County of Los Angeles*, 815 F3d 1178, 1187 (9th Cir 2016).

Open fields are not protected under the Fourth Amendment. Curtilage is protected under the Fourth Amendment. *Hester v United States,* 265 US 57, 59 (1924) "held that the Fourth Amendment's protection accorded 'persons, houses, papers, and effects' did not extend to the open fields." *United States v. Dunn*, 480 US 294, 300 (1987)." The *Dunn* Court wrote: "We reaffirmed the holding of *Hester* in *Oliver v. United States*, supra. There, we recognized that the Fourth Amendment protects the curtilage of a house and that the extent of the curtilage is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself. 466 U.S., at 180, 104 S.Ct., at 1742. We identified the central component of this inquiry as whether the area harbors the 'intimate activity associated with the "sanctity of a man's home and the privacies of life."' *Ibid*. (quoting *Boyd v. United States*, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886))." *Id*.

The Oregon Supreme Court has not adopted the United States Supreme Court's "open fields" philosophy, which separates curtilage (protected by Fourth Amendment) from open fields (not protected by Fourth Amendment). The Oregon Supreme Court has observed: "the Supreme Court's use of the term 'open fields' is not precise. As used by that court, the term encompasses lands that are neither fields nor, in any fair sense of the word, open; the open fields doctrine denies Fourth Amendment protection to all undeveloped and unoccupied land outside the curtilage of a residence." *State v Dixson*, 307 Or 195, 206 (1988) (citing *Oliver v United States*, 466 U.S. 170, 180 n 11 (1984).

In *State v Dixson*, 307 Or 195, 207 (1988) the Oregon Supreme Court noted that "persons, houses, papers, and effects" are not the only things protected, quoting the United States Supreme Court: "Neither a public telephone booth nor a conversation conducted therein can fairly be described as a person, house, paper, or effect; yet we have held that the Fourth Amendment forbids the police

without a warrant to eavesdrop on such a conversation." *Oliver v United States*, 466 US 170, 185 (Marshall, J., dissenting) (footnote omitted) (citing *Katz v United States*, 389 US 347 (1967)). In *Dixon*, the Oregon Supreme Court wrote:

> "We conclude that we cannot rely on a literal reading of Article I, section 9. To hold that the provision applies only to those items specifically enumerated therein would undermine the rationale that we have identified as the touchstone of Article I, section 9--the right to be free from intrusive forms of government scrutiny--and would open up prior decisions of this court, such as *State v. Campbell, supra*, to serious question. We decline to take that step. Article I, section 9, protects the privacy of the individual from certain kinds of governmental scrutiny. If the individual has a privacy interest in land outside the curtilage of his dwelling, that privacy interest will not go unprotected simply because of its location." *Id*. at 208.

The Oregon Court of Appeals has understood that the Oregon Supreme Court has adopted what it calls an "open fields analysis": "Our analysis of these factors is limited to the residential curtilage context and does not relate to the qualitatively distinct 'open fields' analysis developed in *State v Dixson/Digby*, 307 Or 195, 211-12, 766 P.2d 1015 (1988), and its progeny. *See, e.g., State v. Gabbard,* 129 Or App 122, 126-27, 877 P.2d 1217, *rev den* 320 Or 131, 881 P.2d 815 (1994) (under the 'open fields' doctrine, 'Article I, section 9, protects a privacy interest in land outside the curtilage of a person's dwelling, if the person manifests an intent to exclude the public by erecting barriers such as fences or signs. * * * Cases considering the requisite showing of intent to exclude visitors from going to the front door of a house have imposed a more stringent standard than that applied in *Dixson/Digby*.')." *State v Somfleth*, 168 Or App 414, n 8 (2000).

In *Gabbard*, the Court of Appeals had characterized the privacy right that the *Somfleth* court may have been calling "open fields" this way: "Article I, section 9, protects a privacy interest in land outside the curtilage of a person's dwelling, if the person manifests an intent to exclude the public by erecting barriers, such as fences or signs. *State v. Dixson/Digby*, 307 Or. 195, 211-12, 766 P.2d 1015 (1988). A person also has a privacy interest in the curtilage of the dwelling. *State v Breshears/Oliver*, 98 Or App 105, 111, 779 P.2d 158 (1989). However, a person impliedly consents to visitors going to the front door of the person's house, provided the person has not manifested an intent to forbid the intrusion of casual visitors onto the property. *State . Ohling*, 70 Or App 249, 688 P.2d 1384, *rev den* 298 Or 334, 691 P.2d 483 (1984)." *State v Gabbard*, 129 Or App 122, 126-27 (1994).

4.6.3.A Implied Consent & Barriers

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

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

The legal test to determine if officers trespassed is the residents' intent to exclude the public from entering the property. A "person impliedly consents to visitors approaching the front door unless the person has manifested an intent to forbid the intrusion of casual visitors onto the property." *State v Gabbard*, 129 Or App 122, *rev den* 320 Or 131 (1994) ("Beware of Dog" and "Keep Out" signs not adjacent to the driveway did not manifest an intent to exclude the public); *State v Cam*, 255 Or App 1, *adh'd to on recons*, 256 Or App 146, *rev den* 354 Or 148 (2013).

"Going to the front door and knocking [is] not a trespass. Drivers who run out of gas, Girl Scouts selling cookies, and political candidates all go to front doors of residences on a more or less regular basis. Doing so is so common in this society that, unless there are posted warnings, a fence, a moat filled with crocodiles, or other evidence of a desire to exclude casual visitors, the person living in the house has impliedly consented to the intrusion." *State v Ohling*, 70 Or App 249, 253, *rev den*, 298 Or 334 (1984); *State v Welsh*, 267 Or App 8 (2014).

"The scope of a homeowner's implied consent to approach the home is limited to those acts reasonably undertaken to contact the residents of the home; such consent does not extend, for instance, to an exploratory search of the curtilage.' *State v Cardell*, 180 Or App 104, 108 (2002)." *State v Welsh*, 267 Or App 8 (2014).

A "Private Property" sign – and nothing else - is likely insufficient to show intent to exclude others, but a "No Trespassing" sign has been held to be both sufficient and insufficient. A "Private Property" and "No Trespassing" sign on a roadway is insufficient. *State v Wilson*, 285 Or App 296 (2017) (insufficient). A "Private Property" sign plus an open gate on a property is <u>in</u>sufficient to manifest intent to exclude the public. *State v Cam*, 255 Or App 1, *adh'd to on recons*, 256 Or App 146, *rev den*, 354 Or 148 (2013) (officers did not trespass because defendant had not manifested a clear intent to exclude visitors).

Three "No Trespassing" signs that a reasonable person would have seen, even if police officers credibly testified that they did not see the signs, has been deemed sufficient to prove residents' intent to exclude the public, even if the driveway gate was open and one of those 3 signs was not visible. *State v Roper*, 254 Or App 197 (2012) (officers trespassed because defendants made their intent to exclude objectively evident by placing "No Trespassing" signs on both sides of the

driveway and posted other signs at the driveway entrance and further into the driveway, even though a boundary fence and gate were open).

In *State v McKee*, 272 Or App 372 (2015), a sheriff followed defendant onto his family's rural farm property marked with "No Trespassing" signs. Case remanded to the trial court to make findings regarding the size and readability of the signs or locations of other signs.

Front doors are different than backdoors or backyards. Under Oregon law, intrusions onto residential curtilage are deemed to be trespasses *unless* the entry is privileged or has the occupant's express or implied consent. *State v Unger*, 252 Or App 478 (2012), *rev'd on other grounds* 356 Or 59 (2014) (despite officers' deliberate, flagrant trespass into backyard and bedroom door, evidence is not suppressed because the victim of the police trespass voluntarily consented to a search).

4.6.3.B Lawful Vantage Point

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

4.6.4 "Entries"

"Houses" are specifically listed as protected in the Fourth Amendment and Article I, section 9, of the Oregon Constitution.

Several exceptions have arisen (or have been recognized) to a general idea that warrants are required for a home invasion. The United States Supreme Court appears to continue the "exigent circumstances" exception with subcategories. The Oregon Supreme Court copied those federally recognized exigent circumstances but in the past several decades has drifted off to separately list "exigent circumstances" from "emergency aid."

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

- "to provide emergency assistance to an occupant of a home, *Michigan v Fisher*, 588 US 45, 47-48 (2009),"

- to "engage in hot pursuit of a fleeing suspect, *United States v Santana*, 427 US 38, 42-32 (1976),"

- or to "enter a burning building to put out a fire and investigate its cause, *Michigan v Tyler*, 436 US 499, 509-10 (1978),"

> •or "to prevent the imminent destruction of evidence" under *Cupp v Murphy*, 412 US 291, 296 (1973) and *Ker v California*, 374 US 23 (1963),
>
> •to prevent a person from destroying hidden contraband in his trailer, *Illinois v McArthur*, 531 US 326, 331 (2001),
>
> • and to search "a suspect's fingernails to preserve evidence that the suspect was trying to rub off." *Missouri v McNeely*, 133 S Ct 1552 (2012).

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

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

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

> "Under Article I, section 9, '[w]arrantless entries and searches of premises are *per se* unreasonable unless they fall within one of the few specifically established and carefully delineated exceptions to the warrant requirement.' *State v Bridewell,* 306 Or 231, 235 (1988). One of those exceptions is the emergency/exigent circumstances exception. *Id.* That exception requires both probable cause and an exigency. *Id.* Here, defendant does not dispute that the officers had probable cause to believe that he had committed a felony, nor does he dispute that the officers had probable cause to believe that they would find evidence of his identity in his car. Rather, defendant argues that no exigent circumstance existed that justified the officers' failure to obtain a warrant. On that point, this court has explained that '[a]n exigent circumstance is a situation that requires police to act swiftly to prevent danger to life or serious damage to property, or to forestall a suspect's escape or the destruction of evidence.' *State v Stevens,* 311 Or 119, 126 (1991)." *State v Snow*, 337 Or 219 (1994).

In 2014, the Oregon Supreme Court then separated an "exigent circumstances exception" from an "emergency aid exception" in *State v Fessenden/Dicke*, 355 Or 759, 765 (2014):

> They "differ in at least one key way. The exigent circumstances exception 'requires both probable cause and an exigency. *State v Snow*, 337 Or 219, 223 (2004). The emergency aid exception does not: It permits warrantless entry, search, or seizure, regardless of whether the officer has probable cause to believe that a crime has been or is being committed, as long as the officer reasonably believes it necessary to 'render immediate aid to persons * * * who have suffered, or who are imminently threatened with suffering, serious physical

injury or harm. [*State v Baker*, 350 Or 641, 649 (2011)]. Emergency aid requires only 'an objectively reasonable belief, based on articulable facts' that such an emergency exists. *Id*. The exceptions also may differ in scope." *Id*. at 765.

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

The exigent circumstances exception "requires both probable cause and an exigency" but the emergency aid exception "does not." "Emergency aid requires only 'an objectively reasonable belief, based on articulable facts' that such an emergency exists." All the officer needs, under prior emergency-aid cases, is a reasonable belief that "warrantless entry, search, or seizure" is "necessary to render immediate aid to persons * * * who have suffered, or who are imminently threatened with suffering, serious physical injury or harm." The Court stated that the two exceptions "also may differ in scope" because under one case the Court used the word "property" for the exigent circumstances exception but the "emergency aid doctrine, on the other hand, has been described as applying to situations in which immediate action is necessary to render aid to 'persons.'" The Court wrote: "the exigent circumstances exception to Article I, section 9, is not limited * * * to circumstances in which human life is threatened. This court implicitly has recognized that officers are permitted to take warrantless measures in instances in which those measures are necessary to enable officers to fulfill essential law enforcement responsibilities in emergency circumstances." *Id*. at 772 (emphasis added). So the "exigent circumstances exception applies in "emergency circumstances." *State v Fessenden/Dicke*, 355 Or 759, 765 (2014) (emphasis added).

4.6.4.A Exigencies and Emergencies

1. Article I, section 9

"Warrantless entries and searches of premises are per se unreasonable unless they fall within an exception to the warrant requirement. *State v Davis*, 295 Or 227, 237 (1983). One such exception permits an enforcement officers to enter a home if they are 'presented with both probable cause to believe that a crime had occurred and an exigent circumstance.' *State v Stevens*, 311 Or 119, 126 (1991). The state bears the burden of proving that such an exception to the warrant requirement exists. *Id*." *State v Kelly*, 274 Or App 363, 372 (2015) (held: state failed to prove even a reasonable suspicion, let alone probable cause, to believe that defendant was engaged in criminal activity when the deputy opened her garage door).

"[T]o justify a warrantless home entry," the courts require "some showing [by the state] as to how long it would have taken to obtain a warrant under the circumstances." *State v Hermanson*, 278 Or App 570, 575 (2016) (quoting *State v Sullivan*, 265 Or App 62, 78 (2014)).

"It is not that unusual for the [Oregon Supreme] court to recognize new exceptions to the warrant requirement. We did it a few short years ago in [*State v. Baker*, 350 Or 641 (2011)], in which we

expressly recognized what we had implicitly held in a few earlier cases: namely, an emergency-aid exception to the warrant requirement of Article I, section 9." *State v Bonilla*, 358 Or 475, 497 (2015) (Landau, J., concurring). The "emergency-aid exception is predicated on the court's determination that in certain circumstances—those in which it appears that it is necessary to render immediate aid or assistance to someone in imminent threat of serious harm—officers may engage in conduct that might otherwise violate Article I, section 9, because it is reasonable to do so. *State v Baker*, 350 Or 641, 649, 260 P3d 476 (2011) ("[W]e conclude that an emergency aid exception to the Article I, section 9 warrant requirement is justified when police officers have an objectively reasonable belief, based on articulable facts, that a warrantless entry is necessary to either render immediate aid to persons, or to assist persons who have suffered, or who are imminently threatened with suffering, serious physical injury or harm." (Footnotes omitted.))." *Id*. at 496-97.

"Absent consent, a warrantless entry can be supported only by exigent circumstances, *i.e.*, where prompt responsive action by police officers is demanded. Such circumstances have been found, for example, to justify entry in the case of hot pursuit, *United States v Santana*, 427 US 38 (1976), the destruction of evidence, *United States v Kulcsar*, 586 F2d 1283 (8th Cir 1978), flight, *Johnson v United States*, 333 US 10 (1948), and where emergency aid was required by someone within, *United States v Goldenstein*, 456 F2d 1006 (8th Cir 1972)." *State v Davis*, 295 Or 227, 237-38 (1983) (motel room). "The linchpin in all the cases which rely upon the emergency doctrine to justify a warrantless entry is the urgent need to render aid and assistance within." *Id*. at 238.

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

"[A]n emergency aid exception to the Article I, section 9, warrant requirement is justified when police officers have an objectively reasonable belief, based on articulable facts, that a warrantless entry is necessary to either render immediate aid to persons, or to assist persons who have suffered, or who are imminently threatened with suffering, serious physical injury or harm." *State v Baker*, 350 Or 641, 649 (2011) (deciding the case under Oregon's Constitution but reciting the "elements of an emergency aid exception to the Fourth Amendment warrant requirement" from *Mincey v Arizona*, 437 US 385 (1978) and *Brigham City, Utah v Stuart*, 547 US 398 (2006)); *see also State v Rennells*, 253 Or App 580 (2012).

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

entry, gave the officers an objectively reasonable belief that warrantless entry was necessary to assist a person who was seriously injured. *State v Wan*, 251 Or App 74 (2012).

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

> ***State v Potter***, 282 Or App 605 (11/30/16) (De Muniz, Ortega, Lagesen) (Yamhill) Defendant's daughter told schoolteachers then a sheriff's deputy that she found a suicide note from her mother that morning, and that her mother was not answering from behind her locked bedroom door. Deputies quickly went to the home, where defendant was sitting outside with parents and friends. She was angry. Deputies radioed to cancel emergency services. She said she had tried to kill herself the night before by taking a Vicodin and a Gabapentin, and her kids were better off without her. One female deputy (who had been an EMT for six years) talked with her while the other called a mental health emergency person. The deputies believed she would kill herself that day. Defendant got up, walked into her bedroom while on the phone, slammed the door in the EMT/deputy's face, and locked it. She refused to open the door. The deputy kicked in the door, saw no pills, but saw defendant lunge into a closet. The deputy handcuffed defendant, fearing weapons, and escorted defendant out to the patrol vehicle to go to the hospital. The deputy/EMT testified that she searched the bedroom without a warrant to look for pills because as an EMT she knew that doctors want to know what drugs are involved in potential drug overdose cases. She found prescription hydrocodone, marijuana, meth, a glass pipe, a prescription pill bottle with the label torn off, "a basket of prescription pill bottles, most of which were Gabapentin, prescribed to defendant," and a hard case with a baggy of meth inside. She stopped searching and called the ER, reporting her find to the ER, and then she brought the load of prescription drugs to the hospital and the meth to the sheriff's office. Defendant was charged with possession of meth and filed a motion to suppress, contending that the emergency aid exception did not apply to the bedroom search.
>
> The trial court concluded that the warrantless search was within the emergency aid exception because the officer believed the bedroom search was necessary under a current medical emergency.
>
> The Court of Appeals reversed and remanded. The emergency aid exception to the warrant requirement allows an officer to "enter" if she has 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 personal injury or harm." *Id*. at 610 (quoting *State v Baker*, 350 Or 641, 649 (2011)). The Court of Appeals fact-matched with several prior cases and wrote that the case "is more akin" to the cases defendant cited. "Here, the emergency associated with a drug overdoes dissipated before [the officer's] warrantless search of defendant's bedroom. When the deputies arrived, defendant was agitated due to her failed suicide attempt, but she was able to clearly articulate her emotions. Unlike [State v McDonald, 168 Or App 452, rev den, 331 Or 193 (2000)], defendant was not hazy, incoherent, or demonstrating any other type of mental compromise that would indicate a

recent drug overdose or the need for urgent medical care. Similar to [State v Davis, 295 Or 227 (1983)], the initial emergency dissipated once defendant walked out of her locked bedroom and outside her home prior to the deputies' arrival, without exhibiting any symptoms of a drug overdose." Id. at 612. Then "the emergency was reintroduced when defendant locked herself in her bedroom for the second time while still expressing suicidal thoughts. That emergency, however, only existed until [the deputy] kicked down the door and observed defendant either on the phone or with a phone * * * without any pills or a glass of water nearby. At that point, the subsequent emergency had dissipated." Id. at 613.

State v Hamilton, 285 Or App 315 (5/03/17) (Shorr, Armstrong, Tookey) (Multnomah) Police responded to a 911 call that two roommates were violently fighting. The caller – one of the roommates - retreated to a bedroom with a baseball bat. Police entered the home without a warrant. No one disputes that the entry was lawful. Defendant was brandishing a knife. Officers handcuffed him at gunpoint. Police removed both roommates. There were knife slashes on the doorjamb of the roommate's room. Broken objects were strewn around. They searched the home for dead or unconscious persons. None were found, but defendant's marijuana distribution operation was discovered in the basement. Officers notified a drug team. Defendant was charged with unlawful delivery of marijuana and other crimes.

The Court of Appeals reversed his conviction. The home entry was not unlawful because it was justified under the "emergency aid exception" to Article I, section 9. But the continued search after defendant and the roommate were removed was not justified. The emergency had dissipated. The record demonstrates that the officers did not have subjective belief of an emergency when they searched the basement to discover if someone else was in the house.

State v Hershey, 286 Or App 824 (7/19/17) (Harney) (Duncan, DeVore, Garrett) The sheriff of Harney County had over 31 years' experience in law enforcement including several animal abuse/neglect cases. A sergeant involved also had conducted 10 major animal abuse/neglect cases. In July, in Burns, a rancher called to report starving that cows were starving with no water on a nearby ranch. The cattle are concealed from public view. Sergeant called defendant, who was at the coast. Defendant said the cattle were ok, that he'd fired the workers for failing to take care of them, and a man had been hired to take care of them. Sergeant took no further immediate action. The next day, the rancher's husband who had ranched his whole life called the sheriff that the cattle "were near death." They were trying to break out of the property. The sergeant said that another neighbor told him they'd thrown some hay over the fence because the cows were "starving," and "trying to get out." The sheriff and sergeant then went to the property. The sergeant testified it was "absolutely" necessary to enter the property. They entered. Defendant was charged with five counts of first-degree animal neglect and one count of second-degree animal neglect. Defendant moved to suppress the evidence on grounds that the sheriff had no warrant, and the emergency aid exception was not met. The trial court denied the motion.

The Court of Appeals affirmed. "The emergency aid exception does not require probable cause to believe that a crime has been or is being committed" under *Fessenden/Dicke*, 355

Or 759, 765 (2014). That exception "permits warrantless entry, search, or seizure, regardless of whether the officer has probable cause * * * as long as the officer reasonably believes it necessary to 'render immediate aid to persons * * * who have suffered, or who are imminently threatened with suffering, serious physical injury or harm." *Id*. at 831 (quoting *Fessenden* which quoted *State v Baker*, 350 Or 641, 649 (2011)). Here although the officers waited a day before entering, this was still established as a true emergency, based on changed information over that day. There was no evidence in the record that anyone attempted to get a warrant. The Court of Appeals did not mention that.

State v Ritz, 361 Or 781 (8/10/17) (Baldwin, SJ) (Curry) This is a "destruction-of-evidence" case brought on the state's petition for review. About 30 minutes after an accident and about 2.5 hours after defendant had eluded police, law enforcement obtained DUII evidence from a warrantless entry of defendant's home. An officer testified that it would have taken 45 minutes or 90 minutes to obtain a telephonic warrant. The trial court denied defendant's motion to suppress. The Court of Appeals affirmed, not relying on Article I, section 9, but instead on *Missouri v McNeely*, 133 S Ct 1552 (2013), which is a Fourth Amendment case.

In the Court of Appeals, the state apparently argued that the warrantless entry was valid under what it – and the Court of Appeals -- contended are two separate exceptions: "so-called exigency" and "hot pursuit." (Note: hot pursuit *is* an exigent circumstance. And an exigent circumstance isn't a "so-called exigency."). The Court of Appeals also added that the state has "the substantial burden" of justifying a warrantless home entry. *Id*. at 94. (Note: Either that "substantial burden" wording is gratuitous dicta, or it raises a question of whether the Court of Appeals believed the state has some kind of elevated burden of proof in warrantless home entry cases.).

The Oregon Supreme Court reversed the decision of the Court of Appeals. Its reasoning is as follows:

"Exigent circumstances include situations where the delay caused by obtaining a warrant would likely lead to the loss of evidence. *See State v Snow*, 337 Or 219, 223, 94 P3d 872 (2004) (explaining that an exigent circumstance includes 'a situation that requires police to act swiftly *** to forestall * * * the destruction of evidence' (quoting *State v Stevens*, 311 Or 119, 126, 806 P2d 92 (1991))). The state has the burden of proving that the circumstances at the time of the warrantless search fall within the exigent circumstances exception. *State v Baker*, 350 Or 641, 647, 260 P3d 476 (2011). To satisfy that burden in this case, the state must establish both that the officers had probable cause and that exigent circumstances justified the officers' warrantless search. *See Snow*, 337 Or at 223 (stating that the exigent circumstances exception 'requires both probable cause and an exigency')." *Id*. at 790.

The "state must establish that officers reasonably believed that the delay caused by obtaining a warrant would likely lead to the loss of evidence. The state argues that delaying entry into defendant's residence in this case would have allowed additional blood-alcohol evidence to dissipate. But the record does not support such a conclusion." *Id*. at 795. *State v Machuca*, 347 Or 644 (2010), a blood-draw case, "is distinguishable [from this home-entry case] because a blood draw directly preserves a defendant's BAC, but a

home entry does not." *Id*. "Thus, any delay in performing the blood draw necessarily equates to a delay in preserving the evidence. The same is not true for a home entry. The metabolic process causing the blood-alcohol evidence to dissipate does not stop simply because officers have entered a defendant's home. Instead, to preserve a defendant's BAC, officers entering a home must then also obtain and test a sample of the defendant's breath or blood. As a result, the appropriate question in determining whether there was an exigency is not whether obtaining a warrant would have delayed entering defendant's home. The appropriate question is whether obtaining a warrant would have delayed obtaining and testing a sample of defendant's breath or blood." *Id*. The "time that the officers entered the home is the relevant temporal reference point for us to consider." *Id*. at 796 (quotation omitted).

"Thus, at the time that officers entered defendant's home, they had no reason to think that obtaining a warrant to enter the home would delay a consensual search for defendant's BAC evidence, because they had no reason to think that defendant would consent to such a search. As defendant points out, without satisfying the statutory standards for consent, the officers were required by statute to obtain a warrant (or some other type of court order) to obtain defendant's BAC evidence. Under ORS 813.100(1), an officer may request that a DUII defendant submit to a chemical test that would determine his or her BAC. But, under ORS 813.100(2) and ORS 813.320(2)(b), if the defendant refuses to provide a sample, then an officer may compel the defendant's cooperation by obtaining a warrant." *Id*. at 796.

"If, at the time that the officers entered defendant's home, a warrant was statutorily required to obtain and test defendant's BAC evidence, then it is not clear how requiring the officers to obtain a warrant to enter the home—rather than after entering the home—was likely to delay preserving defendant's BAC evidence, particularly because the officers were capable of applying for a warrant from the scene. In other words, obtaining a warrant prior to entering the home would have delayed entering the home. But, if officers were required to obtain a warrant in order to preserve defendant's BAC, then obtaining a warrant before entering defendant's home would not have delayed preserving defendant's BAC evidence. As a result, based on the record and arguments before us, the state has not even satisfied the exigency standard that it reads *Machuca* as applying." *Id*. at 797.

Further "none of the officers in this case testified before the trial court that observational evidence was the object of their search. * * * [N]one of the officers in this case testified before the trial court that observational evidence was the object of their search. *Id*. at 798.

The "record does not establish that the officers reasonably believed, at the time that they entered defendant's home, that obtaining a warrant would have delayed preserving evidence that was dissipating. The state therefore failed to establish that the officers reasonably believed that they were faced with an exigency in this case. We recognize that, by deciding this case on the facts, we are not resolving the legal question that the parties have brought to us—namely, what factors should be considered in determining whether an exigency search is justified. However, because the state failed to establish the existence of an exigency, the state cannot justify its warrantless search as an exigency

search, regardless of what other factors should be considered or how those factors should be weighed." *Id*. at 799.

State v Stanley, 287 Or App 399 (8/23/17) (Clackamas) (Garrett, DeVore, James) Two officers responded to a 911 call from defendant's girlfriend, who said he'd attacked her in his house, taken her phone, broke down the door, had a gun in a safe, and she was hiding upstairs safely. Three officers arrived to find defendant on the porch, calm and casual. An officer told defendant, "I'm going to go in and check on [the girlfriend]." Defendant responded, "Go ahead. She's inside. No one asked for his consent to enter his home. Officers entered the house, found the damaged door, and the girlfriend had a red ear and parts of her face were red. Defendant moved to suppress.

The Court of Appeals concluded that the trial court erred in denying a motion to suppress. The warrantless home entry was not justified by the emergency aid exception. None of the officers had even a subjective belief that the girlfriend had suffered serious physical injury and needed immediate help. The officers used the word "if" in the suppression hearing: "if there was a crime," and "if anybody was injured." That was too speculative to support a warrantless home entry.

As for consent, the state failed to prove by a preponderance of the evidence that defendant voluntarily consented to the home entry. This was "mere acquiescence" to police authority, not voluntary consent, citing *State v Berg*, 223 Or App 387, 392 (2008), *adh'd to as modif on recons*, 228 Or App 754, *rev den*, 346 Or 361 (2009). The court is to "pay close attention to the words" the officer used. *Id*. at 407. "When those words do not provide the listener with a reasonable opportunity to choose to consent, or when those words leave the listener with the impression that a search is inevitable, absent strong countervailing factors, we have consistently found acquiescence rather than consent." *Id*. (quotation omitted). This was defendant passively acquiescing, based on the record.

State v Perrott, 288 Or App 837 (11/15/17) (Lane) (Duncan, DeVore, James) While looking for a car that had been involved in driving-related offenses, an officer formed probable cause to believe that defendant had been drunk driving. Moments after the officer made those observations, he entered the property. The officer thought it would take hours to get a warrant to enter the property, and among the officer's concerns at the time was his knowledge that "alcohol dissipates from the blood." That was the only evidence in the record concerning alcohol dissipation. Defendant moved to suppress. The trial court denied the motion. The trial court also found, based on testimony from the officer and another, that it likely would have taken two to four hours to get a warrant to enter the premises. The trial court concluded, however, that the state had failed to establish exigent circumstances, because it had not presented evidence of the time it would take for the evidence to be lost. The state appealed.

The Court of Appeals affirmed. "To satisfy its burden to prove the existence of an exigency here, the state was required to develop a record that would permit an assessment of whether, at the time he entered the property, the officer reasonably believed that the blood-alcohol evidence he sought was at risk of complete dissipation in the time it would take to get a warrant. *State v Ritz*, 361 Or 781, 798 n 9, 399 P3d 421 (2017)." This record "does not include any evidence of the amount of time that the officer

reasonably believed it would take for the evidence to be lost." Because "the state has not pointed to any evidence in the record from which the trial court could have determined that the dissipation of alcohol presented an exigency in this case, we conclude that the trial court did not err in concluding that the state had failed to meet its burden of proving exigency." In other words: no presumption of dissipation rates.

State v Gerety, 286 Or App 175 (6/14/17) (Washington) (Egan, Armstrong, Shorr) Defendant was driving drunk, and recklessly. She made it home. Around 11:22 p.m. , police arrived at her home, knocked, and when she answered, noticed that she reeked of alcohol and could hardly stand. The police determined that they had probable cause to arrest her. She tried to slam the door in an officer's face, but he shoved his foot in the door and told her she was not free to leave. She cooperated. Another officer then asked her to perform field sobriety tests, took her to the police station, and she refused to take a breath test (The opinion does not state if she passed or failed the field sobriety tests). She moved to suppress her arrest and all subsequent evidence due to the warrantless home entry. The officer testified that it would take four to five hours to get a search warrant. He described the basis for that time estimate. He explained how alcohol dissipates at about one drink per hour from the body. Tigard Police Department does not use telephonic warrants because Washington County does not have "that procedure in place." Even if telephonic warrants were "in place," he testified that he would still have to get a hold of a DA and a judge, then actually execute the warrant. The trial court denied the motion to suppress.

The Court of Appeals affirmed, noting that the state had established how long it would have taken to obtain a warrant. "That evidence was nonspeculative proof of the time it would have taken to obtain a warrant in this case." Further, "We are not aware of any case law requiring the state to prove how long a *telephonic* warrant would have taken to establish exigent circumstances to justify a warrantless entry into defendant's home when telephonic warrants are not available." The court here "agree[d] that it is troubling that the county has not adopted methods to expeditiously obtain warrants, given all the advances in technology available to it. However, we are not aware of any authority that requires the county to use telephonic warrants." *Id*. at 181.

2. Fourth Amendment

"One well-recognized exception applies when 'the exigencies of the situation' make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *Kentucky v King*, 131 S Ct 1849, 1856 (2011). Under the Fourth Amendment, the United States Supreme Court "has identified several exigencies that may justify a warrantless search of a home* * *. Under the 'emergency aid' exception, for example, 'officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect and occupant from imminent injury.' * * * Police officers may enter premises without a warrant when they are in hot pursuit of a fleeing suspect* * * * *. And * * * the need 'to prevent the imminent destruction of evidence' has long been recognized as a sufficient justification for a warrantless search". *King*, 131 S Ct 1849.

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

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

•"to provide emergency assistance to an occupant of a home, *Michigan v Fisher*, 588 US 45, 47-48 (2009),"

•to "engage in hot pursuit of a fleeing suspect, *United States v Santana*, 427 US 38, 42-32 (1976),"

•or to "enter a burning building to put out a fire and investigate its cause, *Michigan v Tyler*, 436 US 499, 509-10 (1978),"

•or "to prevent the imminent destruction of evidence" under *Cupp v Murphy*, 412 US 291, 296 (1973) and *Ker v California*, 374 US 23 (1963),

•to prevent a person from destroying hidden contraband in his trailer, *Illinois v McArthur*, 531 US 326, 331 (2001),

• and to search "a suspect's fingernails to preserve evidence that the suspect was trying to rub off." *Missouri v McNeely*, 133 S Ct 1552 (2012).

4.6.4.B "Knock and Talk" – Fourth Amendment

"The 'knock-and-announce' rule is a subset of the reasonableness requirement of the Fourth Amendment; for a search to be reasonable, police officers must generally knock and announce their presence, unless the circumstances are such that doing so would be unreasonable. *See, e.g., Richards v. Wisconsin*, 520 US 385, 395-96, 117 S Ct 1416, 137 L Ed 2d 615 (1997) (failure to comply with knock-and-announce reasonable because of officer's fears that evidence would be destroyed)." *State v Bailey*, 356 Or 486, 499 n 6 (2014) "The interests protected by the knock-and-announce rule include (1) 'the protection of human life and limb, because an unannounced entry may provoke violence in supposed self-defense by a surprised resident'; (2) the protection of property, because breaking into a house "'absent an announcement would penalize someone who' 'did not know of the process, of which, if he had notice, it is to be presumed that he would obey it'; and (3) 'those elements of privacy and dignity that can be destroyed by a sudden entrance.' *Id*. at 594 (quotation and citations omitted). 'What the knock-and-announce rule has never protected, however, is one's interest in preventing the government from seeing or taking evidence described in a warrant.'" *Id*. at 499 n 7 (quoting *Hudson v. Michigan*, 547 US 586, 593-94 (2006)).

Under the Fourth Amendment's "knock and talk" exception, "a police officer not armed with a warrant may approach a home and knock, precisely because that is no more than any private citizen might do." *Florida v Jardines*, 133 S Ct 1409, 1416 (2013) (quoting *Kentucky v King*, 131 S Ct 1849, 1862 (2011)). In *Carroll v Carman*, a per curiam opinion, the US Supreme Court overturned a

Third Circuit case on qualified immunity, noting: "We do not decide today whether * * * cases were correctly decided or whether a police officer may conduct a "knock and talk" at any entrance that is open to visitors rather than only the front door." 574 U. S. ____ (2014) (slip op at 7).

4.6.4.C Consent to Enter Premises

See **Sections 4.6.2** and **4.6.3.**

1. Fourth Amendment

Although United States Supreme Court "cases establish that a warrant is generally required for a search of a home . . . the ultimate touchstone of the Fourth Amendment is reasonableness." *Fernandez v California*, 134 S Ct 1126 (2014). Under the Fourth and Fourteenth Amendments, consent "by one resident of a jointly occupied premises is generally sufficient to justify a warrantless search." *Id*. The exception to that rule is when one resident refuses to consent, and another resident grants consent in the physical presence of the refuser; that is not "consent" to search. *Id.* (citing *Georgia v Randolph*, 547 US 103 (2006)). It does not matter that "the police could readily have obtained a warrant to search the shared residence." *Fernandez*, (Ginsburg, J, dissenting). Note that Justice Ginsburg, dissenting in *Fernandez*, points out a critical slippage in the Fourth Amendment warrant requirement, which the Court is replacing with a "reasonableness" standard:

> "Instead of adhering to the warrant requirement, today's decision tells the police they may dodge it, nevermind ample time to secure the approval of a neutral magistrate. Suppressing the warrant requirement, the Court shrinks to petite size our holding in *Georgia v. Randolph*, 547 U. S. 103 (2006), that 'a physically present inhabitant's express refusal of consent to a police search [of his home] is dispositive as to him, regardless of the consent of a fellow occupant,' *id*., at 122–123." (*Fernandez*, Ginsburg, J., dissenting, at slip op. at 2. She explained:
>
> "The Fourth Amendment guarantees to the people '[t]he right . . . to be secure in their . . . houses . . . against unreasonable searches and seizures.' Warrants to search premises, the Amendment further instructs, shall issue only when authorized by a neutral magistrate upon a showing of 'probable cause' to believe criminal activity has occurred or is afoot. This Court has read these complementary provisions to convey that, 'whenever practicable, [the police must] obtain advance judicial approval of searches and seizures through the warrant procedure.' *Terry v. Ohio*, 392 U. S. 1, 20 (1968). The warrant requirement, Justice Jackson observed, ranks among the 'fundamental distinctions between our form of government, where officers are under the law, and the police state where they are the law.' *Johnson v. United States*, 333 U. S. 10, 17 (1948). The Court has accordingly declared warrantless searches, in the main, 'per se unreasonable.' *Mincey v. Arizona*, 437 U. S. 385, 390 (1978) (internal quotation marks omitted); *see Groh v. Ramirez*, 540 U. S. 551, 559 (2004). If this main rule is to remain hardy, the Court has explained, exceptions to the warrant requirement must be 'few in number and carefully delineated.' *United States v. United States Dist. Court*

for Eastern Dist. of Mich., 407 U. S. 297, 318 (1972); *see Kyllo v. United States*, 533 U. S. 27, 31 (2001)." *Id*. at slip op. 1.

2. Article I, section 9

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

4.6.4.D Officer Safety

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

State v Madden, 283 Or App 524 (02/01/17), ***review allowed***, 361 Or 800 (2017) (Lane) (Sercombe, Hadlock, Tookey) Eight police detectives arrived at a "flophouse" to execute a search warrant as part of a meth operation. Two men were in a parked car in the flophouse driveway. Defendant was in the driver's seat. No one recognized him. A known meth user who carried weapons (nunchucks, brass knuckles, knives) was in the passenger seat. Three detectives knew that known meth user. When the detectives approached, defendant reached back ward and pushed a pack down between the back seats. Detective opened defendant's door and told him to get out and raise his hands. He did as he was told. Another detective "removed" the passenger from the car. Both men were handcuffed, patted down, and taken into the house. Nothing was on defendant's person; the passenger had meth on him. Detectives interviewed defendant two times. He admitted having meth and a gun in the car, on the first interview. At the second interview, he consented to a car search, and signed a document stating his consent was voluntary. Defendant admitted to being a felon, not legally entitled to possess a gun, but having a gun and 7.5 ounces of meth in the car. The car search revealed a loaded handgun, 7.4 ounces of meth, a digital scale, plastic baggies, a meth pipe, over $1600 in US currency, and $3600 in Pakistani currency.

Charged with delivery and possession of meth and of being a felon in possession of a firearm, defendant moved to suppress. The state argued that seizing defendant was justified under the officer safety exception, specifically under *State v Swibies*, 183 Or App 460 (2002), which the state argued allowed the handcuffing of all persons who were present with an armed and dangerous person. The trial court denied the motion to suppress, citing *Swibies* for the idea that "if any one

of the persons who are present" when police execute a search warrant "poses a danger and the court finds that that would be a known danger to the officers, then all of the persons present" may be seized." This is under the officer-safety exception to the warrant requirement.

The Court of Appeals affirmed, under *Swibies*. There was at least one accessible weapon in the car, the officers knew defendant's colleague often carried weapons and had been armed in about half of their prior encounters, defendant shoved a backpack between the car's backseat as the officers approached. Therefore "officers had reason to believe" that defendant's colleague had a weapon and were justified in handcuffing and detaining defendant. *Id*. at 533. That holds even though police believed defendant's colleague was armed and dangerous: The "officers' reasonable belief that [the colleague] was armed and dangerous allowed them to handcuff and detain defendant for 'long enough to ensure both the officers' and the occupants' safety.'" *Id.* at 534 (quoting *Swibes*, 183 Or App at 467). The Court of Appeals reasoned that there is no distinction between an occupant of a residence and someone immediately outside the residence, citing not an Oregon case, but instead a US Supreme Court case, *Bailey v United States*, 133 S Ct 1031, 1038 (2013). *Id*. at 534.

Note: This is yet another case in which Oregon appellate judges write that they "are mindful that it is 'not our function to uncharitably second-guess an officer's judgement.'" *Id*. at 530 (internal quote charitably omitted).

In ***State v Gaylor***, 287 Or App 495, 501 (8/30/17), the Court of Appeals described *Madden* this way: "In *Madden*, the issue was whether the officer safety exception justified the warrantless handcuffing of the defendant, who was present at a house where officers were executing a warrant. 283 Or App at 532-35. We concluded that it did. The defendant was in a car parked in front of the house with a person who officers suspected, based on past encounters, was armed and dangerous. *Id*. Relying on past cases discussing the particular dangers associated with the execution of a warrant, we reasoned that the execution of a warrant at a known drug house presented a dangerous situation, and that the defendant's presence outside the house with a person reasonably believed to be armed and dangerous made it objectively reasonable to think that posed a threat of harm to officers, so as to justify his detention while officers secured the premises. *Id*."

4.6.5 Garbage Curbside

Before a garbage company collects trash, an owner has a possessory interest in it. After a garbage company collects trash, an owner has no possessory interest. Just because "garbage was collected by a small or large truck one minute or one hour before the normal routine is of no constitutional moment." *State v Lien/Wilverding*, 283 Or App 334, 342 (2017). "The possessory interest in the garbage is lost in either case upon retrieval by the sanitation company on the regularly scheduled day."

Residential garbage left in closed, opaque containers for pickup by a collection company is there for a specific purpose: pickup and disposal. People do not implicitly authorize anyone else to paw through their garbage, or view, or take items. People retain control over their cans based on contract expectations. *State v Galloway*, 198 Or App 585 (2005).

But <u>after</u> a trash company takes garbage, the garbage owners “retain[] no more right to control the disposition of the garbage” than if they had abandoned it. *State v Howard/Dawson*, 342 Or 635, 643-44 (2007). A “person retains no constitutionally protected privacy interest in abandoned property.” *Id*. at 641-42. “The possessory interest in the garbage is lost * * * upon retrieval by the sanitation company on the regularly scheduled day.” *State v Lien/Wilverding*, 283 Or App 334, 342 (2017).

The Fourth Amendment to the United States Constitution does not prohibit the police from searching a person's garbage after the sanitation company has collected it. *California v Greenwood*, 486 U.S. 35 (1988).

4.7 Warrants

"* * * **and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched and the person or thing to be seized**." -- Article I, section 9, Or Const

"A warrant is a judicial mandate to an officer to conduct a search or make an arrest, and the officer has a sworn duty to carry out its provisions." *Utah v Strieff*, 579 US __ slip op 7 (2016) (quoting *United States v Leon*, 468 US 897, 920, n. 21 (1984)).

A "defendant bears the burden of proving the unlawfulness of a warranted search." *State v Walker*, 350 Or 540 (2011); *State v Mansor*, 279 Or App 778, 789 (2016), *review allowed* 360 Or 752 (2017).

4.7.1 Application

Warrant applications need not be in writing. See ORS 133.545 to 133.619: Instead of written affidavits, "the judge may take an oral statement under oath" if it is recorded, transcribed, certified, and retained. ORS 133.545(5). In addition, "the proposed warrant and the affidavit may be sent to the court by facsimile transmission or any similar electronic transmission that delivers a complete printable image of the proposed warrant. The affidavit may have a notarized acknowledgment, or the affiant may swear to the affidavit by telephone." ORS 133.545(6). See *State v Perryman*, 275 Or App 631, 635, 643 (2015); *State v Kauppi*, 277 Or App 485 (2016).

The determination of "probable cause" to issue a warrant must be made by a "neutral and detached magistrate." *Coolidge v New Hampshire*, 403 US 443, 449 (1971) (Fourth Amendment); *State v Castilleja*, 345 Or 255, 269, *adh'd to on recons*, 345 Or 473 (2008) (copying that phrase from the US Supreme Court into the Oregon Constitution); *State v Pierce*, 263 Or App 515, 519-20 (2014) (so noting).

"The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v United States*, 333 US 10, 13-14 (1948); *State v Matsen/Wilson*, 287 Or 581, 587 (1979) and *State v Ritz*, 361 Or 781, 790 n 3 (2017) (so quoting).

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

4.7.2 Jurisdiction and Authority

ORS 136.583 authorizes an Oregon circuit court to issue a search warrant to Yahoo in California for stored electronic files in Yahoo's California database. The statute's purpose was to allow Oregon courts to issue warrants for electronic communications in accordance with the Stored Communications Act at 18 USC sections 2701 to 2712, which Congress enacted in 1986 as part of the Electronic Communications Privacy Act. The SCA permits the government to require a provider of electronic communication services to disclose records if the entity (the government) obtains a warrant under state or federal rules. The SCA does not itself state whether a state can issue a search warrant for content in another state, but it allows states to authorize a procedure. Oregon did so in 2009, by enacting ORS 136.583, which authorizes warrants to recipients regardless if the recipient or the records are in Oregon. ORS 136.583 is a long-arm statute authorizing Oregon courts to issue search warrants. *State v Rose*, 264 Or App 95 (2014).

4.7.3 Probable Cause and Particularity

4.7.3.A Probable Cause

See **Particularity**, *post*, as Probable Cause and Particularity may overlap.

"Probable cause exists when facts set out in the affidavit could 'lead a reasonable person to believe that seizable things will probably be found in the location searched." *State v Newsted*, 279 Or App 701, 705 (2016). "A warrant may not authorize a search that is broader than the supporting affidavit supplies probable cause to justify." *State v Reid*, 319 Or 65, 71 (1994).

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

The "probable cause" necessary to conduct a warrantless search and to obtain a warrant to search is the same standard. *See* ORS 131.007(11) (probable cause to arrest); ORS 133.555 (probable cause to issue a search warrant). "'Probably' means 'more likely than not.'" "Those basic requirements for objective probable cause are equally applicable in the context of warrantless and warranted searches." *State v Foster*, 233 Or App 135, *aff'd* 350 Or 161 (2011).

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

Appellate courts "need not give any 'deference to the trial court's findings or conclusions'" but resolve "doubtful cases" "by deferring to an issuing magistrate's determination of probable cause." *State v Klingler*, 284 Or App 534, 540 (2017) (citations omitted). To encourage applications

for warrants, courts "resolve marginal cases in favor of holding the warrant valid." *State v Ingram*, 251 Or 324, 329 (1968); *State v Lambert*, 263 Or App 683 (2014). On reviewing whether an issuing magistrate could have concluded that an affidavit established probable cause, see *State v Goecks*, 265 Or App 158 (2014) and *State v Gardner*, 263 Or App 309 (2014). Appellate courts "are to construe the supporting affidavit in a commonsense and realistic fashion" deferring to reasonable inferences that could be drawn from the facts in the affidavit. *State v Heyne/Yunke*, 270 Or App 601, 605 (2015).

State v Webber, 281 Or App 342 (2016) The Court of Appeals reversed and remanded defendant's conviction, because the affidavit to support the search warrant did not establish probable cause to search his home. "Search warrants are presumptively valid; thus, in challenging a search warrant, it is defendant's burden to establish that the warrant was defective." *Id*. at 347. The affidavit established that there was probable cause to believe that defendant was connected with drug activity – he does not dispute that – but nothing in the affidavit connected drug activity to his home. The affiant's training and experience was not enough, in itself, to establish probable cause. Objective facts are required to establish probable cause to issue a warrant. The court had to adjust its reasoning around *State v Goodman*, 328 Or 318 (1999), which did state that "reliance on [an officer's training and experience] is a permissible way to establish a nexus between a suspected crime and a particular location to be searched."

4.7.4.B Particularity

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

State v Kauppi, 277 Or App 485 (2016) The Court of Appeals affirmed the trial court's issuance of a telephonic search warrant despite a clerical error on the written application and affidavit that used the wrong first and middle names. The "place" to be searched was defendant himself: This was an application for a breath test or a blood draw after defendant refused a breath test for a DUI. The "particularity requirements of both Article I, section 9, and ORS 133.565(2)" are reviewed under the same standards. *Id*. at 488. "[W]hen an otherwise adequately descriptive warrant contains a clerical error, that error does not render the warrant insufficient where the executing officer is aware of that error and uses personal knowledge to remedy the incorrect information in the warrant." *Id*. at 490.

State v Mansor, 279 Or App 778 (2016), *review allowed* 360 Or 752 (2017), oral argument webcast here. The Court of Appeals reversed and remanded a trial court's denial of a

motion to suppress evidence of defendant's murder of his infant because the warrant authorizing the seizure and subsequent search of defendant's home computers was overbroad, thus violating the particularity requirement of Article I, section 9. The Oregon Supreme Court allowed review of this case.

Defendant shook his 11-week old infant so hard, the infant's brain liquefied. (Portland Tribune report here.) Thereafter, the infant was taking one breath every one or two minutes. Rather than call 911, defendant decided to do computer research about babies not breathing. After 15 minutes of researching, he then called 911 to say that his baby wasn't breathing. Medics arrived within minutes. A detective arrived a few minutes later and interviewed the "non-emotive" defendant who admitted "smacking" and "shaking" the infant. He hadn't bothered to call his wife, even during the interview with the detective. He did not state which of the four computers he used to do his research.

After a doctor told the detective that the baby's skull was fractured, his retinas were detached, his ribs were broken, his brain was "dead," and the infant would die soon, and also the infant's twin brother also had six rib fractures, the detective prepared an affidavit for a search warrant for the four computers, cell phones, and several other types of evidence (ie. rags and medicines) listed an "attachment A" to his affidavit, and a form of search warrant that said: "See attachment A" under the heading "You are to seize and search and forensically examine the following objects:". The warrant application did not specify any protocol for the forensic examination of the computers. The warrant application did not have any time constraints on the computer examinations. The affidavit stated that there was probable cause that Criminal Mistreatment I and Assault I had occurred at defendant's condominium.

The trial judge signed the search warrant at the judge's house at night. The detective executed the search warrant by seizing four computers among other things from defendant's residence. An examiner accessed the computer data therein, including 10-year old search-history data. In other words, the forensic exam was not limited to the day of the death. The search for key words produced infant-abuse search terms and things such as "Oregon child abuse laws" and "father hates infant." According to a July 14, 2012 Oregonian report (this is not in the appellate opinion):

> "Detectives also asked [Northwest Regional Computer Forensics Laboratory], to investigate Internet use related to child abuse, without a time frame. The forensics report shows that between April 19 and June 9, 2011, the computers' Internet history includes many searches and visits to web pages related to child abuse. According to the report, information was accessed on state child abuse law, 'newborn abuse,' infant injuries, shaken baby syndrome and therapy for abusers, among other related information. The report cites specific searches and web hits, including 'father hates infant,' 'How do I stop abusing my baby,' and 'Parents of Newborn Baby Accused of Horrific Abuse.' The lab also found a game called "Candyvan" had been downloaded on one of the computers. According to the report, the game is a 'simple DOS-based program where the protagonist drives around in a van/bus/ice-cream truck, picks up 10 children, and abuses them (physically and/or sexually) while trying to avoid attention and the police.' Certain player actions correspond in the game to words such as, 'You

> throw the kid to the ground and kick until there's a pool of blood on the floor.' The report shows the game was saved to a download folder with the username 'kaliq' and played."

Defendant moved to suppress all evidence from the seizure and search of the computers, although defense counsel stated during oral argument that defendant did not object to a search of computer terms during the 15 minutes before the 911 call. *Id*. at 786. The trial court denied the motion.

Defendant was charged with murder by abuse and first- and third-degree criminal mistreatment. It is somewhat unclear from the Court of Appeals' opinion precisely what evidence was admitted at trial. According to the imprecise Court of Appeals' opinion, "the state presented evidence of the results of the forensic examination of defendant's computers, recounting the internet search history described above. See 279 Or App at 782-83." The evidence the jury heard appears to be this:

> Specifically, the examination disclosed internet searches on: (1) April 19, 2011, for "infant abuse" and "infant abuse symptoms"; (2) April 30, for "signs of abused infant"; (3) May 19, for "signs of newborn abuse"; and (4) May 22, for "abused newborn symptoms" and "abused newborns." Finally, the examination disclosed Google searches on June 9 for the terms "newborn abuse," "abuser therapy," "Oregon child abuse laws," "father hates infant," "afraid of abusing my baby," "how do I deal with a screaming baby," and "baby, swelling, back of head." The examination also disclosed that, on June 9, the user had visited a website and clicked on a file titled "Can therapy help an abuser?" *Id*. at 783.

A jury convicted defendant of all charges. The Court of Appeals reversed and remanded. First, "defendant bears the burden of proving the unlawfulness of a warranted search." The court noted that "[a]lthough [the detective]'s affidavit described defendant's internet searches on [the day of the 911 call], nothing in the affidavit referred to any other searches or, by way of competent expertise, substantiated a likelihood that parents who physically abuse their children are likely to have engaged in prior internet searches pertaining to such conduct."

The court concluded: "The warrant here was overbroad. Certainly, [the detective]'s affidavit established probable cause with respect to internet searches during the 15-minute period preceding the 9-1-1 call—and, arguably, with respect to all electronic communications and photos during the entire time that [the baby] was in defendant's care on [that date]. However, nothing in [the detective]'s affidavit established probable cause that a temporally unlimited examination of the contents of defendants' computers, including of files and functions unrelated to internet searches and emails, would yield other evidence of the events of [that date], or of any other crime." *Id*. at 802.

The "degree of specificity [required in a warrant application] depends on the circumstances and the nature of the property to be seized and may also be affected by the nature of the right which is protected." *Id*. at 792. There is a "specificity" and an "overbreadth" concept. *Id*. at 793. Warrants "authorizing the forensic examination of such devices must specifically identify and carefully circumscribe the information

authorized to be examined." *Id.* at 794. The court concluded that the warrant was "impermissibly overbroad, rendering the warranted search of the contents of defendant's computers unlawful under Article I, section 9." *Id*. at 801. For assessing the "particularity" requirement, "personal electronic devices are more akin to the 'place' to be searched than to the 'thing' to be seized and examined." *Id*. That means the search of the "place" be limited to the "things" – the digital data – for which there is probable cause to search. The affidavit "certainly" established probable cause for the 15-minute period before the 911 call. But the search of all emails and files beyond the day of the 911 call was overbroad.

This warrant "was so unbounded as to sanction the sort of 'undue rummaging' that the particularity requirement was enacted to preclude." *Id*. at 803.

State v Friddle, 281 Or App 130 (2016) Defendant's girlfriend told police he punched her in the face at his home. She said he probably recorded their fight. She said he kept a security system at the home that allows him to access cameras from his cell phone and see a live feed of the house. Police then spoke with defendant at his home, who said he'd punched her in self-defense, and that he'd recorded their "conversation." He let the police officer listen to audio on a cell phone, which was a profanity-laced screaming argument with breaking glass and a thud that sounded like a punch. Three months later, the officer applied for a warrant to seize and search various personal electronic devices and the security system at defendant's house. The trial court issued the warrant authorizing seizure of any cell phones, computers, security system, recorders, or tablets owned or operated by defendant at his residence, and then their examination for evidence of the crime of assault. The officer arrested defendant, seized from him the same cell phone that defendant had used to let the officer listen to the assault. Officers then executed the warrant, seizing "a couple cell phones," two cameras from the security system, and defendant's computer and hard drive. They then went into his garage, saw a gun safe, opened it, and took recording devices, cameras, computer hardware, and 93 grams of marijuana from inside it. He was charged with possession of marijuana.

Defendant moved to suppress. He contended that the warrant was overbroad because it encompassed some electronic devices for which there was no probable cause to seize or conduct any examination. He contended that the warrant application established probable cause to examine the contents of only the single cell phone and the home security system. The trial court denied the motion to suppress.

The Court of Appeals reversed and remanded, relying on ***State v Mansor***, 279 Or App 778 (2016), *review allowed* 360 Or 752 (2017). The warrant was overbroad because the affidavit in support of the warrant provided probable cause to search only his cell phone that had the audio and his home surveillance system, which defendant did not dispute. The probable cause assessment depends on "the contents of the warrant application affidavit." *Id* at 138. "A warrant may not authorize a search that is broader than the supporting affidavit supplies probable cause to justify." *Ibid*. Even assuming the affiant's asserted competence in recording and storing audio and visual, nothing in the affidavit addressed whether a suspect who stored a recording on an event on one personal device will do so on any or all other devices that he owns. The affidavit did not

even refer to such a scenario, let alone allow for probable cause to so conclude. In short, the "search warrant was invalid, rendering the search of the gun safe unlawful."

State v Burnham, 287 Or App 661 (9/07/17) (Garrett, Lagesen, Ortega) (Lincoln) Defendant allegedly illegally shot and killed an elk. Officers obtained a warrant authorizing them to seize and search the contents of "any and all" of defendant's "computer equipment" and "electronic data devices," including "any data processing hardware and storage devices, cell phones, computers, laptops, notebooks, computer systems," and "any other computer storage media that contains information of illegally obtained or possessed wildlife or parts thereof." In a supporting affidavit, an officer averred that based on his "training and experience as a fish and wildlife officer" it is "customary and traditional" for a hunter to retain photographs of harvested wildlife and to store those photos in "various formats," including in "computer media devices" and "laptops." The officer further averred that based on his training and experience, when a mobile phone is used to take photos, "often times the phone will store the date, time, and a geographical location when the function was performed," and that information "can be stored on, but not limited to, internal memories, and Internet databases."

In executing the search warrant, officers seized a number of incriminating items. Officers also seized a laptop owned by defendant, performed forensic analysis on its digital contents, and obtained incriminating GPS data from photos discovered on the laptop.

Defendant moved to suppress all evidence derived from the execution of the search warrant, arguing, among other things, that the warrant was overbroad and that the affidavit was insufficient to establish probable cause for the seizure and analysis of defendant's laptop. The trial court denied defendant's motion.

The Court of Appeals reversed and remanded: The warrant was impermissibly overbroad and is akin to *State v Friddle*, 281 Or App 130 (2016):

> "When a warrant authorizes the seizure and examination of the contents of multiple personal electronic devices—which are, for purposes of the particularity requirement of Article I, section 9, more akin to 'place[s] to be searched' than 'thing[s] to be seized and examined'—the affidavit must substantiate probable cause for the forensic examination of the contents of each of the electronic devices included in the warrant. *Friddle*, 281 Or App at 138 (quoting [*State v Mansor*, 279 Or App 778, 801 (2016), *rev allowed*, 360 Or 752 (2017)]). If it does not, such a warrant authorizes invasions of privacy that are not supported by probable cause and, as such, is overbroad in violation of Article I, section 9. *Id*. at 137-38."
>
> The court wrote that in both *Friddle* and this case, "the only concrete factual link between the crimes under investigation and the multiple electronic devices covered by the warrant was the likely presence of incriminating digital data on specifically identified devices—here, a single cellular phone. As in *Friddle*, the search-warrant affidavit in this case relies on the evidence potentially contained in the phone to justify the search of other electronic devices based on the invocation of the affiant's "training and experience." Yet, as in *Friddle*, the affiant

in this case alleged no specialized training or experience actually bearing on the transmission of data between electronic devices, nor is there any experience inherent in that of a fish and wildlife officer from which a magistrate could infer such knowledge. *See id*. at 140 ("The phrase 'training and experience' ** * is not a magical incantation with the power to imbue speculation, stereotype, or pseudoscience with an impenetrable armor of veracity."

"From the affidavit, a magistrate could infer that, because defendant's cellular phone was used to take incriminating photographs—and defendant posted those photos on his Facebook page—there was a possibility that the photos had been transmitted to at least some of his other electronic devices. Yet, the contents of the affidavit failed to establish that is was *more likely than not* that such transmission had occurred with respect to all of his devices. *See id*. at 138 ("'[T]he standard of probability requires the conclusion that it is *more likely than not* that the objects of the search will be found at the specified location.'" (Quoting *State v. Williams*, 270 Or App 721, 725, 349 P3d 616 (2015) (emphasis in *Friddle*).)). Thus, as in *Friddle*, because the affidavit contains no specific information to support an inference that data existing on one device would have been transmitted to other devices belonging to defendant, the affidavit was insufficient to support probable cause to examine those other devices. Accordingly, the warrant was impermissibly overbroad in violation of Article I, section 9, and the trial court erred in denying defendant's motion to suppress." *Id*. at 666 (emphasis added).

4.7.4.C Staleness

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

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

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

4.7.4 Scope

Oregon Constitution: When "police have acted under authority of a warrant * * * 'the burden is on the party seeking suppression (i.e., the defendant) to prove the unlawfulness of a search or seizure.' *State v Johnson*, 335 Or 511, 520 (2003)." *State v Walker*, 350 Or 540 (2011) (due to the underdeveloped record, the Court reserved "for another day the question whether a premises

warrant authorizes the search of the personal effects of individuals who happen to be on the premises when those effects are not in the physical possession of those individuals.”).

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

4.7.5 Remedy

When a warrant “application includes constitutionally tainted information, the proper remedy is for the reviewing court to excise all the tainted information from the application and determine whether the remaining information in the affidavit is sufficient to establish probable cause.” *State v Gardner*, 263 Or App 309, 313 (2014) (citing *State v Hitesman/Page*, 113 Or App 356, 359, *rev den* 314 Or 574 (1992)). After excising all tainted information, the reviewing court then determines, “based on the remaining information contained in the warrant, whether a neutral and detached magistrate could conclude that there is reason to believe that the facts stated are true, and that the facts and circumstances disclosed in the application sufficient to establish probable cause to justify the requested search.” *Gardner*, 263 Or App at 313 (citing *State v Castilleja*, 345 Or 255, 264-65, *adh’d to on recons*, 345 Or 473 (2008)).

4.8 Exceptions to Warrant Requirement (or Not Searches or Seizures)

It is interesting that the Oregon appellate courts have stated: “Normally, in order for a search to be constitutionally permissible, the police must have a search warrant.” *State v Paulson*, 313 Or 346, 351 (1992); *State v Smith*, 277 Or App 298, 302 (2016) (so quoting). That is not really an accurate description of what is “normal” in search and seizure law. First, a search warrant does not automatically make a search constitutionally permissible. See **Section 4.7** on warrants. Second, “normally,” existing warrant exceptions are invoked to try to make a search constitutionally permissible. This **Section 4.8** describes warrant exceptions.

Moreover, Oregon appellate courts may be trailing after the U.S. Supreme Court in that their analysis is moving toward a “touchstone” of “reasonableness” standard rather than the strict “warrant or a warrant exception” requirement. United States Supreme Court “cases establish that a warrant is generally required for a search of a home, *Brigham City v Stuart*, 547 US 398, 403 (2006), but ‘the ultimate touchstone of the Fourth Amendment is ‘reasonableness.’” *Fernandez v California*, 134 S Ct 1126 (2014); *see also Florida v Jimeno*, 500 US 248, 250 (1991) (“The touchstone of the Fourth Amendment is reasonableness.”) (citing “*Katz v United States*, 389 US 347, 389 US 360 (1967)”).

State action must be involved to implicate search and seizure rights. *State v Sines*, 359 Or 41, 50 (2016).

Even an encounter between a government actor and a person, house, paper, or effect may not implicate the state or federal constitutions. For example, “there is no such thing as a Fourth Amendment right to be free from intrusive questioning.” *Van Patten v State of Oregon*, 273 Or App 476 (2015) (health insurance policy self-assessment questionnaires). “Mere conversation” between a state agent and a person is not a “stop,” so no warrant and no justification for the lack

of a warrant is required to engage in "mere conversation." *State v Backstrand*, 354 Or 392 (2013); *State v Highley*, 354 Or 459 (2013); *State v Anderson*, 354 Or 440 (2013).

If the encounter does implicate a constitution, then: "Warrantless searches and seizures are *per se* unreasonable unless the state proves an exception to the warrant requirement." *State v Bridewell*, 306 Or 231, 235 (1988); *State v Tucker*, 330 Or 85, 89 (2000); ORS 133.693(4). *State v Davis*, 295 Or 227, 237 (1983) (quoting *Katz v United States*, 389 US 347 (1967) and *State v Matsen/Wilson*, 287 Or 581 (1979)) ("warrantless entries and searches are *per se* unreasonable unless falling within one of the few 'specifically established and well-delineated exceptions' to the warrant requirement.").

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

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

"Whenever the police undertake a search or seizure without a warrant, the state must demonstrate by a preponderance of the evidence that the search or seizure did not violate Article I, section 9. *State v Cook*, 332 Or 601, 608, 34 P3d 156 (2001)." *State v Lien/Wilverding*, 283 Or App 334, 341 (2017).

In 1986, the Oregon Supreme Court noted that it foresaw a "near future when the warrant requirement . . . can be fulfilled virtually without exception:"

> "In this modern day of electronics and computers, we foresee a time in the near future when the warrant requirement of the state and federal constitutions can be fulfilled virtually without exception. All that would be needed in this state would be a central facility with magistrates on duty and available 24 hours a day. All police in the state could call in by telephone or other electronic device to the central facility where the facts, given under oath, constituting the purported probable cause for search and seizure would be recorded. The magistrates would evaluate those facts and, if deemed sufficient to justify a search and seizure, the magistrate would immediately issue an electronic warrant authorizing the officer on the scene to proceed. The warrant could either be retained in the central facility or electronically recorded in any city or county in the state. Thus, the desired goal of having a neutral magistrate could be achieved without the present invasion of the rights of a citizen created by the delay under our current cumbersome procedure and yet would fully protect the rights of the citizen from warrantless searches." *State v Brown*, 301 Or 268, 278 n 6 (1986); *State v Bliss*, 283 Or App 833, 838 n 3 (2017) *review allowed* (2017).

4.8.1 Probable Cause to Arrest

An arrest is a seizure. "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). "'A peace officer may arrest a person

without a warrant if the officer has probable cause to believe that the person has committed' a crime. ORS 133.310(1)." *State v Sepulveda*, 288 Or App 632, 641 (2017)

"The state bears the burden of establishing the validity of a warrantless search or seizure." *State v Hebrard*, 244 Or App 593, 599 (2011).

"An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure on an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." *Beck v Ohio*, 379 US 89, 96 (1964) (Officers violated Fourth and Fourteenth Amendments in a search incident to arrest because the arrest lacked probable cause: "Whether that arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.").

"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.

In *State v Sepulveda*, 288 Or App 632, 641 (2017), the Court of Appeals explained that "deputies lacked probable cause to arrest defendant after the frisk revealed that defendant was not armed, because the concern for officer safety had dissipated. The stop and frisk did not reveal any further information that would lead an objectively reasonable officer to conclude that it was more likely than not that defendant had committed a crime. Nor did the state present any evidence to demonstrate that probable cause existed to further detain defendant in handcuffs following the frisk."

Walking alone while female at night, on a Portland public sidewalk on 82nd Avenue in a puffy jacket, skirt, and heeled boots is not particularly suspicious for the crime of attempted prostitution. Neither is looking backward over one's shoulder under those circumstances. *State v Martin*, 260 Or App 461 (2014). In contrast, probable cause to arrest has been present for attempted prostitution when an officer testifies that a lone female "was standing on a corner in a high vice area; she had waved and beckoned to four separate lone male motorists; two of the motorists circled the block and returned to talk with her; she had waved and beckoned to him; when he circled the block and returned to her, she walked away from his car when another woman talked to her and pointed at him; she acknowledged that she was 'dating,' a street term that [the officer] understood from his experience and training to mean that she was soliciting for prostitution; and she indicated that she would not 'date' him because he was a police officer." *State v Wiseman*, 68 Or App 839, 842 (1984).

4.8.2 Search Incident to Lawful Arrest

4.8.2.A Oregon Constitution

A search incident to lawful arrest is one of the "few" specifically established exceptions to the warrant requirement. *State v Hite*, 198 Or App 1, 6 (2005). A lawful arrest requires probable cause: "An officer has probable cause to arrest a person only when the officer has a substantial objective basis for believing that, more likely than not, an offense has been committed and the person to be arrested has committed it." *State v Martin*, 260 Or App 461, 471 (2014).

"It is the state's burden to prove that a warrantless arrest and search was supported by probable cause. ORS 133.693(4); *State v Foster*, 350 Or 161, 169-70 (2011)." *State v Barker*, 271 Or App 63, 68 (2015).

"Lack of probable cause to arrest, of course, would mean that there could be no search incident to a presumed arrest on that charge and that the things seized pursuant to such a presumed arrest should be suppressed." *State v Plummer*, 160 Or App 275, 280 (1999).

A search incident to arrest "must be reasonable in time, scope, and intensity." *State v. Delfino*, 281 Or App 725, 727 (2016), *rev den*, 361 Or 525 (2017); *State v Bladorn*, 289 Or App 1, 6 (2017).

"A search incident to arrest may precede the arrest" when "the defendant was subject to restraint when the search occurred." *State v Mazzola*, 356 Or 804, 812 n 8 (2015). But probable cause for an arrest must exist" independently of evidence brought to light by the search." *Ibid*. (quotation omitted). *See also State v Jacobs*, 187 Or App 330, 333 (2003) ("A search may be considered to be 'incident to arrest' even though it preceded the arrest.").

Under Article I, section 9, there are three valid justifications for a warrantless search incident to lawful arrest: (1) to protect the police officer's safety, (2) to prevent the destruction of evidence, and (3) to discover evidence relevant to the crime of arrest. *State v Mazzola*, 356 Or 804, 811 (2015); *State v Hoskinson*, 320 Or 83, 86 (1994); *State v Barker*, 271 Or App 63, 67 (2015). A search incident to arrest must be reasonable in time, scope, and intensity. *State v Washington*, 265 Or App 532, 536 (2014). The first two purposes – keeping people safe and preventing destruction of evidence -- relate to exigency. Such searches are justified only when the area searches is still within the defendant's control. *State v Krause*, 281 Or App 143, 146 (2016). The third basis – to discover evidence of the crime of arrest – is lawful "even though the defendant no longer has control over the area searched, as long as the evidence reasonably could be found in that area and the search is otherwise reasonable in time, scope, and intensity." *Id*. (citing *State v Washington*, 265 Or App 536 (2014)); *State v Owens*, 302 Or 196, 205 (1986).

If an officer arrests a person for one crime, "but also has probable cause to arrest that person for a new crime, the officer may conduct a search for evidence of that new crime so long as the search is reasonable under the circumstances." *State v Nix*, 236 Or App 32, 42 (2010); *State v Delfino*, 281 Or App 725, 729 n 2 (2016).

Note: Courts may justify this exception other than as stated in *State v Hoskinson*, 320 Or 83, 86 (1994). For example: "The justification for this exception to the warrant requirement is that such searches are necessary in order to protect the arresting officer in case the suspect has a weapon within reach and to prevent the suspect from reaching and destroying evidence. *State v Caraher*, 293 Or 741, 759 (1982)." *State v Groom*, 249 Or App 118 (2012). Another example: A "police officer may conduct a search incident to arrest if the search 'relates to a crime which there is

probable cause to believe the arrestee has committee, and when it is reasonable in all the circumstances.' *State v Owens*, 302 Or 196, 204 (1986)." *State v D.C.*, 269 Or App 869, 874 (2015).

"The arrest must be for a crime, evidence of which reasonably could be concealed on the arrestee's person or in the belongings in his or her immediate possession at the time of the arrest. * * * [I]f the person is arrested for a crime which ordinarily has neither instrumentalities nor fruits which could reasonably be concealed on the arrestee's person or in the belongings in his or her immediate possession, no warrantless search for evidence of that crime would be authorized as incident to that arrest." *State v Owens*, 302 Or 196, 200 (1986).

An officer may search closed containers without a warrant as an incident to a lawful arrest, "so long as the search was reasonable in time and space and was either for evidence of the crime prompting the arrest, to prevent the destruction of evidence, or to protect the arresting officer." *State v Gotham*, 109 Or App 646, 649 (1991) *rev den* 312 Or 677 (1992) (citing *State v Caraher*, 293 Or 741, 759 (1982)). Stated differently: "The police may search closed containers 'found on or immediately associated with the arrestee, but only when it is reasonable to believe that evidence of a crime for which the person was arrested could be concealed there.' *State v Owens*, 302 Or 196, 202 (1986)." *State v Hite*, 266 Or App 710, 724-25 (2014).

After closed containers are removed from a defendant's person, there may be neither an officer-safety need, nor a risk-of-escape need to open the container. *State v Moulton*, 266 Or App 128 (2014) (closed pouch and case); *State v Petri*, 214 Or App 138, 144-45 (2007) (sunglasses case opened a needle inside); *State v Dickerson*, 135 Or App 192, 194-95 (1995) (pocketknife opened).

On mobile-device searches incident to arrest, the Court of Appeals has held: "the 40-minute delay between defendant's arrest and the search of his cellular telephone was 'necessary and appropriate' to ensure that the cellular telephone could be expertly searched and to protect against the inadvertent destruction of evidence. Further, * * * there is no suggestion in this record of any unjustifiable delay. * * * Accordingly, the search of defendant's cellular telephone was reasonable in time for purposes of the search incident to arrest exception." *State v Nix*, 236 Or App 32, 36 (2010).

Under *State v Hoskinson*, 320 Or 83 (1994), there are three justifications for a search incident to arrest: officer safety, prevent destruction of evidence, and discover evidence relevant to the crime. "However, a search incident to arrest for failure to display a driver's license ordinarily is 'limited to a search for weapons, because there is no reason to search an individual for evidence of that crime, which is complete upon noncompliance." A limited pat-down or a "limited search for weapons" to protect the officer or "to prevent escape" is justified whenever a person is taken into custody but a "search of defendant's pocket" is justified only if the officer develops reasonable suspicion that the person in custody "poses a serious threat of harm or escape and that a search would lessen or eliminate the threat." *State v Durando*, 262 Or App 299 (2014); see also *State v Washington*, 265 Or App 532 (2014); *State v Moulton*, 266 Or App 128 (2014).

The "mere fact that a defendant has a history of drug use does not provide an officer with reasonable suspicion to stop a defendant, let alone probable cause to search or arrest." *State v Barker*, 271 Or App 63 (2015) citing *State v Frias*, 229 Or App 60, 65 (2009); *State v Holcomb*, 202 Or App 73, 78, *adh'd to as modif on recons*, 203 Or App 34 (2005). That includes a messy truck, ground-down teeth, a leathery look, and a drug history.

A "defendant's inability to remain still and dilated pupils also contribute little to establishing probable cause." *State v Barker*, 271 Or App 63 (2015) citing *State v Kolb*, 251 Or App 303 (2012). Stacking inferences does not establish reasonable suspicion let alone probable cause.

A defendant's possession of a scale does not give rise to probable cause that defendant is in current possession of illegal drugs. *State v Barker*, 271 Or App 63 (2015); *State v Lane*, 135 Or App 233, *rev den*, 322 Or 360 (1995).

A defendant's protective behavior of her purse is her exercise of her privacy rights. "The assertion of a constitutionally protected right against warrantless searches cannot be a basis for such a search." *State v Barker*, 271 Or App 63 (2015) citing *State v Lavender*, 93 Or App 361, 364 (1988).

Once the officer saw that a defendant's gun was fake, he could not look for more weapons in his pockets. *State v Castillo-Lima*, 274 Or App 67 (2015). Note: This opinion begins stating that the "search incident to arrest" exception is at issue, but mid-way through the analysis, the opinion states: "The parties appear to agree that the relevant exception in this case is the officer-safety exception." *Id*. at 69, 72.

> "Mere presence in the proximity of a controlled substance is not a sufficient basis from which to draw an inference of constructive possession," per *State v Fry*, 191 Or App 90, 93 (2003). Also, being a driver of a car or owner or a residence does not "give rise to probable cause" that the driver or owner "controlled everything within," per *State v Daniels*, 348 Or 513, 522 (2010). ***State v Keller***, 280 Or App 249 (2016)

4.8.2.B Fourth Amendment

"In 1914, [the United States] Court first acknowledged in dictum 'the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime.' *Weeks v. United States*, 232 U. S. 383, 392. Since that time, it has been well accepted that such a search constitutes an exception to the warrant requirement." *Riley v California*, 134 S Ct 2473 (2014) slip op. at 9. **See Section 4.8.3.A.iii, *post*, on warrantless searches of mobile devices incident to lawful arrest.**

Probable cause for a warrantless arrest arises when circumstances within the officer's knowledge are sufficient to warrant a prudent person to believe that the suspect has committed, is committing, or is about to commit an offense. *Devenpeck v Alford*, 543 US 146, 152 (2004); *Michigan v DeFillippo*, 443 US 31, 37 (1979).

4.8.2.B.i Mobile Phones, Computers, Devices

See **Section 4.5.13.B** and **4.8.3.A.iii** regarding mobile devices. See *State v Mansor*, 279 Or App 778 (2016), *review allowed*, 360 Or 752 (2017). on standards for obtaining a warrant to search computers.

Officers must generally secure a warrant before conducting a search of information on a mobile device even under a search incident to arrest. *Riley v California*, 134 S Ct 2473 (2014). "Privacy comes at a cost. Our holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest." *Id*. at slip op. 25.

"Digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape. Law enforcement officers remain free to examine the physical aspects of a phone to ensure that it will not be used as a weapon—say, to determine whether there is a razor blade hidden between the phone and its case. Once an officer has secured a phone and eliminated any potential physical threats, however, data on the phone can endanger no one." *Id*. at slip op 11. "Absent more precise guidance from the founding era, we generally determine whether to exempt a given type of search from the warrant requirement 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.' *Wyoming* v *Houghton*, 526 U. S. 295, 300 (1999)." *Riley v California*, 134 S Ct 2473 (2014).

See *Schlossberg v Solesbee*, 844 F Supp 2d 1165 (D Or 2012) on warrantless police searches of personal electronic devices as searches incident to arrest. www.youtube.com/watch?v=rVyt4e5SNeM. Personal digital cameras cannot be searched as incident to an arrest "absent a showing that the search was necessary to prevent the destruction of evidence, to ensure officer safety, or that other exigent circumstances exist." A laptop, a cell phone, a smart phone, and a camera, are categorized the same way because a rule requiring officers to distinguish between such devices is impractical. Note: This case predated *Riley v California*, 573 US __, 134 S Ct 2473 (2014).

4.8.2.B.ii DNA Searches of Arrested Persons

*Maryland v King,*133 S Ct 1958 (2013) held that taking and analyzing DNA from an arrested person's cheek as a search incident to arrest for a "dangerous" or "serious offense," supported by probable cause, is a legitimate police booking procedure that is reasonable under the Fourth Amendment, like fingerprinting and photographing. Per the Court, such searches are *similar to and different from* "special needs" cases. *Similar* to special needs cases because "the search involves no discretion" by officers. *Different* from because special needs cases have no individualized suspicion but people are arrested for serious offenses based on probable cause. In this case, the Court appears to have blended "special needs" analysis with the "search incident to arrest" analysis with prison-specific administrative searches.

4.8.2.B.iii Smell of Drugs

See **Section 4.8.9.C** on Drug Detection Dogs.

The presence of odor of contraband may establish probable cause to arrest without a warrant. *United States v Barron*, 472 F2d 1215, 1217 (9th Cir 1973); *United States v Ramos*, 443 F3d 304, 308 (3rd Cir 2004); *State v Derrah*, 191 Or App 511, 518 (2004) (the smell of marijuana from a residence

without more is sufficient to support a conclusion that marijuana will likely be found inside that residence).

The presence of an odor of contraband may establish reasonable suspicion to justify an investigatory stop. *State v Vennell*, 274 Or App 94, 99 (2015). As a lawful stop, it can sufficiently attenuate an unlawful seizure. State v Lay, 242 Or App 38, 49 (2011); *State v Lowell*, 275 Or App 365, 376 (2015).

4.8.2.B.iv Body Searches

See also **Body Searches** under Exigent Circumstances.

State v Scruggs, 274 Or App 575 (2015) With binoculars at 5:00 a.m., officers saw defendant in "Crack Alley" in Old Town Portland talking to known drug dealers. Defendant reached down the front of his pants, "dug around," took something out, and appeared to engage in a drug transaction. Defendant ran when police approached, police lost sight of him, then they found him, but no drugs were in his pockets. Officers brought defendant to a police station (the opinion is unclear if he'd been arrested at this point) because they suspected him of "keistering." That is, holding drugs between the buttocks or farther up. In a private room, officers had defendant remove all his clothes, bend over, and "to use his own hands to spread apart his buttock cheeks" and "to cough." Defendant put in only a "halfhearted" effort by bending to 45 degrees. Officer handcuffed defendant, and three officers then "physically bent defendant over," and upon defendant's "clenching," the officers "proceeded to physically and forcibly spread them open." A baggie was stuffed between his buttocks. An officer "pulled out" the bag, which contained cocaine. The officer testified that he would've had to get a warrant if the bag had been in the anal canal. Defendant was arrested. The police discovered that defendant was on probation and held him on a "no bail probation violation detainer," meaning that his probation officer would have asked defendant to be held without bail. Although the Multnomah County Jail has a "strip search policy," that policy was not introduced as evidence "during trial." A sergeant testified that the policy does not permit deputies to physically manipulate the inmate during a strip search; instead, a noncompliant inmate is handcuffed and placed into a room without a toilet and/or deputies may obtain a warrant to send the inmate to a hospital.

Under the search incident to lawful arrest exception, a search must be "reasonable in time, scope, and intensity" to be valid. The Court of Appeals agreed with the trial court that the search incident to arrest exception was not met because this search was not reasonable in time, scope, or intensity. This is a case of first impression: the reasonableness for time, scope, or intensity of a "search incident to arrest" has not been applied to "strip or body cavity searches."

4.8.3 Exigent Circumstances

See **Section 4.6.4** on Entering Premises. In *State v Fessenden/Dicke*, 355 Or 759, 765, 773 n 14 (2014), the Oregon Supreme Court in dicta listed three separate acts: "warrantless entry, search, or seizure" under its "emergency aid exception" and "exigent circumstances" discussion. Because the Court inexplicably made that distinction, "warrantless entries" (as if an "entry" differs from a "search") are addressed in Section 4.6.4, and this Section addresses exigent circumstances generally.

In *State v Bonilla,* 358 Or 475, 489 (2015), the court recited the following as *separate* exceptions to the warrant requirement:

-- "the emergency aid exception"
-- "the officer safety exception"
-- "the school safety exception"
-- "the more general 'exigent circumstances' exception"

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

"Absent consent, a warrantless entry can be supported only by exigent circumstances, i.e., where prompt responsive action by police officers is demanded. Such circumstances have been found, for example, to justify entry in the case of hot pursuit, * * * the destruction of evidence, * * * flight of a suspect, * * * and where emergency aid was required by someone within." *State v Davis*, 295 Or 227, 237-38 (1983) (citing federal cases).

The exigent circumstances exception applies to property, which includes animals. *State v Fessenden/Dicke*, 355 Or 759 (2014).

Note that "emergency aid" was a subset of "exigent circumstances" under *Davis*. But under recent Oregon Supreme Court cases, "emergency aid" now is a separate exception.

4.8.3.A Fourth Amendment

4.8.3.A.i Body Searches

See Body Searches under **Search Incident to Lawful Arrest** at **Section 4.8.2**.

In a warrantless blood-draw case, the US Supreme Court recited cases where exigencies allow for "acting without a warrant," "searching," and/or "seizing" *in homes or buildings*. Those are: "to provide emergency assistance to an occupant of a home, *Michigan v Fisher*, 588 US 45, 47-48 (2009)," to "engage in hot pursuit of a fleeing suspect, *United States v Santana*, 427 US 38, 42-32 (1976)," or to "enter a burning building to put out a fire and investigate its cause, *Michigan v Tyler*, 436 US 499, 509-10 (1978)," or "to prevent the imminent destruction of evidence" under *Cupp v Murphy*, 412 US 291, 296 (1973), to prevent a person from destroying hidden contraband in his trailer, *Illinois v McArthur*, 531 US 326, 331 (2001), and to search "a suspect's fingernails to preserve evidence that the suspect was trying to rub off." *Missouri v McNeely*, 133 S Ct 1552 (2012).

4.8.3.A.ii Entries to Premises

See **Sections 4.6.2** and **4.6.3** and **4.6.4.**

"[T]he exigencies of the situation [may] make the needs of law enforcement so compelling that the warrantless search is objectively reasonable." *Michigan v Fisher*, 558 US 45, 130 S Ct 546, 548

(2009) ("law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury") (quoting *Mincey v Arizona*, 437 US 385, 393–394 (1978)). Officers "may enter a residence without a warrant when they have 'an objectively reasonable basis for believing that an occupant is . . . imminently threatened with [serious injury.]'" *Ryburn v Huff*, 132 S Ct 987, 990 (2012) (quoting *Brigham City v Stuart*, 547 US 398, 400 (2006) (Fourth Amendment). The Court "explained that the need to protect or preserve life or avoid serious injury is justification for what would otherwise illegal absent an exigency or emergency." *Ibid*.

"[T]he exigent circumstances rule applies when the police do not gain entry to premises by means of an actual or threatened violation of the Fourth Amendment." *Kentucky v King*, 131 S Ct 1849 (2011). Reiterating exigencies it had identified in *Brigham City v Stuart*, 547 US 398, 403 (2006) the Court summarized "exigencies that may justify a warrantless search of a home. * * * Under the 'emergency aid' exception, for example, 'officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.' * * * Police officers may enter premises without a warrant when they are in hot pursuit of a fleeing suspect." The "need to 'prevent the imminent destruction of evidence' has long been recognized as a sufficient justification for a warrantless search." *Id*. (citations omitted).

Note: In April 2012, the Oregon Supreme Court wrote: "It appears that, although the United States Supreme Court has recognized an 'exigent circumstances' exception to the warrant requirement in the Fourth Amendment context, it has never attempted to summarize the exception." *State v Miskell/Sinibaldi*, 351 Or 680, 690 n 4 (2012). But in January 2011, in *Kentucky v King*, 131 S Ct 1849 (2011), the United States Supreme Court had summarized "the exigent circumstances rule." *King* is not its first US Supreme Court case to recite the "exigent circumstances" exception. The *King* Court cited *Brigham City v Stuart*, 547 US 398, 403 (2006), which listed its cases on exigent circumstances. In January 2012, in *Ryburn v Huff*, 132 S Ct 987 (2012), the US Supreme Court also had issued a per curiam opinion again emphasizing its case law on exigencies and emergencies justifying warrantless entries to houses.

4.8.3.A.iii Mobile Device Data

In *Riley v California*, the court addressed searches of mobile phones incident to lawful arrest without a warrant. The court noted that police generally may not, without a warrant, search digital information on a cell phone seized from an individual who has been arrested. The Court wrote: "As the text makes clear, 'the ultimate touchstone of the Fourth Amendment is "reasonableness."' *Brigham City v. Stuart*, 547 U. S. 398, 403 (2006). Our cases have determined that '[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant.' *Vernonia School Dist. 47J v. Acton*, 515 U. S. 646, 653 (1995). Such a warrant ensures that the inferences to support a search are 'drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' *Johnson v. United States*, 333 U. S. 10, 14 (1948). *Riley*, slip op. at 5.

In *Riley*, an officer searched Riley incident to an arrest and found items associated with the "Bloods" street gang. He also seized a smart phone from Riley's pants pocket. The officer accessed information on the phone and noticed that some words were preceded by the letters

"CK"—a label that, he believed, stood for "Crip Killers," a slang term for members of the Bloods gang. At the police station about two hours after the arrest, a detective specializing in gangs further examined the contents of the phone. The detective testified that he "went through" Riley's phone "looking for evidence, because . . . gang members will often video themselves with guns or take pictures of themselves with the guns." Although there was "a lot of stuff " on the phone, particular files that "caught [the detective's] eye" included videos of young men sparring while someone yelled encouragement using the moniker "Blood." The police also found photographs of Riley standing in front of a car they suspected had been involved in a shooting a few weeks earlier. Prior to his attempted-murder trial, Riley moved to suppress all evidence that the police had obtained from his cell phone. He contended that the searches of his phone violated the Fourth Amendment, because they had been performed without a warrant and were not otherwise justified by exigent circumstances. The trial court denied the motion and the state appellate courts affirmed. The US Supreme Court reversed on search-incident to lawful arrest grounds, but noted that the exigent circumstances exception may apply in some circumstandes.

"Remote wiping can be fully prevented by disconnecting a phone from the network. There are at least two simple ways to do this: First, law enforcement officers can turn the phone off or remove its battery. Second, if they are concerned about encryption or other potential problems, they can leave a phone powered on and place it in an enclosure that isolates the phone from radio waves. Such devices are commonly called 'Faraday bags,' after the English scientist Michael Faraday. They are essentially sandwich bags made of aluminum foil: cheap, lightweight, and easy to use. They may not be a complete answer to the problem, but at least for now they provide a reasonable response. In fact, a number of law enforcement agencies around the country already encourage the use of Faraday bags." *Riley v California*, 134 S Ct 2473 (2014) (citations omitted).

"If the police are truly confronted with a 'now or never' situation,—for example, circumstances suggesting that a defendant's phone will be the target of an imminent remote-wipe attempt—they may be able to rely on exigent circumstances to search the phone immediately. *Missouri* v. *McNeely*, 569 US ___, 133 S Ct 1552 (2013) (quoting *Roaden* v *Kentucky*, 413 US 496, 505 (1973)." *Riley v California*, 134 S Ct 2473 (2014) (quotations omitted).

4.8.3.B Oregon Constitution

Under Article I, section 9, warrantless entries and searches are *per se* unreasonable unless the state proves an exception to the warrant requirement, such as the existence of exigent circumstances when the officers have probable cause to arrest a suspect. *State v Bridewell*, 306 Or 231, 235 (1988); *see also State v Barraza*, 206 Or App 505, 509 (2006) (framing the exception as allowing "police to act without a warrant when they have probable cause to suspect a crime and exigent circumstances exist").

"The Oregon Supreme Court has recognized both an emergency/exigent circumstances exception to the warrant requirement and a distinct 'emergency aid' doctrine." *State v Sullivan*, 265 Or App 62, 68 (2014). But see *State v Fessenden/Dicke*, 355 Or 759, 765 (2014) where the Oregon Supreme Court identifies the "exigent circumstances exception" and the "emergency aid exception."

"[A]n emergency aid exception to the Article I, section 9, warrant requirement is justified when police officer have an objectively reasonable belief, based on articulable facts, that a warrantless entry is necessary to either render immediate aid to persons, or to assists person who have

suffered, or who are imminently threatened with suffering, serious physical injury or harm." *State v Baker*, 350 Or App 641, 649 (2011) (referring to it as the "*so-called emergency aid exception*").

In *State v Fair*, 353 Or 588 (2013), a woman called 911, then the line went dead. Police traced the call, went to the house, saw a man and woman in the house, and ordered the woman out, and separated the two. She had obviously recently been beaten in the head. While her husband yelled at her not to speak to police, she answered police that she had been arrested before. She also allowed a search of her pockets and a syringe cap fell out. She moved to suppress the drug evidence. The Supreme Court, using the words *house*, *home*, or *private residence* 47 times in this opinion, upheld the trial court's denial of defendant's motion to suppress. The Court decided that defendant was seized on her porch but the seizure was reasonable as "a patent exigency excusing a warrant" because the defendant had called 911 and her face was beaten up by the man who had retreated into the home. The police were authorized to detain her because she was a potential witness to her own beating. So the Court found it reasonable that the police asked her if she'd been arrested, what the charges were, and because she did not have a driver's license.

4.8.3.CSpecific Exigencies

4.8.3.C(i) Emergency Aid

In *State v Bonilla,* 358 Or 475, 489 (2015), the court recited the following as separate exceptions to the warrant requirement:

-- "the emergency aid exception"
-- "the officer safety exception"
-- "the school safety exception"
-- "the more general 'exigent circumstances' exception"

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

In the home-entry context, "an emergency aid exception to the Article I, section 9, warrant requirement is justified when police officers have an objective reasonable belief, based on articulable facts, that a warrantless entry is necessary to either render immediate aid to persons, or to assist persons who have suffered, or who are imminently threatened with suffering, serious physical injury or harm." *State v Baker*, 350 Or 641, 649 (2011).

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

See State v Fessenden/Dicke, 355 Or 759 (2014) in **Section 4.6.4**.

4.8.3.C(ii) Destruction of, or Damage to, Evidence

See also **Entries into Homes, Section 4.6.4.A**

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

"Destruction of evidence" is a "variant of exigency." *State v Raymond*, 274 Or App 409, 415 (2016) (held: exigent circumstances coupled with probable cause excused the failure to procure a warrant for urinalysis).

"Exigent circumstances exist when a reasonable person in the police officer's position would determine under the circumstances that immediate action is necessary to prevent the disappearance, dissipation, or destruction of evidence. *State v Snow*, 337 Or 18 219, (2004); *State v Meharry*, 342 Or 173, 177 (2006); *State v Miller*, 300 Or 203, 229, 709 (1985); *State v Parras*, 110 Or App 200, 203, (1991); *see United States v Alaimalo*, 313 F3d 1188, 1192-93 (9th Cir 2002), *cert den*, 540 US 895 (2003) (exigent circumstances 'are present when a reasonable person [would] believe that entry * * * was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts')." *State v J.C.L.*, 261 Or App 692 (2014) (computer hard drive connected and ready to be deleted).

"[W]hen the claimed exigency is the need to prevent a suspect's escape or to prevent the destruction of evidence, warrantless entry is permissible only when the escape or destruction "was *imminent*." *State v Matsen/Wilson*, 287 Or 581, 587, 601 P2d 784 (1979) (emphasis added). In some cases, it is easy to identify the circumstance that creates the demand for immediate police action: drugs may be flushed down the toilet or a forged document may be burned in a relative instant. That is not so where a suspect's intoxication is the potential evidence sought; depending on the time that the warrant would have taken to obtain, the alcohol in the bloodstream might have dissipated entirely, not at all, to a degree that impaired the efficacy of testing, or to a degree that had no material effect." *State v Sullivan*, 265 Or App 62 (2014).

Probable Cause + Imminent Destruction of Highly Destructible Evidence

> Under the Fourth Amendment, when a suspect is not arrested, but is attempting to destroy evidence and refuses to consent to a search and seizure of his body (fingernail scrapings for DNA evidence), a very limited intrusion of scraping his fingernails at the police station does not violate the Fourth and Fourteenth Amendments. *Cupp v Murphy*, 412 US 291 (1973).
>
> A detective was investigating a teenage defendant for possession on child porn on a hard drive. Defendant given his hard drive to another student and told the student to delete everything. The detective saw defendant's hard drive removed and was connected to the student's home computer by a cable. Detective believed that "the destruction of evidence was imminent" and thus he seized the computer and hard drive. Under *State v Machuca*, 347 Or 644 (2010), the warrantless seizure was permissible: the detective knew that the student had previously helped the defendant's uncle delete child porn off his computer, defendant had instructed the student to delete everything including back up files, and a cable was hooked up from defendant's to the student's computer. *State v J.C.L.*, 261 Or App 692 (2014).

> *State v Machuca*, 347 Or 644 (2010) (warrantless blood draws in DUII cases) does not control warrantless home entries made to make arrests. That is because blood draws and home entries are "fundamentally different" intrusions. "A government intrusion into the home is at the extreme end of the spectrum [of privacy and liberty]. Nothing is as personal or private. Nothing is more inviolate. *State v Fair*, 353 Or 588, 600 (2013)." "Put simply, the home is different," this court wrote. *State v Sullivan*, 265 Or App 62 (2014)

DUII blood draws: Emergencies. Extraction of human bodily fluids – such as blood draws - is both a search and a seizure. *Weber v Oakridge School Dist*., 184 Or App 415, 426 (2002); *State v Milligan*, 304 Or 659, 664 (1988).

Under Article I, section 9, the state need not prove that destruction of blood-alcohol evidence is imminent in each case to justify a warrantless search and seizure of it: "the evanescent nature of a suspect's blood alcohol content is an exigent circumstance that will ordinarily permit a warrantless blood draw," or a warrantless breath test, when an officer has probable cause to believe a suspect has been drunk driving. *State v Machuca*, 347 Or 644, 657 (2010) (blood draw); *State v Allen*, 234 Or App 363 (2010) (breath test); *State v McMullen*, 250 Or App 208 (2012) (urine test); *State v Raymond*, 274 Or App 409 (2016) (urine test). But "particular facts may show, in the rare case, that a warrant could have been obtained and executed *significantly* faster than the actual process otherwise used under the circumstances. We anticipate that only in those rare cases will a warrantless blood draw be unconstitutional" under a probable-cause-to-arrest with destruction-of-evidence exception to the warrant requirement. *Machuca*, 347 Or at 656-57; *State v Perryman*, 275 Or App 631, 638 (2015). A hypothetical example of a "rare case" is imagined in *State v Martinez-Alvarez*, 245 Or App 369 (2011).

In contrast with Oregon, the US Supreme Court held that "the natural metabolization of alcohol in the bloodstream" does not present "a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." Each case is evaluated individually to determine if a warrant was required under the Fourth Amendment: "In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." *Missouri v McNeely*, 133 S Ct 1552 (2013).

In *McNeely*, the Court footnoted that in contrast with the automobile exception and searches incident to arrest (which are <u>not</u> evaluated on a case-by-case basis), "the general exigency exception, which asks whether an emergency existed that justified a warrantless search, naturally calls for a case-specific inquiry." *Id*. at n 3.

In response, the Oregon Supreme Court has written: "In our view, the [*McNeely*] Court's rejection of a per se exigency rule is not inconsistent with our statement in [*State v Machuca*, 347 Or 644 (2010] that, while exigent circumstances are 'ordinarily' present in a case involving alcohol, that may not be true, depending on the facts of a particular case." *State v Moore*, 354 Or 493, 497 n 5 (2013) (*Moore* involved voluntariness of implied consent after warnings of consequences of refusal of blood and urine samples, rather than an emergency directly).

See Section 4.8.5 on Consent to DUII blood and urine samples.

Field Sobriety Tests

Administering Field Sobriety Tests is a "search" under the Oregon Constitution. *State v Nagel*, 320 Or 24, 30-31 (1994); *State v McCrary*, 266 Or App 513 (2014). Accordingly, "an officer must have either a search warrant to conduct the tests or the authority to conduct them must come within one of the recognized exceptions to the warrant requirement." *State v Rutherford*, 160 Or App 343, 346 *rev den*, 329 Or 447 (1999). "Exigent circumstances include, among other things, situations in which immediate action is necessary to prevent the disappearance, dissipation, or other loss of evidence." *State v Stevens*, 311 Or 119, 126 (1991); *State v Mazzola*, 356 Or 804, 811 (2015).

See *State v Baucum*, 268 Or App 649 (2015) on scientific evidence on retrograde extrapolation.

In *State v Mazzola*, 356 Or 804 (2015), the Court held that three field sobriety tests (the walk and turn, the one-leg stand, and the finger-to-nose) are of "limited scope and intensity" and are proximate "in time to defendant's arrest," therefore a "sufficient exigency" is established at the time of driving "to justify the warrantless administration" of those three FSTs in *this* case. Relevant statutes are ORS 813.010(1)(b) (alternative ways to prove controlled substance DUII) and ORS 801.272 (defining FSTs), see also OAR 257-025-0000 to -0025. The Court stated that the "search incident to arrest" exception (which it called a "doctrine") is an exception "related" to exigent circumstances. *Id*. at 811-12. Prior cases, including *Machuca*, "teach us that, where a warrantless search for evidence of the crime of DUII is supported by probable cause to arrest the defendant, the issue of exigency should be assessed in light of the reasonableness of the search in time, scope, and intensity." Here, defendant was already validly stopped and was subject to arrest for DUII. The three tests are limited in scope and intensity, they did not intrude into the body, and they determine current impairment soon after the person has been observed driving. The warrantless administration of the FSTs in this case were justified as exigent circumstances. *Id*. at 820.

Unidentified Controlled Substances

"Once police have probable cause to believe that evidence of a controlled substance will be in a suspect's urine * * * the exact identity of the substance is of no consequence in determining whether exigent circumstances exist. That is so because we cannot reasonably expect police officers, even drug recognition experts, to be able to determine which controlled substance, alone or in combination, is causing a person to act in such a way as to indicate intoxication." *State v McMullen*, 250 Or App 208 (2012); see also *State v Fuller*, 252 Or App 245 (2012) (same).

4.8.3.C(iii) Escape

If the warrantless search is undertaken to prevent destruction of evidence or escape, the state must prove that the destruction or escape was imminent. *State v Matsen/Wilson*, 287 Or 581, 587 (1979). That "drugs are usually of a destructible nature, and the fact that suspects are likely to run out the back door when police enter the front door does not *ipso facto* create exigent circumstances." *Id*.

See *State v Pellar*, 287 Or 255 (1979) where the Oregon Supreme Court concluded that if police have no indication that a suspect is attempting to "make a break" then the exigent circumstances exception is not justified to enter a home to retrieve car keys.

See *State v Snow*, 337 Or 219 (2004), where Oregon Supreme Court parenthetically stated that the "risk that defendant might escape created exigent circumstance justifying warrantless search."

"[W]hen the claimed exigency is the need to prevent a suspect's escape or to prevent the destruction of evidence, warrantless entry is permissible only when the escape or destruction "was imminent." *State v Matsen/Wilson*, 287 Or 581, 587, 601 P2d 784 (1979). "In some cases, it is easy to identify the circumstance that creates the demand for immediate police action: drugs may be flushed down the toilet or a forged document may be burned in a relative instant. That is not so where a suspect's intoxication is the potential evidence sought; depending on the time that the warrant would have taken to obtain, the alcohol in the bloodstream might have dissipated entirely, not at all, to a degree that impaired the efficacy of testing, or to a degree that had no material effect." *State v Sullivan*, 265 Or App 62 (2014).

4.8.3.C(iv) Hot Pursuit

"It is preposterous to assert that a police officer in hot pursuit * * * must stop as soon as the pursued drives upon private property * * * and get a search warrant in order to apprehend the [suspect]." *State v Roberts*, 249 Or 139, 143 (1968); *State v Fessenden/Dicke*, 355 Or 759, 772 (2014) (so quoting).

<u>Note</u>: there may be a question as to whether the Fourth Amendment "hot pursuit" exception applies only for felonies, or if applies to misdemeanors as well. Under *Welch v Wisconsin*, 466 US 740, 750 (1984), a mere traffic offense may not justify warrantless entry into a house. The court paraphrased dicta in *Steagald v United States*, 451 US 204, 221 (1981) for the "hot pursuit" exception applying when there is probable cause to arrest for a crime plus hot pursuit. Another case, *Stanton v Sims*, 134 S Ct 3, 6 (2013) provides that "hot pursuit of a fleeing felon justifies an officer's warrantless entry" into a home. The court here cited *United States v Santana*, 427 US 38 (1976) to support the denial of the motion to suppress.

4.8.3.C(v) Entering a Home

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)).

One exception to the warrant requirement is when police "have probable cause to suspect a crime and exigent circumstances exist. *State v Barraza*, 206 Or App 505, 509 (2006); *State v McHenry*, 272 Or App 148, 151 (2015) (held: police lacked objective probable cause to justify the warrantless entry into defendant's home for the crime of furnishing alcohol to minors).

"To show a warrantless entry into a home was justified by the need to render emergency aid, the state must establish that the officer had a subjective 'belief that there is an immediate need to aid

or assist a person' and that the belief was 'objectively reasonable.'" *State v Garcia*, 276 Or App 838, 846 (2016) (quoting *State v McCullough*, 264 Or App 496, 502 (2014)).

State v Garcia, 276 Or App 838 (2016) Defendant's neighbor called 911 about a domestic disturbance in defendant's home. Police arrived, defendant refused to come out, but he smelled strongly of alcohol through a screen door. Officers ordered him out. He refused. Officers arrested him. He was belligerent. Officers asked about defendant's wife, who defendant said was inside. Officers heard nothing inside. An officer entered the home, found the wife, who had been crying, and said she'd been arguing with defendant, but appeared uninjured. Another officer entered the home and saw "multiple old bruises" on her arms. Eventually the wife admitted she'd been abused. Defendant was charged with multiple offenses. He moved to suppress. The trial court argued "emergency aid" and also "inevitable discovery doctrine." The trial court ruled that the emergency had dissipated when officers entered the home but denied the motion to suppress based on "inevitable discovery."

The Court of Appeals reversed and remanded: the trial court did not err when it determined that the officers had an objectively reasonable belief that someone in defendant's home was in need of their immediate assistance and that the emergency had dissipated" after the officer encountered the wife in the home. The trial court "did err when it concluded that the inevitable discovery doctrine applied to allow the officers to remain in defendant's home and obtain the challenged evidence."

The Oregon Court of Appeals referenced what it calls "the material witness exception." But there is no thing called a "material witness exception" under Article I, section 9. The court "conclude[d] that the material witness exception in *Fair* does not apply to this case." *Id*. at 851.

State v Fair, 353 Or 588 (2013) did not create a "material witness exception." It just lengthily discussed what is essentially a *Terry* stop at a private home in which a woman being beaten was "ordered" out of her home, then arrested for meth possession. The *Fair* Court wrote that several cases "stand for the limited proposition that a law enforcement officer constitutionally may halt and briefly detain a person passing through a public area as a means to engage the citizen long enough to impart information or seek the citizen's cooperation or assistance. * * * police are free to 'approach persons on the street or in public places, question them, and even accompany them to another location without the encounter necessarily constituting a "seizure" of a person." *Fair* at 598. The Court concluded that officers "seized" the abused woman by ordering her out of her home but were justified in arresting her for meth possession after finding meth on her thereafter. *Id*. at 600.

The Court copied other courts' reasoning and wrote: "We therefore hold that officers constitutionally may, in appropriate circumstances, stop and temporarily detain for questioning a person whom they reasonably believe is a potential material witness to a crime. We further agree with the basic test that the state has proposed for determining the circumstances in which such a temporary detention will be reasonable. In particular, we agree that the stop and temporary on-the-scene detention of a likely material witness will be constitutional if: (1) the officer reasonably believes that an offense involving

danger of forcible injury to a person recently has been committed nearby; (2) the officer reasonably believes that the person has knowledge that may aid the investigation of the suspected crime; and (3) the detention is reasonably necessary to obtain or verify the identity of the person, or to obtain an account of the crime." *Id*. at 609.

The *Fair* Court further wrote: "this court has recognized that 'there is nothing ipso facto unconstitutional in the brief detention of citizens under circumstances not justifying an arrest, for purposes of limited inquiry in the course of routine police investigations.' *State v Cloman*, 254 Or 1, 7, 456 P2d 67 (1969) (quoting with approval *Wilson v Porter*, 361 F2d 412, 415 (9th Cir 1966). To be constitutional, such a detention does not require probable cause. Rather, "due regard for the practical necessities of effective law enforcement requires that the validity of brief, informal detention be recognized whenever it appears from the totality of the circumstances that the detaining officers could have had reasonable grounds for their action." *Id*. at 8 (quoting with approval *Porter*, 361 F2d at 415). Thus, as already described, Article I, section 9, typically requires a degree of justification for a seizure of a person that correlates with the extent to which police conduct intrudes on that citizen's liberty. See *Holmes*, 311 Or at 407 (describing three general categories of police citizen encounters). To arrest a citizen, an officer must have probable cause. *Id*. But when the intrusion is less—such as a temporary detention and questioning of a person—so, too, may the justification be less. Temporary detention for investigation requires only reasonable suspicion. *Id*."

So, basically, the Oregon Supreme Court rehashed a *Terry* stop of a beaten woman on her front porch just after the beating.

4.8.4 Officer Safety

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

The state has the burden of establishing that "the officer subjectively believed that a defendant posed an immediate threat of serious physical injury and that the officer's belief was objectively reasonable" based on the totality of the circumstances at the time. *State v Zumbrum*, 221 Or App 362, 366 (2008). Without "uncharitably second-guessing" the officers, *Bates*, 304 Or at 524, there must be "specific and articulable facts to justify the officer's conclusion that a particular person presents an immediate threat of harm." *Id*. at 366-67. *See also State v Castillo-Lima*, 274 Or App 67, 72 (2015) (again with the "uncharitably second-guessing" line).

A police officer's suspicion must be particularized to the individual based on the individual's own conduct. *State v Stanley*, 325 Or 239, 245-46 (1997).

<u>Note</u>: Based on the way the Oregon Supreme Court has begun categorizing 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." The court

continues to mix and match exceptions. For example, in *State v Bonilla,* 358 Or 475, 489 (2015), the court recited the following as separate exceptions to the warrant requirement:

-- "the emergency aid exception"
-- "the officer safety exception"
-- "the school safety exception"
-- "the more general 'exigent circumstances' exception"

State v Powell, 288 Or App 660 (11/01/17) (Multnomah) (Shorr, Armstrong, Wilson) A 15 year old Reynolds High School student brought an AR-15, a handgun, and loads of ammunition to school, murdered a freshman, shot a teacher in the hip, then killed himself on school grounds. The school was evacuated. Police had students across the street at a church, conducting patdowns of the students to ensure that the shooter or an accomplice did not escape by blending in with the evacuees. An officer some kind of disorganized mass of students and staff into a line. Each person in the line was called forward, ordered to put his/her hands on his or her head, and patted down by an officer. Officers patted down waistlines, lifted pant legs, lifted jackets or other baggy clothing, and patted or searched any other place that a weapon could have been concealed.

Meanwhile, defendant heard about the shooting. His sister was a freshman at the school. Defendant put a handgun into his pants and went to the school to look for his sister. He had no concealed weapons permit. At the school, an officer saw him, made eye contact, defendant looked away, the officer approached him, and defendant said he did not know where to go or explain why he was there. Defendant seemed nervous. The officer (Lofton) was "concerned" that defendant may have been involved in the shooting, ordered him to come with him, and directed him to the patdown area. The Court of Appeals explained further as follows:

"When they arrived at the patdown area, Lofton ordered defendant to lace his fingers behind his head. Defendant hesitantly raised his hands to the side of his head. Lofton touched defendant's hands together behind his head and said "put your hands together," which defendant did. Apart from that moment of hesitancy, defendant was "generally cooperative" with Lofton's instructions. Lofton "grabbed [defendant's] hands behind his head" to keep them together and walked defendant a few more steps forward. Lofton then decided to search defendant for weapons. Because Lofton was concerned that he would be unable to feel a weapon under defendant's baggy sweatshirt, he lifted defendant's sweatshirt and shirt with one hand while still gripping defendant's hands together behind his head with the other. Lofton made no attempt to patdown defendant first. Immediately upon lifting defendant's shirt, Lofton saw a handgun stuck into the waistband of defendant's pants. Lofton later testified that he "maybe" would have felt the gun if he had conducted only a limited patdown over defendant's clothing. Lofton removed the gun and arrested defendant with assistance from other officers. The state then charged defendant with unlawful possession of a firearm."

Defendant moved to suppress the handgun evidence. The state expressly asserted to the trial court that it was not relying on a "checkpoint" or "roadblock" exception to the warrant requirement. The trial court denied the motion to suppress on grounds that defendant posed an immediate threat to safety, and also that school safety exception justified the seizure and search, and that the emergency aid exception also applied.

The Court of Appeals reversed and remanded. No exception that the state raised justified this warrantless seizure and search. The checkpoint or roadblock exception in *State v Gerrish*, 96 Or App 582, *aff'd* 311 Or 506 (1991) was expressly discarded at the trial level. (Note: The Supreme Court in *Gerrish* expressly stated that *Gerrish* was not a "roadblock" case). The Court of Appeals rejected each of the trial court's justifications for the warrantless reach into defendant's pants.

The officer-safety exception is not met because defendant's "conduct and demeanor was not the sort that would objectively cause a police officer to develop a reasonable suspicion that defendant was a person that might be armed and dangerous." This exception requires suspicion based on facts specific to the particular person searched, not on intuition or generalized fear. "The officers were assisting in a difficult and dangerous situation" but he lacked objectively reasonable suspicion that this defendant posed an immediate threat.

The consent exception is not met because the "state failed to establish that defendant reasonably would have believed that he would be subjecting himself to search and seizure simply by arriving outside the school to check on his sister." *Id*. at 669. Also, his submission to the officer's orders was "mere acquiescence," which is not voluntary consent.

The emergency aid exception is not met because the officer was not rendering aid to anyone in need of immediate assistance. The officer testified that he stopped and searched defendant "to determine whether defendant was involved in the shooting" rather than to provide emergency aid. *Id*. at 670.

The school safety exception is not met because "[e]ven assuming the exception applied to a search of a non-student conducted by the police just outside school grounds, the search in this case was based on no more than [the officer's] general 'concern' that defendant could have been involved. That general degree of suspicion falls short of the reasonable suspicion, based on credible information and specific and articulable facts, that the Supreme Court required in *State v M.A.D*., 348 Or 381 (2010) and *State v A.J.C*., 355 Or 552 (2014).

In this case, once again, an appellate court vapidly discloses its perception as giver of charity with the condescending phrase: "Certainly, it is not our role to 'uncharitably second-guess'" school officials. *Id*. at 672. The role of a judge ruling on a motion to suppress is to second-guess state officers. Neither party in that process is giving or receiving "charity."

4.8.4.A Closed Containers

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

1. Inventory
2. Search incident to arrest for officer safety or to preserve evidence
3. Abandonment
4. Container is a dog lawfully in police control

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)).

> *State v Young*, 268 Or App 688 (2015): Elements of officer-safety exception are not met when a defendant's backpack was searched inside a stopped car. "After the car's driver and passengers had exited the vehicle and were seated on a curb, in the presence of a backup officer, there is no plausible reason * * * why safety concerns would have required [the officer] to reenter the vehicle to search the backpack or to remove the backpack from the car."
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> *State v Amsbary*, 275 Or App 115 (2015): Elements of officer-safety exception are <u>not</u> met when a traffic-stopped defendant had a small black pouch with a string resting on his leg, officer grabbed the string, and meth was inside. No evidence in the record shows that the officer had subjective belief that the pouch contained a weapon.

4.8.4.B Inquiries or Consent

See **Section 4.8.5** on Consent generally. This section covers consent as part of the officer-safety exception to the warrant requirement.

A question is not a search." *State v Jimenez*, 357 Or 417, 434 (2015) (Kistler, J., concurring).

"Questions and requests by an officer can have the effect of stopping a person." *State v Beasley*, 263 Or App 29 (2014) (citing *State v Rodgers/Kirkeby*, 347 Or 610, 627-28 (2010) (parked car). But "verbal inquiries are not searches and seizures." *State v Pichardo*, 263 Or App 1, 5 (2014) (quoting *Rogers/Kirkeby*, 347 Or at 622), *vac'd and rem'd*, 356 Or 574 (2014), *aff'd on remand*, 275 Or App 49 (2016), *aff'd* 360 Or 754 (2017).

"For a weapons inquiry conducted in the course of a traffic investigation to be reasonably related to that investigation and reasonably necessary to effectuate it, an officer must have reasonable, circumstance-specific concerns for the officer's safety or the safety of other persons who are present. To justify an officer's weapons inquiry, the officer's safety concerns need not arise from facts particular to the detained individual; the can arise from the totality of the circumstances that the officer faces. However, if the officer does not have at least a circumstance-specific safety concern, then the officers' weapons inquiry has no logical relationship to the traffic investigation. And, if the officers' circumstance-specific safety concerns are not reasonable, then an officer who acts on those concerns violates Article I, section 9, which protects the people from an 'unreasonable search, or seizure." *State v Jimenez*, 357 Or 417, 429 (2015).

<u>Note on courts' "uncharitable second guessing" of law enforcement</u>: The phrase "uncharitably second-guess" first appeared in *State v Bates*, 304 Or 519 (1987), when *Bates* condensed a tenet in *State v Riley*, 240 Or 521, 525 (1965) that when a search or seizure is legal, an "officer should be permitted to take every reasonable precaution to safeguard his life in the process of making the arrest." This phrase continues to raise its head in judicial opinions, which is unfortunate, see for example *State v Castillo-Lima*, 274 Or App 67, 72 (2015). It may give an impression that judges are donating charity on police. Moreover, it *is* the judiciary's role to second-guess the other branches' decisions particularly with constitutional issues. But charity has nothing to do with it.

4.8.4.C Patdowns and Intrusions into Clothes

A "frisk" or a "patdown" is "an external patting of a person's outer clothing." *State v Musalf*, 280 Or App 142, 156-59 (2016) (citation omitted) (held: officer did not describe size or shape of a hard object in defendant's pocket to support the idea that it could be a weapon, thus no justification to remove it on officer safety grounds).

Terry v Ohio, 392 US 1 (1968) created an exception to the Fourth Amendment's probable cause requirement. With reasonable suspicion (specific and articulable facts that the person is involved in criminal activity), police may briefly stop a person for investigatory purposes. And if the police have reasonable suspicion that a person is armed and dangerous, the police may frisk the person for weapons.

The Oregon Supreme Court has copied the Fourth Amendment standard into the Oregon Constitution: "Article I, section 9, of the Oregon Constitution, does not forbid an officer to take reasonable steps to protect himself or others if, during the course of a lawful encounter with a citizen, the officer develops a reasonable suspicion, based upon specific and articulable facts, that the citizen might post an immediate threat of serious physical injury to the officer or to others then present." *State v Bates*, 304 Or 519, 524 (1987); *State v Russell*, 265 Or App 381 (2014). But without objective reasonable suspicion that a person poses an immediate threat of serious physical injury, even a "frisk" during an initially lawful stop will not be justified under the officer-safety doctrine. *State v Rodriguez-Perez*, 262 Or App 206 (2014).

The Oregon Court of Appeals has asserted that the officer safety exception "does not justify searches or seizures during mere conversation." *State v Davenport*, 272 Or App 725, 729 n 4 (2015) (citing *State v Messer*, 71 Or App 506, 510 (1984)). It only applies to a "police-citizen encounter" that is "a stop or an arrest." *Ibid*.

ORS 131.625 permits a peace officer to frisk a stopped person for dangerous or deadly weapons if the officer reasonably suspects that the person is armed and presently dangerous. If during the frisk, the officer feels an object that reasonably feels like a dangerous or deadly weapon, the peace officer may take possession of the weapon. A "frisk" is "an external patting of a person's outer clothing" under ORS 131.605(2).

An officer who pulls everything out of car occupants' pockets rather than patting down their outer clothing, may exceed the scope of ORS 131.605(2). Article I, section 9, "does not forbid an officer to take reasonable steps to protect himself or others if, during the course of a lawful encounter with a citizen, the officer develops a reasonable suspicion, based upon specific and articulable facts, that the citizen might pose an immediate threat of serious physical injury". *State v Rickard*, 150 Or App 517 (1997).

"A patdown, because of its limited intrusiveness, is constitutionally permissible if it is based on a reasonable suspicion of a threat to officer safety. But intrusion *into* a suspect's clothing [such as a boot] requires something more – either probable cause or some greater justification than was present here [where defendant was handcuffed when searched and thus did not have access to anything hidden under her pant leg and inside her boot]." (Emphasis in original). *State v Coffer*, 236 Or App 173 (2010) (quoting *State v Rudder*, 347 Or 14, 25 (2009)).

After conducting a patdown, which is just "an external patting of a person's outer clothing," "an officer may not conduct a further search unless the officer develops reasonable suspicion, based on specific and articulable facts, that the person poses a serious threat of harm and that a further search would lessen or eliminate that threat." *State v Musalf*, 280 Or App 142, 156 (2016) (officer did not describe size or shape of hard object in defendant's pocket therefore no justification to go into the pocket on officer safety grounds); *State v Davenport*, 272 Or App 725, 731 (2015). An "officer may remove an item felt during a patdown only if he or she reasonably suspects that it presents an officer safety concern." *State v Musalf*, 280 Or App 142, 156 (2016) (quotation omitted). The legal test is "whether there was sufficient evidence about defendant's demeanor, conduct, or status that suggested that defendant posed an immediate threat of serious injury" to the officer." *Id*. at 157 (quoting *State v Smith*, 277 Or App 298, 303 (2016). The officer must have "reasonable suspicion" that the suspect "poses a serious threat of harm and that a further search would lessen or eliminate that threat." *Id*. at 159 (quotation omitted).

"[O]ther than certain appellate court decisions involving the application of ORS 810.410 to traffic stops (and not applicable to [stops of persons on foot in a public park]), no authority supports the proposition than an officer cannot, during the course of a stop that is supported by reasonable suspicion or probable cause, inquire whether the stopped person is carrying weapons or contraband. *State v Simcox*, 231 Or App 399, 403 (2009). See *State v Fair*, 353 Or 588 (2013) on consent to a patdown on a home porch.

A few case examples:

> ***City of Portland v Weigel***, 276 Or App 342 (2016) The Court of Appeals affirmed the trial court's denial of defendant's motion to dismiss evidence of his possession of a loaded firearm in public, obtained during a warrantless investigatory stop. Officers received a 911 call of an extremely intoxicated, but cooperative, man armed with a baseball bat and a pistol. One officer knew defendant from the National Guard. A gun was visible in defendant's right front pocket. The bat was 10 feet away. The officer directed to put his hands up, defendant complied, and the officer handcuffed him. Officers then removed the gun, which had five rounds in the chamber. The trial court ruled that officer safety concerns authorized police to handcuff defendant. Handcuffing defendant was not unreasonable.
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> ***State v Thomas***, 276 Or App 334 (2016) Officer stopped defendant and a male companion for jaywalking across a five-lane highway into a lot 50 yards from a motel known for weapons and drug dealing. Defendant, wearing baggy clothes and carrying a backpack, said he had no ID, appeared agitated, would not make eye contact, would look at the companion as if communicating without words. Officer had been an officer for nine years and had conducted over 1,000 stops per year. The companion was telling defendant to "calm down." Officer directed defendant to his knees with his hands behind his back, after initially pulling his hands away from the officer when officer grabbed his fingers. Officer felt a shotgun handle in defendant's waistband. Officer pushed defendant away, defendant ran, and backup officers caught him with a short-barreled shotgun. He was charged with unlawful possession of a firearm. The trial court denied his motion to suppress for the warrantless search based on the officer-safety exception. The Court of Appeals reversed, citing *State v Redmond*, 114 Or App 197 (1992),

State v Rodriguez-Perez, 262 Or App 206 (2014), and *State v Jackson*, 190 Or App 194 (2003), *rev den* 337 Or 182 (2004). "Article I, section 9, does not permit a patdown search for the purpose of alleviating uncertainty or dispelling the understandable apprehension that an officer may experience as the result of uncertainty.''

State v Smith, 277 Or App 298, *rev den* (2016) A forest service officer found five males shooting guns at live trees in a remote area. He had them secure weapons in their vehicles, then he did an officer safety pat-down search, felt a pipe in defendant's pocket, asked if anyone had marijuana, and everyone said "no." Officer asked defendant what the pipe was for, and defendant said "meth." Officer handcuffed defendant, "retrieved the pipe," and saw meth residue on it. The officer testified that no one was threatening, defendant was cooperative, and nothing other than the armed men in the remote area caused him to be concerned for safety. He also testified that he was alone, the area was remote, his backup was 1.5 to 2 hours away, and he did not know if anyone had concealed weapons. He said, "they had guns, that's enough." *Id*. at 302. The court denied defendant's motion to suppress. The Court of Appeals reversed. The officer's "generalized safety concern based on the size of the group, the remoteness of the location, and the absence of a backup officer" were insufficient to justify an officer safety search. Further, although *State v Thomas*, 276 Or App 334, 339 (2016) allowed that "the presence of multiple people can heighten an officer's safety concern so as to permit a patdown of one person" where a companion is armed," here "after the weapons were secured" from defendant's companions and "before defendant was searched, the size of the group provides no defendant-specific evidence of reasonable suspicion of an immediate threat."

State v Musalf, 280 Or App 142 (2016) During an investigatory stop, officer asked defendant if he could pat him down. Defendant held out his arms, officer did the patdown, and officer felt a "hard object" in a pants pocket that was a clear, round container slightly smaller than two widths of a gloved finger in a photo in evidence. The officer withdrew the object from defendant's pants pocket; it had meth on it. The trial court denied the motion to suppress the object on lawful consent and officer safety grounds. The Court of Appeals reversed. First, the consent to the patdown was voluntary. But the search exceeded the scope of defendant's consent. There "is a distinction of constitutional dimension between a patdown and a search that involves entering pockets." *Id*. at 154. Citing *State v Rudder*, 347 Or 14 (2009) and *State v Miglavs*, 337 Or 1, 3 n 1 (2004), the court concluded that defendant consented to a limited patdown search, not to any entry into his pockets. Defendant himself distinguished between a "patdown" as opposed to a search incident to lawful arrest. *Id*. at 155. The search of defendant's pockets exceeded the scope of his consent to a patdown.

The Court of Appeals next held that the search of the inside of defendant's pocket was not justified under the officer-safety exception to the warrant requirement. After conducting a patdown, which is just "an external patting of a person's outer clothing," "an officer may not conduct a further search unless the officer develops reasonable suspicion, based on specific and articulable facts, that the person poses a serious threat of harm and that a further search would lessen or eliminate that threat." *Id.* at 156 (citing *State v Davenport*, 272 Or App 725, 731 (2015)). An "officer may remove an item felt during a patdown only if he or she reasonably suspects that it presents an officer safety

concern." *Ibid.* The legal test is "whether there was sufficient evidence about defendant's demeanor, conduct, or status that suggested that defendant posed an immediate threat of serious injury" to the officer." *Id*. at 157 (quoting *State v Smith*, 277 Or App 298, 303 (2016). The "threat" must be "based on facts specific to defendant, not on intuition or a generalized fear that defendant might pose a threat." *Id*. at 157. Here, defendant never was combative, he laughed when first asked to consent to the search, and he raised his arms for the patdown. He never tried to flee or reach. The officer did not testify that he was afraid that defendant had a weapon. The officer did not describe the dimensions of the hard container in defendant's pants. He said the hard container "could have been a weapon" but something more is required to justify the invasive intrusion into his pocket. The officer must have "reasonable suspicion" that the suspect "poses a serious threat of harm and that a further search would lessen or eliminate that threat." *Id*. at 159 (quotation omitted).

State v Sigfridson, 287 Or App 74 (7/26/17) (Douglas) (Duncan, DeVore, Garrett) The Court of Appeals reversed the trial court's denial of defendant's motion to suppress evidence of a syringe, a "cooker," and a plastic bag and heroin inside it. Officers received a 911 call that defendant had overdosed on heroin. On their arrival, defendant was standing, swaying, with slurred speech, and red watery eyes. He said he'd had too much to drink. He had a no-alcohol clause in his probation agreement. Officer prepared to arrest him, and asked if he had anything illegal on him. Defendant said no and refused to consent to search him. Defendant's family urged him to consent. The record is unclear but either he volunteered or said yes when asked if he had drug paraphernalia. Officer asked where that was and if any needles would poke him. Deendant said there was a capped needle in his front left sweatshirt pocket, and he had a cooker in his pants and some cleaning swabs. Officer searched there and found a capped, used syringe, and the bottom of a Pepsi can with dark residue in the pants pocket, and a bag with unused cotton swabs. Heroin residue was on the baggie and the can. Defendant was asked and answered that he had used heroin within an hour. He was Mirandized then asked if he'd had alcohol or heroin. He said not much alcohol but yes to heroin.

The Court of Appeals held that the evidence should have been suppressed and that there is insufficient evidence of inevitable discovery. A patdown does not automatically justify going into – inside - clothing. Here nothing in the record shows that the officer would have believed that the object in the sweatshirt was a capped needle, or that the "cooker in his pants was a weapon" to justify "reaching into defendant's pockets." *Id*. at 82. The officer reached into defendant's pockets only after defendant told him those items were there. The officer "did not provide *any* testimony about how a patdown of *this arrestee* would have proceeded without those admissions, such as describing the size and shape of the capped syringe or cooker, the thickness of the defendant's clothing, or what the discovered items might have felt like through the defendant's clothing." *Id*. at 83 (citing *Musalf*) (emphasis by court). "Thus, the trial court could only speculate as to whether [the officer] *would have* seized a capped syringe or cooker based on a reasonable belief that those items were weapons. This record supports, at most, a conclusion that [the officer] *might* have lawfully discovered the physical evidence during a patdown of defendant. The inevitable discovery doctrine requires more than that." *Ibid*. (emphasis by court).

4.8.4.D "Protective Sweeps of a House"

With a warrantless search, under a statute (ORS 133.693(4)), "the burden of proving by a preponderance of the evidence the validity of the search is on the prosecution." And then under Article I, section 9, "a warrantless search of one's private living quarters is *per se* unreasonable and unlawful unless the search fits within a recognized exception to the warrant requirement." *State v Guggenmos*, 350 Or 243 (2011) (citing *State v Paulson*, 313 Or 346, 351 (1992)).

A "protective sweep" is <u>not</u> an exception to the warrant requirement. A protective sweep can be justified under the Oregon Supreme Court's "standards for an officer safety search." *State v Guggenmos*, 350 Or 243 (2011) (citing *State v Cocke*, 334 Or 1 (2002)). The officer's suspicion of an immediate threat of serious physical injury must be based on "specific and articulable facts" under *State v Bates*, 304 Or 519 (1987); *State v Guggenmos*, 350 Or 243 (2011).

4.8.4.E Excessive Use of Force – Fourth Amendment

When evaluating a Fourth Amendment claim of excessive force, courts ask "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." *Graham v Connor*, 490 US 386, 397 (1989). This inquiry "requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Id*. at 396 (quoting *Tennessee v Garner*, 471 US 1, 8 (1985)).

"The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id*. at 396–97. Reasonableness therefore "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id*. at 396.

The Supreme Court has explained: "[O]fficers executing search warrants on occasion must damage property in order to perform their duty." *Dalia v United States*, 441 U.S. 238, 258 (1979). Like other Fourth Amendments inquiries, "the manner in which a warrant is executed"—including the damage of property—"is subject to later judicial review as to its reasonableness." *Id*. "The general touchstone of reasonableness which governs Fourth Amendment analysis . . . governs the method of execution of the warrant." *United States v Ramirez*, 523 U.S. 65, 71 (1998) (internal citation omitted). *Brown v Battle Creek Police Department*, __ F3d __ (2017) (so stating).

In *Hughes v Kisela*, __ F3d __ (9th Cir 2016), the court noted that the strength of the government's interest in the force used is evaluated by examining three primary factors: (1) "the severity of the crime at issue," (2) "whether the suspect poses an immediate threat to the safety of the officers or others," and (3) "whether [s]he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 40 US at 396 (citing *Garner*, 471 U.S. at 8–9). The "'most important' factor under *Graham* is whether the suspect posed an 'immediate threat to the safety of officers or third parties.'" *George v Morris*, 736 F3d 829, 838 (9th Cir 2013) (quoting *Bryan v MacPherson*, 630 F.3d 805, 826 (9th Cir 2010)).

The *Hughes* court noted that the factors identified in *Graham* are not exclusive. *See Bryan*, 630 F3d at 826. When assessing the officer's conduct, a court must examine "the totality of the circumstances and consider 'whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*.'" *Id*. (quoting *Franklin v. Foxworth*, 31 F3d 873, 876 (9th Cir 1994)). Other relevant factors may include the availability of less intrusive force, whether proper warnings were given, and whether it should have been apparent to the officer that the subject of the force used was mentally disturbed. *See, e.g., Bryan*, 630 F3d at 831; *Deorle v Rutherford*, 272 F3d 1272, 1282–83 (9th Cir 2001). With respect to the possibility of less intrusive force, officers need not employ the least intrusive means available so long as they act within a range of reasonable conduct. *See Scott v Henrich*, 39 F3d 912, 915 (9th Cir 1994).

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

"A claim that law-enforcement officers used excessive force to effect a seizure is governed by the Fourth Amendment's "reasonableness" standard. See *Graham v Connor*, 490 US 386 (1989); *Tennessee v Garner*, 471 US 1 (1985). In *Graham*, we held that determining the objective reasonableness of a particular seizure under the Fourth Amendment "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." 490 US at 396. * * * We analyze this question from the perspective "of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Ibid*." *Plumhoff v Rickard*, 134 S Ct 2012, 2020 (2014) ("if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended").

"It stands to reason that, if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended." *Plumhoff v Rickard*, 134 S Ct 2012 (2014) (police officers chased a car that been pulled over for having one headlight and the driver sped off rather than step out of the car; police chased the car, then fired 15 shots into the car, killing the two occupants; no Fourth Amendment violation).

4.8.5 Consent

<u>Note</u>: Consent to "enter," search, or seize (the Oregon Supreme Court has listed those three categories, rather than just "searches or seizures") must be voluntary, but it need <u>not</u> be knowing. In other words, under current Article I, section 9, interpretation, a person can waive his privacy rights *while police are actively violating his privacy rights*, simply by voluntarily consenting to the violation, even if the person has no idea he has the right not to waive his right to privacy. In 2014, four of the seven Justices of the Oregon Supreme Court decided that four armed detectives illegally trespassing on a man's private backyard could awaken him by banging on his glass door at his bedroom, ask for his "consent" to inspect the house, and *as long as the man's "consent" is voluntary*, the evidence gleaned from such a search can be used against the man, even if he did not realize that he could deny the police access to his bedroom during their illegal trespass. *State v Unger*, 356 Or 59 (2014) (Article I, section 9, of the Oregon Constitution).

In contrast, Article I, section 12, still requires a voluntary *and* knowing waiver of the right to remain silent, with *Miranda* warnings required. *State v Moore/Coen*, 349 Or 371, 382 (2010).

4.8.5.A Generally

The Oregon Supreme Court has written: "This court has described consent to a search as an 'exception' to the warrant requirement under Article I, section 9." *State v Bonilla*, 358 Or 475, 480 (2015). Stated similarly: "Voluntary consent is one [warrant] exception, unless the government exploited an unreasonable seizure to obtain that consent. *State v Unger*, 356 Or 59, 74-75, 85 (2014).

A question is not a search." *State v Jimenez*, 357 Or 417, 434 (2015) (Kistler, J., concurring).

"Questions and requests by an officer can have the effect of stopping a person." *State v Beasley*, 263 Or App 29 (2014) (citing *State v Rodgers/Kirkeby*, 347 Or 610, 627-28 (2010) (parked car). But "verbal inquiries are not searches and seizures." *State v Pichardo*, 263 Or App 1, 5 (2014) (quoting *Rogers/Kirkeby*, 347 Or at 622), *vac'd and rem'd*, 356 Or 574 (2014), *aff'd on remand*, 275 Or App 49 (2016), *aff'd* 360 Or 754 (2017).

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); *State v Bonilla,* 358 Or 475, 489 (2015) (there is no "apparent authority" to consent under the Oregon Constitution), *State v Lamoreaux*, 271 Or App 757, 760 (2015). "When the state relies on consent, it must prove by a preponderance of the evidence that 'someone having the authority to do so' voluntarily gave the police consent to search the defendant's property and that any limitations on the scope of the consent were complied with." *State v Bonilla*, 358 Or 475, 481 (2015).

Due to *Unger*, "when a defendant challenges the validity of his or her consent based on a prior police illegality, the state bears the burden of demonstrating that the consent was voluntary and was not the product of police exploitation of that illegality. [*State v Unger*, 356 Or 59, 74-75 (2014)]." *State v Musser*, 356 Or 148, 150 (2014). Whether "police have exploited their unlawful conduct to obtain a defendant's consent depends on the totality of the circumstances." *Ibid*. That analysis "should recognize the importance of the voluntariness of the consent and should consider not only the temporal proximity between the unlawful conduct and the consent and any intervening or mitigating circumstances * * * but also the nature of the unlawful conduct, including its purpose and flagrancy." *Ibid*.

When "there is no question that the defendant's consent was voluntary," courts consider "the totality of the circumstances to determine whether the state had carried its burden of proving that the consent was independent of, or only tenuously related to, the unlawful police conduct." *State v Pichardo*, 275 Or App 49, 54 (2015) (citing *Unger*). This is the "exploitation" analysis to determine whether the consent was tainted because it derived from the unlawful conduct. *Id*.

The Oregon Court of Appeals categorizes "consent" into four categories. Those are cases involving: (1) voluntariness; (2) authority; (3) scope; and (4) vindication of rights violated by earlier police misconduct. Three of those four categories (except "authority") involve

autonomous choice. *State v Marshall*, 254 Or App 419 (2013) (In *Marshall*, the Court of Appeals applied Article I, section 12, self-incrimination reasoning to this Article I, section 9, consent case).

"The existence of probable cause does not relieve the state of its obligation to obtain a warrant or to establish that an exception to the warrant requirement applies." *State v Groling*, 262 Or App 582 (2014) (citing *State v Rudder*, 347 Or 14, 21 (2009)).

"In assessing voluntariness, we examine the totality of the circumstances to determine whether a defendant's consent was the product of the defendant's free will or was the result of express or implied coercion. *State v Parker*, 317 Or 225, 230 (1993)." *State v Moore*, 265 Or App 1 (2014). "Drug use may be a relevant factor in determining whether consent is voluntary if it impairs a defendant's capacity to make a knowing, voluntary and intelligent choice. Drug use, however, is not determinative." *Id*. (quoting *State v Larson*, 141 Or App 186, 198, *rev den*, 324 Or 229 (1996)).

"Whether the state has carried its burden to prove the voluntariness of consent requires us to 'examine the totality of the facts and circumstances to see whether the consent was given by defendant's free will or was the result of coercion, express or implied.' *State v. Unger*, 356 Or 59, 72, 333 P3d 1009 (2014) (quoting *State v. Kennedy*, 290 Or 493, 502, 624 P2d 99 (1981)). Ultimately, whether consent is voluntary is a legal question. *State v. Stevens*, 311 Or 119, 135, 806 P2d 92 (1991). Relevant factors that we consider in making that determination include: 'whether physical force was used or threatened'; 'whether weapons were displayed'; 'whether the consent was obtained in public'; 'whether the person who g[ave] consent [was] the subject of an investigation'; 'the number of officers present'; 'whether the atmosphere surrounding the consent [was] antagonistic or oppressive'; and whether drug use impaired the defendant's 'capacity to make a knowing, voluntary, and intelligent choice.' *State v. Larson*, 141 Or App 186, 198, 917 P2d 519, *rev den*, 324 Or 229 (1996)." *State v Stevens*, 286 Or App 306, 310 (2017).

> ***State v Unger***, 356 Or 59 (2014) held: "*Hall*'s test for exploitation is flawed" and the Court overruled part of it. The Court "disavow[ed] the 'minimal factual nexus' part of the Hall test." *Id*. at 74. "Instead, we hold that, when a defendant has established that an illegal stop or an illegal search occurred and challenges the validity of his or her subsequent consent to a search, the state bears the burden of demonstrating that (1) the consent was voluntary; and (2) the voluntary consent was not the product of police exploitation of the illegal stop or search." *Id*. at 74-76. Even if "an officer requested consent" during police misconduct, that "does not demonstrate that the officer *necessarily exploited* the prior illegal conduct to gain consent." *Id*. at 78-79. "Properly considered, then, a voluntary consent to search that is prompted by an officer's request can be sufficient to demonstrate that the consent is unrelated or only tenuously related to the prior illegal police conduct." *Id*. at 79.
>
> Further: "*Hall* erred in focusing exclusively on 'temporal proximity' and the presence of mitigating or intervening circumstances in determining whether the police exploited unlawful conduct to obtain consent to search." *Id.* at 79. The Court wrote: "If the conduct is intrusive, extended, or severe, it is more likely to influence improperly a defendant's consent to search. In contrast, where the nature and severity of the violation is limited, so too may the extent to which the defendant's consent is tainted." *Id.* at 81.

The "purpose and flagrancy" of the police misconduct is part of the exploitation assessment. This factor is taken from *Brown v Illinois*, 422 Or 590, 603-04 (1975) where the United States Supreme Court described the purpose and flagrancy of the misconduct as "relevant" to the Fourth Amendment exploitation analysis. *Id*. at 81. In *Hall*, the Oregon Supreme Court had written that the "purpose and flagrancy" elements relate only to the Fourth Amendment's deterrence rationale and have "no applicability to the exclusionary rule under Article I, section 9," which is a "rights-based" rationale. *Id*. The *Unger* Court adopted the "purpose and flagrancy" elements to the "rights-based" rationale of Article I, section 9, without adopting (or admitting that it was adopting) the deterrence rationale.

In sum, to determine if police misconduct exploited a defendant's consent to a search, the *Hall* Court had only considered temporal proximity and intervening or mitigating factors. Now, other factors are relevant: "the nature, extent, and severity of the constitutional violation are relevant, as are the purpose and flagrancy of the misconduct." *Id*. at 86. In addition, per a treatise, "account must be taken of the proximity * * *, whether the illegal seizure was 'flagrant police misconduct,' whether the consent was volunteered rather than requested by the detaining officers, whether the arrestee was made fully aware of the fact that he could decline to consent and thus prevent an immediate search of the car of residence, whether there has been a significant intervening event * * * and whether the police purpose underlying the illegality was to obtain the consent." *Id*. at 87.

Justice Landau concurred, providing the fourth vote for the majority: "The problem is that the personal rights rationale for Oregon's exclusionary rule is incomplete. * * * Sometimes, regardless of whether a defendant consented, the court should exclude evidence otherwise unlawfully obtained to prevent police from reaping the benefits of their misconduct." *Id*. at 95. "[T]his court, in staking out the position that deterrence has no role in determining whether evidence must be excluded, stands almost alone. Nearly all the state courts that have adopted an exclusionary rule under their state constitutions recognize that deterrence is, at the very least, a relevant consideration". *Id*. at 98 & n 1 (only Oregon, New Mexico, and Pennsylvania have rejected deterrence as a justification for a state exclusionary rule." "In my view, the personal rights explanation for exclusion fails to explain why a defendant's voluntary consent does not suffice to justify the search." *Id*. at 101.

4.8.5.B Traffic Stops

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

4.8.5.C Scope of Consent

A defendant's consent is based on his "actual consent" under Article I, section 9, not what was objectively reasonable to the police.

State v Blair, 361 Or 527 (6/15/17) (Brewer) (Tillamook) Sheriff's deputies responded to a report that "armed suspects" were chasing defendant in a public park. They found defendant very unkempt, dirty, and scratched, having apparently run through blackberry patches and dug around in the dirt with his bare hands. He couldn't respond to questions, he was "agitated, disheveled, and somewhat incoherent" and did not want to be alone to retrieve a backpack and a sweatshirt he said he'd lost in the park. An officer walked with defendant, who located his backpack. Officer asked if he could search the backpack. The record did not disclose what words the officer used. But defendant said "yeah," so the officer opened the backpack, found a knotted Fred Meyer plastic bag, opened that bag, and found a Ziploc bag containing psilocybin mushrooms. Defendant said "shit those aren't mine." He was charged with possession of a Schedule I controlled substance. He moved to suppress. He presented an expert who testified that defendant appeared to be under the influence of mushrooms and could not "grasp reality" and could not consent. The trial court denied the motion. The Court of Appeals reversed and remanded.

On the state's petition for review, the Oregon Supreme Court reversed the decision of the Court of Appeals and remanded to the trial court. The proper test for scope of consent of containers-in-containers is: "Did defendant intend to consent to the search of closed containers inside his backpack?" *Id*. at 529. In this case, "it is unclear whether the trial court so understood the inquiry before it, and, on the record before us, we conclude that opposing inferences permissibly could have been drawn from the evidence as to that issue." *Id*.

The Court recited: "The state bears the burden of showing by a preponderance of the evidence that an exception to the warrant requirement applies." *Id*. at 534. "This court's focus on actual consent as a touchstone of the consent exception under Article I, section 9, is distinct from the way the consent exception operates under the Fourth Amendment. Fourth Amendment decisions do not recognize any analytical difference in perspective between the consent exception and other recognized exceptions to the warrant requirement. The United States Supreme Court has reasoned that, because other exceptions to the warrant requirement are tested against a standard of objective reasonableness from the point of view of the police, the same standard should apply to the facts bearing on the application of the consent exception. *Illinois v Rodriguez*, 497 US 177, 186 (1990)." *Id*. at 535-36.

In determining actual consent, "what a person says is often the best indicator of what the person intended." *Id*. at 537 (no supporting citation). The court then wrote this paragraph:

> "However, where—based on the totality of circumstances—the defendant's intent with respect to the scope of consent is unambiguously expressed, that manifestation of intent is controlling. In that way, what a reasonable person would understand by his or her choice of unambiguous words or other manifestations of intent will bear its expected weight in citizen-police interactions. Such clarity in expression will be further promoted when officers

requesting consent make clear to a suspect what the objects of the requested search are and what level of scrutiny is sought." *Id*. at 538.

The court noted that "[a]t least on this record, defendant's failure to object [to the officer's unknotting and opening of the plastic bag] did not constitute an unambiguous manifestation of consent to the search of closed containers inside the backpack." *Id*. at 541. In short, "it is unclear from the record whether the trial court found as fact that defendant actually intended to consent to the search of closed containers inside his backpack. * * * it is not apparent that the trial court . . . understood the scope of consent determination to be the factual inquiry that we have described." *Id*. at 41-42.

State v Winn, 361 Or 636 (6/29/17) (Brewer) (Marion) Defendant brought her purse to a court facility. Two signs on the wall informed people that they are subject to search in the building. The security officer asked her to put the purse on an x-ray scanner belt. She did. A makeup compact and a spoon showed on the x-ray. The officer asked defendant if he could run it through again. She said yes. The security officer asked defendant, "May I please search your purse?" according to the record. *Id*. at 636. "Defendant responded in the affirmative." *Ibid*. While she stood there, the officer opened a makeup compact in the purse and found a small baggie of meth inside. A sheriff's deputy arrested defendant. Charged with possession of meth, defendant moved to suppress. The only issue on review was her consent. She argued that her consent to the purse-search was not broad enough to encompass opening the makeup compact.

The trial court denied her motion. The Court of Appeals reversed and remanded. The Oregon Supreme Court reversed the Court of Appeals' decision and remanded to the trial court, following its recent decision in *State v Blair*, 361 Or 527 (2017). The *Winn* Court quoted *Blair*:

"[i]n determining whether a particular search falls within the scope of a defendant's consent, the trial court will determine, based on the totality of the circumstances, what the defendant actually intended." *Id.* at 642.

Further, "an unqualified affirmative response to a police officer's generalized request to search an item of personal property" does not automatically extend "to opening and inspecting any closed container" inside the larger container. *Id*.

In this case, defendant did not "unambiguously manifest[] consent – or denial of consent - to the opening of any small closed containers" that the security officer might encounter while searching the purse. Instead, "defendant's affirmative response to [the officer's] generalized request to search gave rise to competing inferences" regarding scope of consent.

Thus, "[b]ecause the record would support either of those opposing inferences, we cannot conclude that defendant's unqualified expression of assent to [the officer's] request to search her purse by hand was unambiguous with respect to the scope of her consent. Instead, the scope of consent determination requires the resolution of those competing inferences. The trial court's written decision indicates that the court did not

resolve that factual issue * * *. [W]e must remand to the trial court to determine the scope of defendant's consent under the correct standard." *Id*. at 644.

4.8.5.D Third-Party Consent

"Under the Fourth Amendment, consent of a third party may be valid if it is based on apparent authority. *Illinois v Rodriguez*, 497 US 177, 188-89 (1990).

The "existence of valid third-party consent depends either on the third party's common authority over the property based on her or his own property interest," "or, alternatively, on the application of agency principles." *State v Bonilla,* 358 Or 475, 486 (2016).

"When the state relies on consent, it must prove by a preponderance of the evidence that 'someone having the authority to do so' voluntarily gave the police consent to search the defendant's property and that any limitations on the scope of the consent were complied with. * * * Where * * * the police rely on consent from someone other than the defendant, it is necessary to establish the basis of the third party's authority. As an example of valid authority, a co-inhabitant with common authority over property, based on joint access or control, generally has authority to give consent to search the property. *State v Carsey*, 295 Or. 32, 41, 664 P.2d 1085 (1983)." *State v Bonilla*, 358 Or 475, 481 (2015) (not a traffic case).

"[C]ommon authority to validly consent to a search rests on mutual use of the property by persons generally having joint access or control for most purposes." The state has the burden of proving by a preponderance of the evidence that the consenting person has the requisite authority. One joint occupant of a premises has assumed the risk that another occupant might permit a search of those premises. And conversely where one co-occupant has limited another co-occupant's authority, the question under Article I, section 9, is "whether the search is within that limited authority." *Held*: defendant's girlfriend knew she did not have authority to consent to a search of a van, and gave consent only did so when badgered by the officer. *State v Kurokawa-Lasciak*, 249 Or App 435 (2012).

State v Bonilla, 358 Or 475 (12/31/15) (Brewer) The Oregon Supreme Court held that the evidence in this case was insufficient to satisfy the consent exception because "the state adduced no evidence" that a mother had authority to consent to the search of her daughter's wooden box in their shared bedroom. The bedroom was small and had one single bed and a recliner. The mother was in the recliner and handed the officer a bag of marijuana that she said she'd been smoking. Officer asked if he could "check to make sure" there were no more drugs; she said yes. Officer saw a wooden box next to the bed, he opened it, and found three bags of meth. Mother said it wasn't hers, that it must be her daughter's. Only at that point did the officer realize that the bedroom was used by two people (mother and daughter-defendant). Officer then asked the daughter-defendant for permission to search the bedroom, which she granted, and officer found "snort tubes" with meth. The trial court denied defendant's motion to suppress due to consent. The Court of Appeals reversed.

The Oregon Supreme Court affirmed. On review, the state for the first time argued that the search was justified under an "apparent authority doctrine" grafted off of *Illinois v*

Rodriguez, 497 US 177, 188-89 (1990) under the Fourth Amendment. The Oregon Supreme Court did not adopt an "apparent authority doctrine" to justify a warrantless search based on third-party consent. The "Fourth Amendment doctrine of apparent authority is based on different principles than those underlying the consent exception under Article I, section 9." *Id*. at 486. Because "consent under Article I, section 9, involves the relinquishment of a privacy interest," "it must be given by (or lawfully on behalf of) the person who holds the protected privacy interest." *Id*. at 486. "For that reason, the existence of valid third-party consent depends either on the third party's common authority over the property based on her or his own property interest," "or, alternatively, on the application of agency principles." *Ibid*. Moreover, "under Article I, section 9, consent always has been treated differently from other recognized justifications for warrantless searches." *Id*. at 487. Objective reasonableness is the "standard," "based on the facts known to police at the time of a search, when reviewing the lawfulness of warrantless searches based on the emergency aid exception," "the officer safety exception," "the school safety exception," and "the more general 'exigent circumstances' exception." *Id*. at 489.

State v Voyles, 280 Or App 579 (2016) Police executed a search warrant on defendant's rural property to seize a large number of horses and other animals being neglected. Without a warrant, other officers also visited two other properties that other people owned where defendant was boarding more horses. Both of those other property owners expressed concern to officers about the condition of defendants' horses that defendant kept on their property. Officers took defendant's horses from those other properties based on the other owners' consents. No contracts for boarding horses were part of the evidence in this case. Charged with 18 counts of animal neglect and one count of felon in possession of a firearm, defendant moved to suppress the horse evidence taken from the other peoples' properties, on grounds that the other property owners did not have lawful authority to let the state enter the stalls and pastures where defendant's horses were, or to let the state take her horses. The trial court denied the motion to suppress.

The Court of Appeals reversed and remanded. The court distinguished "searches" (occurs when a person's privacy interests are invaded) from "seizures" (occurs when there is a significant interference with a person's possessory or ownership interests in property). *Id*. at 584. Consent to a search "is only as good as the authority of the person providing it." *Id*. at 585. "The state must prove by a preponderance of the evidence that consent was provided by 'someone having authority to do so.'" *Id*. (quoting *State v Weaver*, 319 Or 212, 219 (1994)). "Whether the third party had authority to consent to a search of another person's property is a fact-specific inquiry and depends on the 'relationship of the third party to the premises or the things searched." *Ibid*. (quoting *State v Fuller*, 158 Or App 501, 505 (1999)).

Here, the other property owners consented. They had actual authority to consent to the officers entering their property. There is nothing in the record to indicate that defendant had any exclusive or even joint control over the other owners' properties. This is not a joint-ownership or housemates situation. No error on the "search" aspect of this case. The trial court did err, however, on the "seizure" aspect of its ruling. Defendant did not abandon her interest, or relinquish all her protected interest, in her horses merely by boarding them. "In other words, the third-party property owners could not hand over

horses that they did not have a legal right to hand over by virtue of the simple boarding relationship." *Id*. at 589. Oregon Supreme Court "case law compels a separate and independent analysis of the search of the real property and seizure of the personal property within it." *Id*. "Even if the deputies have made a lawful entry into a private space, they may not seize personal property within that space unless they see evidence of a crime in plain view or the item is otherwise subject to seizure based on probable cause and an exception to the warrant requirement, such as exigency." *Id*. at 590 (citing *State v Sargent*, 323 Or 455, 463 (1996)). Earlier Oregon Court of Appeals cases that might be read to allow police to seize a defendant's personal property on another person's real property "conflict with subsequent Supreme Court law and, therefore, they are no longer good law." *Id*.

4.8.5.E "Mere Acquiescence"

Merely failing to oppose officers' efforts to search does not establish consent. *State v Mast*, 250 Or App 605 (2012); *State v Ry/Guinto*, 211 Or App 298, 303-07 (2007).

The act of opening a *vehicle* door may reasonably be viewed as giving the officer access to the inside of the vehicle – "as manifesting nonverbal consent for the officer to search it" – under some circumstances. *State v Pickle*, 253 Or App 235 (2012).

That differs from a consent-search of a *premises* where an officer knocks on the front door and an occupant opens the door. That is not consent to search a premises under *State v Martin*, 222 Or App 138 (2008), *rev den*, 345 Or 690 (2009). *State v Pickle*, 253 Or App 235 (2012).

Words matter in consent-by-conduct cases. *State v Jepson*, 254 Or App 2990 (2012); *State v Martin*, 222 Or App 138, 142 (2008). "When [an officer's] words do not provide the listener with a reasonable opportunity to choose to consent, or when the words leave the listener with the impression that the search is inevitable, absent strong countervailing factors, we have consistently found acquiescence rather than consent." The difference is in saying, "I'd like to come in" versus "I'm coming in." *State v Briggs*, 257 Or App 738 (2013); *see also* ***State v Stanley***, 287 Or App 399, 407-08 (2017).

State v Watts, 284 Or App 146 (3/01/17) (Lane) (Tookey, Sercombe, Wollheim SJ) Armed with a search warrant, three armored vehicles with spotlights and sirens on entered defendant's uncle's residence to retrieve two firearms at night. The 10-12 officers inside were wearing "tactical body armor" and carried "AR-15 style semi-automatic rifles." With a loudspeaker, officers ordered the occupants to come out with their hands up. All did, including defendant, and they were handcuffed. Officers found an outbuilding that defendant lived in, with "dogs barking aggressively inside." Defendant said he owned the dogs, officers let him tie up his dogs, then he said, "have at it, it's all yours" before officers entered his outbuilding. A long gun was leaned up against a wall, and officers also found a rifle, a handgun, and a shotgun. Defendant is a convicted felon, but dispatch erroneously told officers he was not. So officers left the guns there. The next day, officers realized he was a convicted felon, so they went back to defendant's residence without a warrant, took his weapons, and cited him for being a felon in possession. Defendant moved to suppress. The state said the search was within the scope of the warrant, and defendant gave consent to the search, and the guns would've

been inevitably discovered. The trial court concluded that the search was outside the scope of the warrant but defendant voluntarily consented to the search because he was not coerced.

The Court of Appeals reversed: defendant did not consent to the search of his residence (the outbuilding). The "only evidence in the record relating to how [the officer] made his request [to search] is from defendant's own testimony. Defendant testified that [the officer] told him 'we need you to let your dogs out so we can search your residence,' and that [the officer] gave defendant 'the choice of the police letting his dogs out or defendant letting his dogs out." Defendant testified that he felt the officers would enter his residence regardless if he consented, and they might harm the dogs.

The court wrote: "When an individual 'is not given an reasonable opportunity to choose to consent or when he or she is informed that a search will occur regardess of whether consent is given,' such 'acquiescence to police authority does not constitute consent.'" *Id*. at 151 (quotation omitted). A reasonable person would think "that a search is inevitable." Further, it was not a request. Defendant merely acquiesced to the statement. This was a coercive atmosphere: 10-12 heavily armed officers, nighttime, sirens, spotlights, loudspeaker, orders to exit the residence with hands up, officers with semi-automatic AR-15 rifles, handcuffs, and the officer's statement. "On this record, we conclude that the state failed to prove by a preponderance of the evidence that defendant consented to a warrantless search of his residence." *Id*. at 152.

State v Stanley, 287 Or App 399 (8/23/17) (Clackamas) (Garrett, DeVore, James) Two officers responded to a 911 call from defendant's girlfriend, who said he'd attacked her in his house, taken her phone, broke down the door, had a gun in a safe, and she was hiding upstairs safely. Three officers arrived to find defendant on the porch, calm and casual. An officer told defendant, "I'm going to go in and check on [the girlfriend]." Defendant responded, "Go ahead. She's inside. No one asked for his consent to enter his home. Officers entered the house, found the damaged door, and the girlfriend had a red ear and parts of her face were red. Defendant moved to suppress.

The Court of Appeals concluded that the trial court erred in denying a motion to suppress. The warrantless home entry was not justified by the emergency aid exception. None of the officers had even a subjective belief that the girlfriend had suffered serious physical injury and needed immediate help. The officers used the word "if" in the suppression hearing: "if there was a crime," and "if anybody was injured." That was too speculative to support a warrantless home entry.

As for consent, the state failed to prove by a preponderance of the evidence that defendant voluntarily consented to the home entry. This was "mere acquiescence" to police authority, not voluntary consent, citing *State v Berg*, 223 Or App 387, 392 (2008), *adh'd to as modif on recons*, 228 Or App 754, *rev den*, 346 Or 361 (2009). The court is to "pay close attention to the words" the officer used. *Id*. at 407. "When those words do not provide the listener with a reasonable opportunity to choose to consent, or when those words leave the listener with the impression that a search is inevitable, absent strong countervailing factors, we have consistently found acquiescence rather than consent." *Id*. (quotation omitted). This was defendant passively acquiescing, based on the record.

See ***State v Powell***, 288 Or App 660 (11/01/17) under "Officer Safety," ante.

4.8.5.F Drivers' Implied Consent

See **Section 4.6.4 on Consent to Enter Premises** and **Section 4.8.3 on Exigent Circumstances**.

Subjecting a person to a breath test is a search and seizure that requires a warrant or an exception under Article I, section 9. *State v Burshia*, 201 Or App 678, 682 (2005); *State v Lopez-Lopez*, 271 Or App 817, 822 (2015). Consent is an exception. *Lopez-Lopez*, 271 Or App at 822 (citing *State v Lowe*, 144 Or App 313, 317 (1996)). Courts will assess the voluntariness of consent to determine if the consent was a product of defendant's free will or was the result of express or implied coercion. *Id*. (quoting *State v Larson*, 141 Or App 186, 197 (1996)).

See ORS 813.100 and 813.130 on drivers' consent to provide blood, breath, and urine samples**.**

It is a crime to drive under the influence of intoxicants, see ORS 813.130. Anyone driving in Oregon has impliedly consented to a chemical test for alcohol on his breath, and sometimes in his blood or urine, upon arrest for DUII, see ORS 813.130 and 813.131 The statute on rights and adverse consequences that the state actor must read to a DUII suspect before administering a test to determine intoxication levels. It is a violation to refuse, plus the driver's license is immediately confiscated, his license is suspended, and he is ineligible for a hardship permit for up to 3 years, and his refusal or failure of the test "may also be offered against" him. *State v Moore*, 354 Or 493 (2013).

When an officer recites to a DUII suspect: "If you refuse or fail a test, evidence of the refusal or failure may be offered against you," that is true and the defendant's consent to state's seizure of blood and urine is not coerced by those words. *State v Moore*, 354 Or 493 (2013) (emphasis on the word "may" rather than "is admissible"); *State v Wieboldt*, 260 Or App 583 (2014); *State v Geren*, 263 Or App 716 (2014).

4.8.5.G Probation and Diversion

A probationer's "prior consent to a home visit," as part of a probation condition, does "not also encompass a more intrusive consent to search the private areas of a residence" under *State v Guzman*, 164 Or App 90 (1999), *rev den* 331 Or 191 (2000).

"Under Article I, section 9, a probation condition requiring a probationer to consent to a home visit is not the same as a consent to search; the latter is more intrusive and is conditioned on the existence of 'reasonable grounds to believe that evidence of a violation will be found.' ORS 137.540(h) and (i). Further, a consent to search is not self-executing; if a probationer refuses to consent, the officer has no authority under the probation condition to search, although the probationer may be subject to a sanction for violating the condition." To determine voluntariness of consent in probation-condition situations, the court considers "whether the probationer was effectively denied a reasonable opportunity to refuse the search or whether the environment was sufficiently coercive to preclude him from doing so." *State v Brock*, 254 Or App 273 (2012). See also Section 4.8.12.

4.8.5.H Suppression as Remedy, or No Remedy

"[W]hen a defendant has established that an illegal stop or an illegal search occurred and challenges the validity of his or her subsequent consent to a search, the state bears the burden of demonstrating that (1) the consent was voluntary; and (2) the voluntary consent was not the product of police exploitation of the illegal stop or search." *State v Unger*, 356 Or 59, 75, 85 (2014). Even "if the consent is voluntary, the court must address whether the police exploited their prior illegal conduct to obtain the evidence." *Id*. at 86. A "voluntary consent to search that is prompted by an officer's request can be sufficient to demonstrate that the consent is unrelated or only tenuously related to the prior illegal police conduct." *Id*. at 79. In determining "exploitation," if the illegal police "conduct is intrusive, extended, or severe, it is more likely to influence improperly a defendant's consent to search. In contrast, where the nature and severity of the violation is limited, so too may be the extent to which the defendant's consent is 'tainted.'" *Id*. at 81. Another "concern relevant to whether a defendant's consent resulted from exploitation of police misconduct is the 'purpose and flagrancy' of the misconduct. The 'purpose and flagrancy' inquiry comes from *Brown v Illinois*, 422 US 590, 603-04 (1975)." *Id*. at 81. The federal "purpose and flagrancy" inquiry is compatible with the federal deterrence rational for suppression and also with the rights-based rationale under the state constitution. *Id*. at 82. "Flagrancy" includes excessive use of force, unlawful forcible entry into a home, lengthy in-custody interrogation "is more likely to affect the defendant's decision to consent than more restrained behavior." *Ibid*. "Purpose" can be "expressed through conduct or comments." *Id*. at 83.

"Exploitation may be found" if there is "a direct causal connection between the prior illegal stop and the consent" if "the request for consent itself (and the evidence gathered) resulted from police knowledge of the presence" of the evidence itself. *Id*. at 86. Further, "evidence may be subject to suppression if the police obtained the consent to search through less direct exploitation of their illegal conduct." *Ibid*. Close timing between the illegal police conduct and consent, the presence of intervening or mitigating circumstances, plus "the nature, extent, and severity of the constitutional violation are relevant, as are the purpose and flagrancy of the misconduct." *Id*.

That inquiry applies even when it is undisputed that police trespassed onto the threshold of a man's bedroom door at his back yard without a warrant, *State v Unger*, 356 Or 59 (2014), or when police trespass by opening an apartment's front door, then knock on a bedroom door from the threshold of the apartment front door without a warrant, *State v Lorenzo*, 356 Or 134, 145 (2014).

The Oregon Supreme Court subsequently has stated that *Unger* was "an attenuation analysis." *State v Bailey*, 356 Or 486, 504 n 13 (2014). Under *Brown v Illinois*, 422 US 590 (1975), there are three factors to consider under a Fourth Amendment "attenuation analysis: (1) the temporal proximity between unlawful police conduct and the discovery of the challenged evidence; (2) the presence of intervening circumstances; and (3) 'particularly, the purpose and flagrancy of the official misconduct." *Bailey*, 356 Or 486; *see also* *State v Pichardo*, 360 Or 754, 764-66 (2017).

The "attenuation test set forth in *Unger*" evaluates "the temporal proximity between the unlawful police conduct and the discovery of the challenged evidence; the presence of mitigating circumstances; the presence of intervening circumstances; the purpose and flagrancy of the unlawful police conduct; and the nature and extent of the constitutional violation." *State v Jones*,

275 Or App 771, 775 (2015) (citations omitted). "Thus, whether we are evaluating attenuation under Article I, section 9, or the Fourth Amendment, we consider essentially the same factors to determine whether the state has met its burden to demonstrate attenuation." *Ibid*. *Unger* disavowed the "minimal factual nexus" part of the test in *State v Hall*, 339 Or 7, 34-35 (2005). *Id*. at 776 n 5.

4.8.5.I Fourth Amendment

The Fourth Amendment does not require "that a lawfully seized defendant must be advised that he is 'free to go' before his consent to search will be recognized as voluntary." *Ohio v Robinette*, 519 US 33, 35 (1996).

The Oregon Court of Appeals has stated: the "test under the Fourth Amendment for the voluntariness of consent to search is 'essentially the same' as the test under Article I, section 9." *State v Brock*, 254 Or App 273 (2012) (quoting *State v Ry/Guinto*, 211 Or App 298, 309, *rev den* 343 Or 224 (2007) (which had cited *Schneckloth v Bustamonte*, 412 US 218, 248-49 (1973)). Note: Proceed with caution on the idea of "sameness" of two distinct constitutions; the Oregon Supreme Court could change that.

But "in contrast to the Fourth Amendment, which requires that the state establish that the person giving consent had apparent authority to do so, Article I, section 9, requires actual authority to give consent." *State v Brown*, 264 Or App 592 n 6 (2014) citing *State v Ready*, 148 Or App 149, 154, *rev den* 326 Or 68 (1997)).

4.8.6 Inventories: Administrative Searches

A. **Generally**. "One exception to the warrant requirement is the 'inventory' exception.'" *State v Cherry*, 262 Or App 612 (2014). An inventory is a common type of administrative "search." "An 'administrative' search is one conducted 'for a purpose other than the enforcement of laws by means of criminal sanctions.' *State v Anderson*, 304 Or 139, 141 (1987). * * * If those intended consequences are criminal prosecution, then the search is not administrative in nature. *Id*. at 104-05." *Weber v Oakridge School Dist*., 184 Or App 415, 433-34 (2002).

Courts "first consider whether the officers complied with the [inventory] policy; if they did so, we then consider whether the policy was constitutionally permissible." *State v Brown*, 229 Or App 294, 302-03 (2009); *State v Hockersmith*, 264 Or App 560, 561 n 1 (2014). Inventory policies "governing inventories in each case vary in language and scope." *Hockersmith* (quoting *State v Swanson*, 187 Or App 477, 483 (2003)). "Undoubtedly, many inventory policies employ some version of the phrase 'designed to carry' (or 'to hold') particular items or valuables." *Ibid*. "Language has meaning" and the Court of Appeals has "been scrupulously rigorous" in construing the words of inventory policies. *Ibid*. (citations omitted).

B. **Elements**. Under Article I, section 9, police may inventory the contents of a lawfully impounded vehicle or the personal effects of a person being taken into custody if three elements are met: (1) the state lawfully possesses the property being inventoried; (2) a valid statute, ordinance, or policy authorizes the state to do so; and (3) the inventory is designed and systematically administered to involve no exercise of discretion by the officer conducting the inventory. *State v Atkinson*, 298 Or 1, 8-10 (1984). The state has the burden of proving the lawfulness of an inventory. *State v Tucker*, 330 Or 85, 89 (2000).

In 2017, the Oregon Court of Appeals summarized the elements of a lawful inventory: "The first rule is that the property being inventoried must be lawfully in the custody of the officer conducting the inventory. *State v Stinstrom*, 261 Or App 186, 190, 322 P3d 1076 (2014) (citing *Atkinson*, 298 Or at 8-10). In addition, the inventory must be conducted pursuant to a policy that has been adopted by 'politically accountable officials.' *Atkinson*, 298 Or at 6. The officer performing the inventory must not have 'deviated from the established policy or procedures of the particular law enforcement agency,' which can occur if the officer scrutinizes the inventoried items beyond 'the extent necessary to complete the inventory.' *Id*. at 10. Finally, if those requirements are met, then it is the court's task to 'assure that such policies and procedures as are adopted do not violate constitutional guarantees.' *Id*. *State v Towai*, 284 Or App 868, 871 (2017). Further, if the adopted policy is overly broad, then "an inventory conducted pursuant to the policy violates Article I, section 9." *State v Cherry*, 262 Or App 612, 617 (2014).

The "inventory" situation most commonly arises when police impound an auto or when a person is booked into custody. *State v Taylor*, 250 Or App 90 (2012). Police departments may adopt policies that authorize officers to itemize the personal property to protect the owner's property, to reduce the likelihood of false claims against the police, and to protect the safety of the officers. *State v Atkinson*, 298 Or 1, 7 (1984). "The purpose of the inventory is not to discover evidence of a crime. Rather, an inventory serves civil purposes and is one type of administrative search." *State v Connally*, 339 Or 583, 587 (2005).

C. **Search Only**. Inventories are an exception to the warrant requirement for searches, not for seizures. Inventory policies govern the search which is "the examination of property and not its seizure." *State v Komas*, 170 Or App 468, 478 (2000); *State v Stinstrom*, 261 Or App 186 (2014). An "inventory policy does not give an officer the authority to seize an item; rather, the inventory policy governs the scope of the examination once the officer already lawfully possesses it." *Komas*, 170 Or App at 478; *State v Stinstrom*, 261 Or App 186 (2014).

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

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

4.8.7 Administrative Searches, Seizures, Subpoenas, Inspections

4.8.7.A Searches

See **Section 4.8.17** on Fourth Amendment exceptions to warrant requirements that do not consider officers' subjective intent. Such situations include execution of an administrative warrant authorizing an inspection of fire-damaged premises to determine the cause, *Michigan v Clifford*, 464 US 287, 294 (1984) or inspection of residential premises to assure compliance with a housing code, *Camara v Municipal Court of City and County of San Francisco*, 387 US 523, 535-538 (1967).

The US Supreme Court has explained "administrative searches" in a case declaring a city ordinance facially unconstitutional. The ordinance in *City of Los Angeles v Patel*, 135 S Ct 2443 (2015) required hotel operators to keep specific information on hotel guests and to provide that information to police on demand. The Court wrote:

> "Search regimes where no warrant is ever required may be reasonable where 'special needs ... make the warrant and probable-cause requirement impracticable,' [*Skinner v. Railway Labor Executives' Assn*., 489 US 602, 619 n 10 (1989)] (quoting *Griffin v Wisconsin*, 483 US 868, 873 (1987)), and where the 'primary purpose' of the searches is '[d]istinguishable from the general interest in crime control,' *Indianapolis v Edmond*, 531 US 32, 44 (2000). Here, we assume that the searches authorized by [the statute] serve a 'special need' other than conducting criminal investigations: They ensure compliance with the recordkeeping requirement, which in turn deters criminals from operating on the hotels' premises. The Court has referred to this kind of search as an 'administrative searc[h].' *Camara v Municipal Court of City and County of San Francisco*, 387 US 523, 534 (1967). Thus, we consider whether [the ordinance] falls within the administrative search exception to the warrant requirement. The Court has held that absent consent, exigent circumstances, or the like, in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker. *See*, 387 U.S., at 545; [*Donovan v Lone Steer, Inc*., 464 US 408, 415 (1984)] (noting that an administrative search may proceed with only a subpoena where the subpoenaed party is sufficiently protected by the opportunity to 'question the reasonableness of the subpoena, before suffering any penalties for refusing to comply with it, by raising objections in an action in district court')." *Id.* at 2452 (internal quotes omitted).

"An 'administrative' search is one conducted 'for a purpose other than the enforcement of laws by means of criminal sanctions.' *State v Anderson*, 304 Or 139, 141 (1987). * * * If those intended consequences are criminal prosecution, then the search is not administrative in nature. *Id*. at 104-05." *Weber v Oakridge School Dist*., 184 Or App 415, 433-34 (2002).

"Typical examples include health and safety inspections and certain inventory searches of lawfully seized automobiles" and schools' student search policies if they are noncriminal and otherwise meet administrative-search requirements. *State v B.A.H*., 245 Or App 203, 206 (2011); *cf. Donovan v Dewey*, 452 US 594, 598 (1981) (administrative inspections of private property, constitute searches under the Fourth Amendment).

One requisite element of the administrative search exception is that there must be “a source of legal authority permitting the administrative search,” per *State v Atkinson*, 298 Or 1 (1984) and *Nelson v Lane County*, 304 Or 97 (1987). *State v Mast*, 250 Or App 605 (2012)

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

“In general, a search qualifies for the exception if it is conducted for a purpose other than law enforcement * * * pursuant to a policy that is authorized by a politically accountable lawmaking body * * * if the policy eliminates the discretion of those responsible for conducting the search.” *State v B.A.H.*, 245 Or App 205 (2011) (school search); *see also State v Spring*, 201 Or App 367, 373 (2005) (DNA testing by swabbing a cheek “is a reasonable administrative search” under Article I, section 9, because it was to establish paternity, was conducted per a statute that eliminated discretion in that every person denying paternity must provide a DNA sample).

A search conducted pursuant to a "statutorily authorized administrative program * * * may justify a search without a warrant and without any individualized suspicion at all." *Clackamas County v M.A.D.*, 348 Or 381, 389 (2010) (citing *State v Atkinson*, 298 Or 1, 8-10 (1984)).

Note that under the Fourth Amendment, suspicion of criminal activity will not defeat an otherwise permissible administrative search. *United States v Villamonte-Marquez*, 462 US 579, 584 n 3 (1983).

4.8.7.B Seizures

Note: The words “administrative seizure” exception arose for the first time in 2014, in *State v Lambert*, 263 Or App 683, 695, *rev’d in part and aff’d in part on recons*, 265 Or App 742, (2014). The phrase “administrative seizure” has been used on foreclosures, liens, and seizures of property in other contexts, see for example *Bank of Lebanon v J & W Lumber Co.*, 252 Or 407 (1968). The words “administrative search” have existed for some time, see for example *State v Mast*, 250 Or App 605 (2012); *State v Snow*, 247 Or App 497 (2011); *State v Haney*, 195 Or App 273 (2004). Notably the *Lambert* court has not provided authority for its new phrase in this context, but discussed the “exception” as if it has existed, leaving an open question about the validity of this type of “exception” to the warrant requirement. In *Lambert*, police discovered a large Jeep-sized hole cut through the chain link fence that enclosed a burglarized water facility lot. Police found a 4x4 decal lying on the ground, and later found a parked Jeep near the fence hole. Police towed the Jeep to a lot, then without a warrant, an officer took the 4x4 decal to the Jeep and it was a perfect match to a spot on the Jeep. Then the officer obtained a warrant to search the interior of the Jeep. The trial court denied motions to suppress because the state’s position was that the “administrative seizure” was based on the Portland City Code regarding tows. The Court of

Appeals eventually reversed and remanded, but under what it, too, called "the administrative seizure exception to the warrant requirement":

"To invoke the administrative seizure exception to the warrant requirement, the state must show not only that the seizure was authorized by law but that 'suspicions of criminal activity play[ed] no part in the officer's decision to seize the property.'" *State v Lambert*, 263 Or App 683, 695, *rev'd in part and aff'd in part on recons*, 265 Or App 742, (2014) (citing *State v Gaunce*, 114 Or App 190, 195-97, *rev den* 351 Or 271 (1992)).

4.8.7.C Subpoenas

See *City of Los Angeles v Patel*, 135 S Ct 2443 (2015), explaining that a subpoena is required before an "administrative search" under the Fourth Amendmente.

Legislative enactments defining and limiting official authority can authorize an administrative subpoena to obtain evidence for a civil investigation that otherwise might infringe a constitutionally protected privacy interest. *State v Ghim*, 360 Or 425, 440 (2016).

"A subpoena duces tecum * * * is much less intrusive than a search warrant: the police do not go rummaging through one's home, office, or desk if armed only with a subpoena. And, perhaps equally important, there is no opportunity to challenge the search warrant [before it is executed], whereas one can always move to quash the subpoena before producing the sought-after materials." *Ghim*, 360 Or at 440 n 12 (quoting *Stanford Daily v Zurcher*, 353 F Supp 124, 130 (ND Cal 1972)).

In ***State v Ghim***, 360 Or 425, 438-44 (2016), the Oregon Supreme Court noted that it "has long recognized that an administrative subpoena issued as part of a civil investigation will comply with Article I, section 9, as long as the subpoena is 'relevant to a lawful investigatory purpose and * * * no broader than the needs of the particular investigation." *Id*. at 439 (quoting *Pope & Talbot, Inc. v State Tax Com*., 216 Or 605, 614-15 (1959) (which had quoted *United States v Morton Salt Co*., 338 US 632, 652-53 (1950)).

4.8.8 Abandonment

"Abandonment of property is an intentional permanent relinquishment of one's interests in the property without vesting those rights in another person." *State v Stinstrom*, 261 Or App 186, 192 (2014) (backpack); *State v Pidcock*, 306 Or 335, 339 (1988) (briefcase); *State v Tanner*, 304 Or 312, 323 (1987); *State v Cook*, 332 Or 601, 608-09 (2001) (defendant disclaimed ownership in duffel bag that he was rustling through when officers told him to step out); *State v Ray*, 164 Or App 145 (1999), *vac'd and rem'd on other grounds*, 332 Or 628 (2001); *State v Linville*, 190 Or App 185 (2003) (defendant abandoned interest in cigarette pack when he said "no" when asked if anything in a car belonged to him).

In Oregon, there is an "actual abandonment" basis and an "apparent abandonment" basis for warrantless inspections. Actual abandonment occurs when the defendant's statements and conduct *demonstrate* that he relinquished all constitutionally protected interests in the property. Apparent abandonment occurs when the defendant's statements and conduct *make it reasonable*

for state actors to conclude that he relinquished all constitutionally protected interests in the property. *State v Ipsen*, 288 Or App 395, 399 n 1 (2017) (quoting *State v Brown*, 273 Or App 347, 352 n 23 (2015)).

Note: "Lost Property" is a related but separate exception, see **Section 4.8.15** on "Lost and Found Property."

Abandoning something does not necessarily allow it to be searched or seized as an exception to the warrant requirement. Rather, abandonment results in relinquishing a constitutionally protected privacy interest in the item, so it is not a "search" or a "seizure." *Cf. State v Stinstrom*, 261 Or App 186, 192 & 195 n 2 (2014).

"A defendant's rights are not violated if the defendant abandoned his or her possessory or privacy interests in an item before it was searched, but it is the state's burden to show that the defendant is not entitled to suppression because he or she abandoned those rights." *State v McClatchey*, 259 Or App 531 (2013) (citing *State v Tucker*, 330 Or 85, 990-91 (2000)).

Case law provides factors to determine intent to abandon: (1) did defendant separate himself from the property based on police instruction or illegal police conduct; (2) did defendant leave the property on public or private property; (3) did defendant make any attempt to hide the property or in any other way manifest an intent to police that he was attempting to maintain control over it; (4) did defendant leave the property under circumstances that objectively make it likely that others will inspect it; (5) did defendant put the item in plain view; and (6) did defendant give up his right to control disposal of the property. *State v Ipsen*, 288 Or App 395, 399-400 (2017); *see also State v Stafford*, 184 Or App 674, 679 (2002), *rev den*, 335 Or 181 (2003); *State v Stubblefield*, 279 Or App 483 (2016).

In ***State v Pilgrim***, 276 Or App 747 (2016), defendant was a passenger in a car whose driver gave officers permission to search it. Before the search, an officer asked defendant if anything belonged to him in the car. He reached in for a bag of candy. Evidence of theft was inside the car. In this odd opinion, which never uses the word "abandonment," the court wrote: "to relinquish a person's constitutionally protect [sic] interests in an object in the circumstances of a case such as this, the person must unequivocally manifest an intention to do that." *Id*. at 753. "Here, defendant's actions did not unequivocally manifest an intention to relinquish his constitutionally protected interests in his bag." Silence does not communicate an intent to disclaim any interest in an object.

In ***State v Jones***, 280 Or App 135 (2016), the court wrote: "A disclaimer of ownership of an item does not necessarily demonstrate an abandonment of all constitutionally protected interests therein." *Id*. at 138. "[A]ffirmatively claiming an interest in certain items is insufficient by itself to support an inference, by negative implication, that the person has abandoned his or her interests in other items." *Id*. at 140. A few weeks after this case was decided, the Court of Appeals described its holding in this case as "an automobile owner's consent to search the owner's automobile is insufficient to justify a warrantless *search* of another person's belongings inside the automobile." *State v Voyles*, 280 Or App 579, 591 n 3 (2016) (emphases in *Voyles*).

> ***State v Ipsen***, 288 Or App 395 (10/25/17) (Washington) (Tookey, DeVore, Garrett) and *State v Ipsen*, 288 Or App 402 (10/25/2017) (Deschutes) (Tookey, DeVore, Garrett)

Defendant, a retired real estate broker, set up a motion-activated video camera in a Sherwood Starbucks bathroom and recorded people using the toilet. A photo of his disguised camera is here. An employee found the camera, which was in plain view. Starbucks retrieved it from Starbucks, gave the Starbucks employees a property receipt, and told them the camera was retrievable from the police department. A police captain later looked at it, slid the back off, and removed the SD card, which contained images of people using the bathroom. Starbucks told a detective that a guy (defendant) had tried to retrieve what he called a "charger" who then fled when Starbucks employees said they gave it to police. The detective reviewed the SD card again and found recordings of defendant adjusting the camera, and of people using a residential bathroom (later determined to be his NW Crossing vacation rental home in Bend). With aid of surveillance cameras in Starbucks, eventually police were able to identify defendant and obtain search warrants.

Defendant moved to suppress evidence from the search of his camera, and of his home. The trial court denied the motion, concluding that defendant had no privacy rights when he left it in the Starbucks public bathroom.

The Court of Appeals affirmed, concluding "that defendant actually abandoned his privacy interest in the device." Courts consider "whether the defendant's statements and conduct demonstrated that he relinquished all constitutionally protected interests" in the property, citing *State v Brown*, 348 Or 293, 302 (2010). "A defendant need not demonstrate 'an intent to permanently relinquish all constitutionally protected interests.'" *Ibid*. Case law provides factors to determine intent to abandon: (1) did defendant separate himself from the property based on police instruction or illegal police conduct; (2) did defendant leave the property on public or private property; (3) did defendant make any attempt to hide the property or in any other way manifest an intent to police that he was attempting to maintain control over it; (4) did defendant leave the property under circumstances that objectively make it likely that others will inspect it; (5) did defendant put the item in plain view; and (6) did defendant give up his right to control disposal of the property. *Id*. at 399-400.

In this case, defendant deliberately left his camera in plain view in a public restroom, plugged in, for several days. He gave up his rights to control the property's disposal. Anyone could take it. His argument that he did not permanently abandon it does not change that conclusion.

Under the Fourth Amendment, a "search" is a government action infringing on a reasonable expectation of privacy. For the same reasons (despite the slightly different federal test), the trial court's ruling is affirmed.

4.8.8.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) (defendants abandoned their privacy rights when they "turned the garbage over to the sanitation company"). But "a

"disclaimer of ownership is not a disclaimer of all protected interests" under *State v Cook*, 332 Or 601, 608-09 (2001).

The Court of Appeals has cautioned that the word "abandonment" may lead to imprecise analysis, because abandonment may be temporary or permanent: "For example, if a person simply sets a bag down and walks away from it, the person has not abandoned the bag itself; the person retains protected interests in the bag and an officer may not search or seize the bag unless the officer does so pursuant to a warrant or an exception to the warrant requirement." *State v Stinstrom*, 261 Or App 186, 196 n 2 (2014) (dicta) (citing *State v Cook*, 332 Or 601, 607-08 (2001)).

"The defendant is not required to assert a privacy interest in order to invoke the protections of Article I, section 9, and 'a defendant's denial of a protected interest is not necessarily dispositive of whether the state has met its burden of proving the validity of a warrantless search.'" *State v McClatchey*, 259 Or App 531 (2013) (mobile phone) (citing *State v Tucker*, 330 Or 85, 91 (2000)). A defendant may abandon his interest in an item before it is searched, resulting in no Article I, section 9, implication, but "it is the state's burden to show that the defendant is not entitled to suppression because he or she abandoned those rights." *State v Stinstrom*, 261 Or App 186 (2014).

"If a person has abandoned property, the person has no protected possessory or privacy interests in it, and, therefore, a seizure or search of the property does not violate the person's Article I, section 9, rights. A person does not abandon property by stepping away from it in response to a police order or by denying ownership of it; indeed, those actions do not even constitute a disclaimer of the person's protected possessory and privacy interests in the property. *State v Cook*, 332 Or 601, 608-09 (2001)." A "disclaimer of ownership is not a disclaimer of all protected interests" under *Cook*. *State v Stinstrom*, 261 Or App 186 (2014) (Note: that likely is dicta).

> ***State v Lien/Wilverding***, 283 Or App 334 (01/05/17) (Linn) (Shorr, Armstrong, Tookey) Police believed defendants were dealing drugs from their home. Police asked the private garbage company that contracts with the city to haul trash from private residences, including defendants'. Defendants have no contract with the garbage company. At 7 a.m. on garbage day, police parked on defendants' street. Defendants' garbage cart was already "placed by the sidewalk." At about 8 or 9 a.m., A garbage-company manager drove ahead of the large garbage truck, picked up defendants' cart, and replaced it with an empty cart. The manager then handed the cart to the police, who found among other things drug bindles. They were charged with meth and heroin. A search warrant issued and more drugs (and a teenager) were at the home. The trial court denied their motion to suppress the drugs in the garbage cart because defendants had abandoned their rights to their garbage when the garbage-company manager picked it up.
>
> The Court of Appeals affirmed, as this case is controlled by, and indistinguishable from, *State v Howard/Dawson*, 342 Or 635 (2007). The court wrote lengthily: "Whenever the police undertake a search or seizure without a warrant, the state must demonstrate by a preponderance of the evidence that the search or seizure did not violate Article I, section 9." *Id*. at 340. "One manner in which the state can do so is by showing that the defendant had neither a protected privacy nor possessory interest in the property, which would mean that the state's search or confiscation is not a search or seizure implicating Article I, section 9." *Id*. at 341. (Concisely: it's not a search or a seizure if the effect has been abandoned.)

Under *Howard/Dawson*, if police themselves seize garbage from a closed container "on the sidewalk and at the end of a driveway *before* the sanitation company arrived to collect those containers," that's a seizure under *Howard/Dawson*, 342 Or at 442-43. People "retain[] protected possessory interests in the contents of their garbage cans *until that collection occurred*." *Id*. Before garbage company collects = possessory interest. After garbage company collects = no possessory interest. In this case, just because "garbage was collected by a small or large truck one minute or one hour before the normal routine is of no constitutional moment." "The possessory interest in the garbage is lost in either case upon retrieval by the sanitation company on the regularly scheduled day."

They also abandoned their privacy interest when they "turned the garbage over to the sanitation company without any restriction on its disposition." *Id*. at 343. The police took control of their garbage after defendants abandoned the garbage to the garbage company.

4.8.8.B Houses

Under the Fourth Amendment, several factors should be considered to determine if a house has been abandoned, such as after a fire: "the type of property, the amount of fire damage, the prior and continued use of the premises, and, in some cases, the owner's efforts to secure [the home] against intruders." *Michigan v Clifford*, 464 US 287, 292 (1984).

See also *United States v Harrison*, 689 F3d 301 (3d Cir 2012): "Before the government may cross the threshold of a home without a warrant [under the abandonment theory in the Fourth Amendment], there must be clear, unequivocal and unmistakable evidence that the property has been abandoned. Only then will such a search be permitted." The police need not be factually correct (that the house was abandoned) but they must be reasonable in so believing. (Note: A mistake of law, even if reasonable, is *not* permitted in the Third Circuit, although this court may be incorrect in so stating, given the good-faith exception to the exclusionary rule). It is unreasonable to assume that a poorly maintained home is abandoned just because it is a dump: "There simply is no 'trashy house exception' to the warrant requirement." However, when the police know more – the house was a "drug den," there was nothing in the house except one mattress, it was awash in urine and crack bags, human feces filled the bathtub and toilets, there was no running water and no electricity, squatters came and went, all over the course of several summer month -- that together is sufficient to form probative evidence of abandonment for Fourth Amendment purposes.

4.8.9 Mobile Automobiles

The automobile exception is a subset of the exigent circumstances exception, *State v Brown*, 301 Or 268 (1986), under which the "mobility of a vehicle, by itself, creates an exigency. *State v Meharry*, 342 Or 173, 177 (2006)." *State v Tovar*, 256 Or App 1, *rev den*, 353 Or 868 (2013). That "exigency" exists because "it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Brown*, 301 Or at 275-76 (quoting *Carroll v United States*, 267 US 132, 153 (1925)).

"[T]he automobile exception applies when officers lawfully stop a moving vehicle, regardless of whether the stop was for a traffic violation or for a crime." ***State v Bliss***, 283 Or App 833, 839, ***review allowed***, 361 Or 543 (2017). Reiterating: "the Oregon automobile exception adopted in *Brown* applies where, as here, police lawfully stop a moving car for a traffic violation and develop probable cause to search the car for contraband or evidence of criminal activity." *Id*. at 842.

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

Basis for Stop

State v Bliss, 283 Or App 833 (02/23/17), ***review allowed***, 361 Or 543 (2017) (Marion) (Lagesen, Ortega, Garrett) The Court of Appeals held that the mobile automobile exception to the warrant requirement applies to autos stopped for traffic infractions. The Oregon Supreme Court allowed review. Oral argument was November 9, 2017, webcast here.

State v George, 287 Or App 312 (8/23/17) (Wasco) (Ortega, Lagesen, Garrett) Defendant was a passenger in a car driven by a person suspected of assault. The car pulled into a carport. Officer ran to the car. Defendant exited. Officer saw that the driver was not the suspect, but officer saw an open beer can on the passenger seat, which is a traffic violation. Defendant smelled of alcohol. Officer opened the passenger door, was "hit with an overwhelming odor of green marijuana," saw a blue duffel bag in the car that also smelled of marijuana, and opened it to find marijuana. Defendant asserted that the officer needed a warrant and that the search was illegal. Defendant was arrested and charged with delivery of marijuana. He moved to suppress his statements and all evidence seized from him and from the car, because the car was parked when encountered and the officer saw that the driver was not the assault suspect when he ran over. The trial court denied the motion to suppress. Defendant pleaded guilty but reserved his right to appeal under ORS 135.335(3).

> The Court of Appeals affirmed: Under *State v Brown*, 301 Or 268 (1986) and *State v Andersen*, 361 Or 187 (2017), the mobile auto exception to the warrant requirement applies if (1) the auto is mobile when stopped by a state actor; and (2) probable cause exists to search the vehicle. Here, defendant argued that the driver parked the car before the officer arrived. Also, the open beer can was not crime evidence but only traffic-violation evidence. The state argued that defendant had not preserved those arguments. The Court of Appeals concluded that defendant's argument was preserved. But the Court of Appeals affirmed first because the Oregon Supreme Court would be the court to change the exception. Second, the *Brown* court intended to provide clear guidelines for auto searches. The exigency arises, under *Brown* and *Anderson*, because the vehicle can be quickly moved. The "mobility status and the probable cause requirements . . . are not dependent on each other. A search cannot occur without probable cause, but a vehicle's mobility status, which provides the impetus for the per se exigency, does not change because an officer's assessment of criminal activity or other offenses has shifted." If police officers have probable cause to believe that the vehicle contains evidence of a crime or contraband, even where that probable cause is unrelated to the reason for initially stopping the vehicle," the auto exception applies. *Id*. at 322.

Mobility

The test for whether the police had probable cause to conduct a search under the mobile auto exception is "whether a magistrate could issue a constitutionally sound search warrant based on the probable cause articulated by the officers," under *State v Brown*, 301 Or 268, 277 (1986). *State v Tovar*, 256 Or App 1 (2013).

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

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

An auto need not be moving "at the first moment the officer saw it." The mobile auto exception applied when a defendant is standing outside her Mercedes with two transient people in a truck stop known for drug transactions, then she moved it to a gas pump while the officer ran her plates and discovered that she has numerous convictions for drug deliveries, then drove her car back to her original point to meet with another person in a car who was a known drug buyer. *State v Von Flue*, 287 Or App 798 (2017).

The mobile auto exception is not met if the officer's encounter with the moving auto was not "in connection with a crime" but instead the officer was "merely randomly 'running' license plates." *State v Groom*, 249 Or App 118 (2012).

Scope

Under the mobile auto exception, "the police may search any area of the vehicle or any container within the vehicle in which they have probable cause to believe that [] contraband or crime evidence may be found." *State v Tovar*, 256 Or App 1 (2013) (quoting *State v Smalley*, 233 Or App 263, 267, *rev den*, 348 Or 415 (2010)). Probable cause to believe that either "contraband or crime evidence" is contained in a mobile auto is sufficient to justify a mobile auto search. *Smalley*, 233 Or App at 270 (search of backpack in auto was lawful because officer had probable cause that defendant possessed < 1 oz. marijuana, which is contraband) (quoting *State v Brown*, 301 Or 268, 277 (1986)); *see also State v Furrillo*, 274 Or App 612, 616 (2015) ("The scope of the search properly included containers belonging to defendant, despite his status as a passenger, because the probable cause for the existence of contraband was associated with the vehicle.").

A lawful auto search may become unlawful if it is unreasonable in scope. The scope is defined by "the object of the search and the places in which there is probable cause to believe that it may be found." *State v Tovar*, 256 Or App 1 (2013) (quoting *State v Brown*, 301 Or 268, 279 (1986) (*Brown* quoted *United States v Ross*, 456 US 798, 824 (1982)).

The mobile auto exception has not been extended to "a search of a defendant's person while the defendant is standing outside the car." *State v Jones*, 253 Or App 246 (2012) (citing *State v Brown*, 301 Or 268 (1986) and *State v Foster*, 350 Or 161 (2011)).

The mobile auto exception has been extended to mobile containers (a trailer) attached to a mobile auto by a hitch. *State v Finlay*, 257 Or App 581 (2013).

> ***State v Andersen***, 361 Or 187 (3/09/17) (Kistler) (Walters, J., concurring) An informant and a drug salesman named "Compton" (a Beaverton "player" in the local drug-sales market) arranged a meth sale by text messages and phone calls for the WinCo parking lot. McNair is a Beaverton PD officer. McNair and the informant were parked out of sight of the WinCo lot. McNair did not see defendant's car arrive at the WinCo parking lot. Defendant is Compton's "girl." However, he heard Compton's running account of the car's arrival because he was on the phone with the informant. Another officer – Henderson - recognized defendant's silver Jeep one minute after it arrived in a WinCo parking lot. The Jeep was askew across several parking spaces and away from parked cars. Henderson saw a passenger speak through an open window with a drug suspect with an arrest warrant against him. Defendant was in the driver's seat and the engine was running. Another plainclothes officer in an unmarked car noted that the silver Jeep had been present only about one minute. A detection dog alerted to the presence of drugs; 14 grams meth were in defendant's purse. The trial court denied her motion to suppress, ruling that the Jeep was mobile when police encountered it, even though it was not moving.
>
> In a 29-page, 7:6 decision, the Court of Appeals reversed and remanded. The split was over the word "mobile." The dissent noted that the meaning of the word "mobile" is in the line of cases that include *State v Brown*, 301 Or 268 (1986), *State v Kock*, 302 Or 29 (1986), *State v Meharry*, 342 Or 193 (2006), and *State v Kurokawa-Lasciak*, 351 Or 179 (2011).
>
> The Oregon Supreme Court reversed the Court of Appeals. It wrote: "we reaffirm that the Oregon automobile exception applies if the automobile is mobile when the officers first encounter it in connection with the investigation of a crime. We also reaffirm that

the exception does not apply if the car is parked, unoccupied, and immobile when officers encounter it." The Court concluded: "we uphold the trial court's ruling that defendant's Jeep was mobile when the officers first encountered it." This is not a Fourth Amendment case. *Id*. at 192 n 3.

The Court reasoned: "Compton's running account of the car's progress and arrival at the WinCo parking lot provided McNair with as clear a confirmation of the Jeep's mobility as did the officer's sighting of the defendant driving her van erratically past the police station in *Meharry* or the officer's view of the car's movement in *Brown*. Put differently, the fact that McNair learned aurally what the officer in *Meharry* learned visually—that the car that was the subject of each officer's investigation was mobile when the officer first encountered it—provides no principled basis for distinguishing this case from either *Meharry* or *Brown*.

Another significant aspect of this case is whether a warrant should have been obtained. The Court wrote: "McNair testified without contradiction that, '[j]ust [to get a warrant] for a cell phone it takes me several hours to write a search warrant, and go get that approved by a DA.' The officer also explained that, if the district attorney had suggestions or corrections, it could take another hour to add those corrections to the warrant application. Not only did the trial court implicitly credit the officer's testimony, but defendant identifies no contrary evidence in the record." *Id*. at 199. "We do not foreclose the possibility that *Brown* held out—that changes in technology and communication could result in warrants being drafted, submitted to a magistrate, and reviewed with sufficient speed that the automobile exception may no longer be justified in all cases. Nor do we foreclose a showing in an individual case that a warrant could have been drafted and obtained with sufficient speed to obviate the exigency that underlies the automobile exception. *See State v. Machuca*, 347 Or 644, 657, 227 P3d 729 (2010) (explaining that, under Article I, section 9, the exigency arising from the dissipation of alcohol ordinarily will permit a warrantless blood draw while recognizing that the particular facts in an individual case may show otherwise); *cf. Missouri v. McNeely*, 569 US ___, 133 S Ct 1552, 185 L Ed 2d 696 (2013) (rejecting the state's argument that the exigency resulting from the dissipation of alcohol will be present in every case)." *Id*. at 200-01.

Justice Walters concurred, focusing on the warrant issue. She wrote: "When this court created the Oregon automobile exception in 1986, it expected that technological advances would occur and that this state would pursue progressive approaches to warrant acquisition. *State v Brown*, 301 Or at 278 n 6. Those advances have occurred, and state law permits police departments to make use of them. ORS 133.545(8) authorizes the electronic transmission of proposed warrants and affidavits to a judge, as well as the electronic transmission of the signed warrant back to the person who made the application. In Multnomah County, warrant affidavits can be submitted "in person, by telephone or by email," *City of Portland Police Bureau Directives Manual*, ch 652.00, and, in *State v. Machuca*, 231 Or App 232, 245, 218 P3d 145 (2009), an officer "conceded that he could have obtained a telephonic search warrant in one hour." Evidence from other jurisdictions suggests that police officers should be able to obtain warrants in less than one hour. In 1973, before the introduction of the first commercially available cell phone, the San Diego District Attorney's Office estimated that 95 percent of warrants were

obtained in less than forty-five minutes. Comment, *Oral Search Warrants: A New Standard of Warrant Availability*, 21 UCLA L Rev 691, 694 n 23 (1973)." *Id*. at 203.

Justice Walters explained why she concurred: "In this case, the officer who conducted the search testified at trial that it would have taken him three hours to write a warrant application and two hours to get authorization from an on-call district attorney to seek judicial approval, after which he would have had to go to a judge's residence to get the warrant signed. Those are facts from which the trial court could have found an exigency and that could have served as the basis for denial of defendant's motion to suppress." *Id*. at 204.

State v Snyder, 281 Or App 308 (2016), ***review allowed***, The Court of Appeals reversed the trial court's denial of defendant's motion to suppress methamphetamine seized from the passenger-side of the car in which he was a passenger, because the police did not have probable cause to search the car after a drug dog alerted. The "mobile automobile" exception – a subset of the exigent circumstances exception – requires police to show that the car was mobile when police encountered it in connection with a crime and police had probable cause to search it. Although an alert by a properly trained and reliable drug-detection dog can be a basis for probable cause, an "individualized inquiry" is required to determine the validity of the alert, based on the dog's and its handler's training, certification, and performance. In this case, similarly to *State v Farmer*, 258 Or App 693 (2013), there is no evidence of the dog's or the handler's training. There is no evidence of certifications. The only evidence is that the dog was "deployed 20 to 50 times," the handler had received "special training," and the dog had received some training to detect marijuana, heroin, cocaine, and meth. Nothing shows the dog's reliability.

4.8.9.B Fourth Amendment

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

4.8.9.C Drug Detection Dogs

A "request to search the car with a drug dog is different from [] walking a drug dog around the exterior of the car. The first – a search – is constitutionally significant and requires consent, a warrant, or an exception to the warrant requirement before law enforcement officers may proceed. * * * An exterior dog sniff of a car in a public place is not a search and does not require constitutional justification." *State v Sexton*, 278 Or App 1, 7 n 1 (2016) (citing *State v Smith*, 327 Or 366, 374 (1998)).

If the record does not establish a particular detection dog's reliability to any degree, the state will not prove probable cause. The Oregon Supreme Court has decided two K-9 search cases, *State v Foster*, 350 Or 161 (2011) and *State v Helzer*, 350 Or 153 (2011), which held that an alert by a

properly trained and reliable drug-detection dog can provide probable cause to search, but that the particular alert by the particular dog must be determined on a case-by-case basis. In *State v Farmer*, 258 Or App 693 (2013), the Court of Appeals wrote:

> "Together, *Foster* and *Helzer* establish several principles []: (1) whether a particular alert by a particular drug-detection dog is reliable must be determined on a case-by-case basis; (2) the factors relevant to that determination include the dog-handler team's training, testing, and certification; but (3) the simple fact that a team has been trained, tested, and certified is not enough to establish that an alert is reliable; rather, the type of training, testing, and certification matters. That is because, as *Foster* and *Helzer* illustrate, a dog-handler team must be trained in a manner that ensures that the dog alerts in response to drug odors, as opposed to, for example, a desire for a reward, non-drug odors, or handler cues or physical or scent trails left by the person who hid the drugs. Similarly, a dog-handler team must be tested in a controlled environment, where precautions against human cuing have been taken and the dog's accuracy can be assessed because the persons conducting the test know where the dog should alert and where it should not.
>
> "*Foster* and *Helzer* also establish that the value of a dog's field records may depend on whether their significance is sufficiently developed through testimony at the hearing or is self-evident * * * and that, in all events, the value of field records is limited because it is unlikely that either false positives or false negatives will be detected in the field." (internal quotes omitted).

In ***State v Snyder***, 281 Or App 308 (2016), ***review allowed***, the Court of Appeals followed *State v Farmer*, 258 Or App 693 (2013), reasoning that while an alert by a properly trained and reliable drug-detection dog can be a basis for probable cause in the mobile auto exception, an "individualized inquiry" is required to determine the validity of the alert, based on the dog's and its handler's training, certification, and performance, and that evidence was absent in this case.

An unpreserved, alleged error -- that a drug detection dog's abilities were sufficiently reliable to establish probable cause for a search – is not plain error. *State v Gillson*, 259 Or App 428, 530 n 2 (2013).

Note: The Ninth Circuit has held that there is "no doubt" that a drug detection dog's history of making erroneous scent identifications is exculpatory evidence under *Brady v Maryland*, 373 US 83 (1983), see *Aguilar v Woodward*, No. 09-55575 (9th Cir 2013). *Brady* recognized a due process obligation for prosecutors to disclose evidence favorable to the defense and material to guilt or sentencing, *Brady*, 373 US at 87, and impeachment, as well as exculpatory evidence, falls within *Brady*'s definition of evidence favorable to the accused. *Aguilar.*

Under the Fourth Amendment, the United States Supreme Court has stated: "We hold that a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures. A seizure justified only by a police-observed traffic violation, therefore, becomes unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a ticket for the violation." *Rodriguez v United States*, 135 S Ct 1609, 1612 (2015) (citing *Illinois v Caballes*, 543 U.S. 405 (2005)).

4.8.9.D Containers

"[T]he police may search any area of the vehicle or any container within the vehicle in which they have probable cause to believe that the contraband or crime evidence may be found." *State v Smalley*, 233 Or App 263, 267, *rev den* 348 Or 415 (2010); *State v Furrillo*, 274 Or App 612, 615 (2016). To "search containers within a vehicle, an officer need not have probable cause to believe that a discrete container holds evidence of crime." *Furrillo*, 274 Or App at 616 (quotation omitted) (held: backpack inside car after drug dog alerted could be searched because it was a discrete container in a vehicle that could contain contraband or crime evidence). The scope of a warrantless search under the automobile exception "is defined by the warrant that the officer *could* have obtained." *State v Tovar*, 256 Or App 1, 14, *rev den*, 353 Or 868 (2013) (emphasis by court).

Probable cause to believe that either "contraband or crime evidence" is contained in a container in a mobile auto is sufficient to justify a mobile auto search. *State v Smalley*, 233 Or App 263, 267, *rev den* 348 Or 415 (2010) (search of backpack in auto was lawful because officer had PC that defendant possessed < 1 oz. marijuana, which is contraband).

The Court of Appeals concluded in *State v Jones*, 280 Or App 135, 138 (2016) that "an automobile owner's consent to search the owner's automobile is insufficient to justify a warrantless *search* of another person's belongings inside the automobile." *State v Voyles*, 280 Or App 579, 591 n 3 (2016) (emphases in *Voyles*).

A trailer attached to a mobile auto – while not an auto itself – is still a searchable container despite being attached to the vehicle rather than inside it. *State v Finlay*, 257 Or App 581 (2013).

4.8.10 Public Schools

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

In *State v Bonilla,* 358 Or 475, 489 (2015), the court recited the following as *separate* exceptions to the warrant requirement:

-- "the emergency aid exception"
-- "the officer safety exception"
-- "the school safety exception"
-- "the more general 'exigent circumstances' exception"

4.8.10.A Random Non-Specific Student Searches

1. Oregon Constitution

Random urine testing in public schools for drug evidence is a search and seizure under the state constitution, even if it is obtained and used for noncriminal purposes. *Weber v Oakridge School District*, 184 Or App 415 (2002) (the primary purposes of the district's drug-testing policy are noncriminal. They are to deter student use of alcohol and illicit

drugs, to encourage participation in treatment programs, and to avoid injuries to student-athletes."). See "Administrative Searches" for requisite criteria that, when met, allow a search to be conducted in a school under a "statutorily authorized administrative program" that "may justify a search without a warrant and without any individualized suspicion at all." *State v M.A.D.*, 348 Or 381, 389 (2010) (so noting); *State v Atkinson*, 298 Or 1, 8-10 (1984).

Contrast with *State v M.A.D.*, 348 Or 381, 389 (2010), where the school's search was for a criminal investigation.

2. Fourth Amendment "Special Needs"

See **Section 4.8.17** on situations similar to "Special Needs." This is a Fourth Amendment exception to the warrant requirement. It is one of several situations where courts do not inquire into the subjective intent of government actors when assessing the constitutionality of the search or seizure.

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

A school district's policy, requiring all middle and high school students to consent to urinalysis testing for drugs to participate in any extracurricular activity is a reasonable means of furthering the school district's important interest in preventing an deterring drug use in school children and does not violate the Fourth Amendment. *Board of Education of Pottawatomie County v Earls*, 536 US 822 (2002). Drug testing of students need not "presumptively be based upon an individualized reasonable suspicion of wrongdoing. * * * The Fourth Amendment does not require a finding of individualized suspicion." *Earls*, 536 US at 837.

4.8.10.B Particular Student Searches

1. Fourth Amendment

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

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

2. Article I, section 9

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

See *State v Powell*, 288 Or App 660 (11/01/17) under "Officer Safety," *ante*. The Court of Appeals in Powell reversed a trial court's denial of a motion to suppress a handgun as evidence of unlawful possession of a weapon. A nonstudent brought a handgun to a high school when he heard that a student had killed another student with an AR-15. The nonstudent-defendant had his unlicensed handgun in his pants as students were evacuated and each was being patted down for weapons. An officer ordered defendant to lace his hands behind his head, then the officer lifted the student's shirt to reveal the gun. The Court of Appeals rejected the state's school-safety justification to the warrantless seizure and search.

Note: In *State v M.A.D.*, 348 Or 381 (2010), the Oregon Supreme Court essentially grafted the Fourth Amendment's "Special Needs" exception to the warrant requirement into the Oregon Constitution through the state's "Officer Safety" exception. But it did so under vague reasoning that both linked to (officer-safety and school exceptions are "somewhat coextensive") and separated from (the school context is "sufficiently different from") the "Officer Safety" exception (which itself is basically part of the "Emergency" exception to the Fourth Amendment's warrant requirement). Consider those aspects of *M.A.D.*, which the Oregon Supreme Court quoted in *State v A.J.C.*, 355 Or 552, 560 (2014):

> "Notably, although we drew guidance from the officer-safety exception in formulating the school-safety standard in *M. A. D.*, we recognized that the school context is 'sufficiently different from the setting in which ordinary police-citizen interactions occur.' *M. A. D.*, 348 Or at 391."
>
> "Thus, although we announced an exception that is somewhat coextensive with the officer-safety exception to the warrant requirement, we articulated a standard applicable to school settings that takes into account the unique environment of those settings." *A.J.C.*, 355 Or at 561.

The court deemed used a phrase, "the school-safety exception," for the first time in this case, stating that it had "announced" the exception in *State v M.A.D*, 348 Or 381 (2010). The Court recited and reiterated the correlation between the officer-safety exception and the school-safety exception for several pages, then "recognized" that "the school context is sufficiently different from the setting in which ordinary police-citizen interactions occur," but without explaining what that is or how it works. The Court raised "the differences between an officer-citizen context and a school context matter in assessing whether protective measures are reasonable" and discussed "the fact that young students are confined in close-quarters on a school campus that they are compelled to attend, and the fact that school officials have a heightened standard of care to students and adults." *State v A.J.C.*, 355 Or 552 (2014) (held: after receiving credible reports that a student brought a gun to school to shoot people, a principal's search of student's backpack compartments where a gun could be contained was reasonable).

4.8.11 Jails and Detention

4.8.11.A Fourth Amendment

4.8.11.A.i. Adults – DNA and Strip Searches

DNA

Maryland v King, 133 S Ct 1958 (2013) held that taking and analyzing DNA at a jail from an arrested person's cheek as a search incident to arrest for a "dangerous" or "serious offense," supported by probable cause, is a legitimate police booking procedure that is reasonable under the Fourth Amendment, like fingerprinting and photographing. Per the Court, such searches are similar to and different from "special needs" cases. (See Section 4.8.17). The Court recited special needs cases because "the search involves no discretion" by officers. But this is not a special needs case, and differs from special needs cases, because special needs cases have no individualized suspicion. The buccal swab at issue in this Maryland statute occurs upon arrest for serious offenses based on probable cause.

Body Searches

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

Jails may have search policies that require detainees, before being held with the general jail population, to undergo a strip search and intimate visual inspection without any reasonable suspicion that they are doing anything dangerous or illegal (such as drugs, weapons, tattoos, or disease or infectious wounds). Regardless of the arrest, the level of offense (misdemeanors or felonies), the detainee's behavior or criminal history, jails do not violate the Fourth Amendment

by requiring detainees to open their mouths, lift their tongues, lift their genitals, cough and squat, spread the buttocks or genital areas, while jail officers watch. "Jails are often crowded, unsanitary, and dangerous places." *Florence v Board of Chosen Freeholders,* 566 US __, 132 S Ct 1510 (2012). (Note: This case does not involve any touching by jailers – just visual inspections. This case also does not address "the types of searches that would be reasonable in instances where, for example, a detainee will be held without assignment to the general jail population and without substantial contact with other detainees."). *See also Cantley v West Virginia Regional Jail*, __ F3d __ (4th Cir 2014) (qualified immunity protects officer who deloused with a garden hose and strip-searched a detainee in a private room in the presence of one officer of the same sex with no touching where "significant security justifications" were recognized to search arrestees); *Gonzalez v City of Schenectady*, __ F3d __ (2d Cir 2013) (qualified immunity protects city, county, and officers in conducting a visual body cavity search).

4.8.11.A ii. Juveniles

"Fourth Amendment challenges in the context of prisons and jails are not typically referred to as special needs cases," but the Supreme Court and Ninth Circuit have upheld prison searches predicated on less than probable cause, or even reasonable suspicion, such as "suspicionless strip searches of arrestees who were confined in a prison's general population," see *Bell v Wolfish*, 441 US 520, 560 (1979) and *Bull v City and County of San Francisco*, 595 F3d 964, 980-82 (9th Cir 2010 (en banc). *Mashburn v Yamhill County*, 698 F Supp 2d 1233 (D Or 2010) (strip searches conducted on juveniles on admission to detention do not violate Fourth Amendment standards, but the searches after contact visits violate the Fourth Amendment).

4.8.11.B Article I, section 9

Note: Case law on this subject is underdeveloped under the Oregon Constitution. The block quotations in this section are not directly on point.

i. Adults

In *State v Tiner*, 340 Or 551 (2006), the Court wrote: "Neither the United States Constitution nor the Oregon Constitution requires a search warrant or its equivalent before the state may take pictures of or inspect defendant's torso because, once defendant became a prisoner, he enjoyed few rights regarding his privacy. *See Hudson v Palmer*, 468 US 517, 526 (1984) (prisoner does not have subjective expectation of privacy in prison cell); *Bell v Wolfish,* 441 US 520, 558 (1979) (visual cavity search of prisoner does not violate Fourth Amendment); *Sterling v Cupp,* 290 Or 611, 620 (1981) ("Those sentenced to prison forfeit many rights that accompany freedom."). In *Tiner*, the Court decided that when the defendant was imprisoned, he lacked the right to privacy that he enjoyed when he was not in prison. Among the rights that he forfeited was the right to keep his personal appearance—including any distinguishing marks such as tattoos—from being known to the state. The state reasonably could compel defendant to remove his shirt so that he could be photographed.

A buccal swab is akin to fingerprinting a person in custody, so that the seizure of DNA of an arrestee via buccal swab "did not constitute an unreasonable seizure under either constitution." *State v Brown*, 212 Or App 164, 1167 (2007).

Pretrial Detainees: Under *State v Tiner*, 340 Or 551 (2006), a defendant has "diminished privacy interests" but still has privacy interests, while a jail inmate. The state bears the burden of proving that an exception to the warrant applies. *State v Moore*, 260 Or App 303 (2013) (While defendant was detained at a jail pending his rape trial, he handwrote a tome with inculpatory statements. The book was not contraband. Police seized the book. The trial court erred in allowing the book to be used against him in his rape trial).

See *State v Sherman*, 270 Or App 459 (2015) regarding a "dealer amount" of cocaine stored inside a female's body.

ii. Juveniles

Generally: "Routine searches of prisoners and probationers without probable cause are reasonable if there is a penological objective. *See State v. Culbertson*, 29 Or App 363, 563 P2d 1224 (1977)." *State v Orozco*, 129 Or App 148, 151 (1994), *rev den* 326 Or 58 (1997) (juvenile case).

4.8.12 Parole and Probation Searches

A. Oregon

If a law *explicitly* allows an arrest based on certain conduct, an officer may stop a person based on a reasonable suspicion that the person engaged in that conduct. *State v Steinke*, 88 Or App 626, 628-29 (1987) (because under a statute, an officer may arrest a person based on probable cause to believe he violated a restraining order, the officer may stop a person based on reasonable suspicion of violating such an order); *State v Morris*, 56 Or App 97, 102-03, *rev den*, 293 Or 340 (1982) (because curfew statute allowed an officer to arrest minors, officer may stop based on reasonable suspicion of curfew violation); but see *State v Chambers*, 287 Or App 840 (2017) (DUI diversion statute does not provide authorities to stop defendant based on suspicion that she violated her diversion agreement).

ORS 137.545(2) allows a police officer or parole and probation officer to arrest a probationer without a warrant upon reasonable suspicion that the probationer is violating any condition of probation. The authority to arrest a probationer for violation of a probation condition implies the authority to stop persons reasonably suspected of violating that probation condition. Even if a defendant is not actually violating a probation condition but the officer believes that he is, "[r]easonable suspicion, as a basis for an investigatory stop, [requires] only that those facts support the reasonable inference of illegal activity by that person." *State v Hiner*, 240 Or App 175 (2010); *State v Faubion*, 258 Or App 184, 194 & n 5 (2013); *State v Steinke*, 88 Or App 626, 629 (1987).

ORS 144.350(1)(a) allows a probation officer to order the arrest of a probationer when the officer has reasonable grounds to believe that the probationer has violated the conditions of probation. The officer may tell a defendant that he may refuse consent, and that such a refusal could subject him to arrest for a probation violation. *State v Hiner*, 240 Or App 175 (2010); *State v Davis*, 133 Or App 467, 473-74, *rev den* 321 Or 429 (1995).

In consent cases involving probationers, to violate Article I, section 9, the surrounding environment must be so coercive as to preclude defendant from refusing consent. Mere pressure not to violate the conditions of probation is insufficient to demonstrate coercion. *State v Stevens*, 286 Or App 306, 311 (2017); *State v Davis*, 133 Or App 467, 475-76, rev den, 321 Or 429 (1995); *State v Brock*, 254 Or App 273, 279 (2012).

"Under Article I, section 9, a probation condition requiring a probationer to consent to a home visit is not the same as a consent to search; the latter is more intrusive and it is condition on the existence of 'reasonable grounds to believe that evidence of a violation will be found.' ORS 137.540(h) and (i). Further, a consent to search is not self-executing; if a probationer refuses to consent, the officer has no authority under the probation condition to search, although the probationer may be subject to a sanction for violating the condition." *State v Brock*, 254 Or App 273 (2013) (citing *State v Dunlap*, 215 Or App 46, 54 (2007)).

"Under Article I, section 9, a probation condition requiring a probationer to consent to a home visit is not the same as a consent to search; the latter is more intrusive and is conditioned on the existence of 'reasonable grounds to believe that evidence of a violation will be found.' ORS 137.540(h) and (i). Further a consent to search is not self-executing; if a probationer refuses to consent, the officer has no authority under the probation condition to search, although the probationer may be subject to a sanction for violating the condition." To determine voluntariness of consent in probation-condition situations, the court considers "whether the probationer was effectively denied a reasonable opportunity to refuse the search or whether the environment was sufficiently coercive to preclude him from doing so." *State v Brock*, 254 Or App 273 (2012).

B. Fourth Amendment

See **Section 4.8.17** on **Special Needs**.

Parolees versus Probationers. Parolees and probationers have different expectations of privacy under the Fourth Amendment. Parolees "have fewer expectations of privacy than probationers." *Samson v California*, 547 US 843, 850 (2006). The "Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee." *Id*. at 857.

Residences. Searches of parolees and probationers' persons have different legal standards than searches of their residences. *Samson v California*, 547 US 843, 847 (2006) (parolees can be subjected to suspicionless searches under some circumstances); *United States v Grandberry*, 730 F3d 968 (9th Cir 2013) (a parole condition permitting searches of "your residence" "is triggered only when the officers have probable cause that the parolee *lives* at the residence").

In *Griffin v Wisconsin*, 483 US 868 (1987), the Court concluded that a state's operation of its probation system was a "special need" that justified the warrantless search of a probationer's home, based on reasonable grounds to suspect the presence of contraband. *Id.* at 872. The Court held that the operation of a probation system was a valid "special need," in that the system worked towards genuine rehabilitation through intensive supervision and a "warrant requirement would interfere to an appreciable degree." *Id.* at 873-76. *Cf. Wyman v James*, 400 US 309, 317-18 (1971) (social worker's home visits are not a "search" if done to verify eligibility for benefits rather than for a criminal investigation).

Under the Fourth Amendment, police need only show a "reasonable suspicion that an [effect] to be searched is owned, controlled, or possessed by probationer, in order to the [effect] to fall within the permissible bounds of a probation search." *United States v Bolivar*, 670 F3d 1091 (9th Cir 2012). To search a residence, "officers must have 'probable cause' that they are at the correct residence but, once validly inside, they need only 'reasonable suspicion' that an [effect] is owned, possessed, or controlled by the parolee or probationer." *Id.*

4.8.13 Plain View or Lawful Vantage Point

A. Search

"Plain View" is not an exception to the warrant requirement. Instead, usually the circumstance is not a search implicating any constitutional rights. However, the Oregon Court of Appeals has confused this point by writing: "Absent a warrant or an exception to the warrant requirement, an officer's observations inside a defendant's home – a private space – is a search for the purposes of Article I, section 9. *See, e.g., State v. Sanchez*, 273 Or App 778, 787, 359 P3d 563 (2015) (explaining that a 'defendant's privacy in [his or] her own home, [is] a setting in which the protections of Article I, section 9, are at their highest'). A defendant's consent to search is a well-recognized exception to the warrant requirement. *State v. Lowell*, 275 Or App 365, 374, 364 P3d 34 (2015)." *State v Parnell*, 278 Or App 260, 268-69 n 2 (2016). The Parnell court concluded that because the defendant consented to detectives' entry into his home, "any evidence that officers observed in plain view * * * as well as evidence of any statements defendant made * * * is admissible." *Id*. at 268-69.

"A search, for purposes of Article I, section 9, occurs when 'a person's privacy interests are invaded.' *State v Owens*, 302 Or 196, 206 (1986). No search occurs, however, when police officers make observations from a 'lawful vantage point.' *State v Ainsworth*, 310 Or 613, 617 (1990). A 'lawful vantage point' may be within the curtilage of a property in which a defendant has a privacy interest, given that, 'absent evidence of an intent to exclude, an occupant impliedly consents to people walking to the front door and knocking on it, because of social and legal norms of behavior.' *State v Portrey*, 134 Or App 460, 464 (1995)." *State v Pierce*, 226 Or App 336, 343 (2009).

B. Seizure

"Under the plain-view doctrine, an officer may seize an item if the officer can do so from a position where that officer is entitled to be and the incriminating character of the item to be seized is 'immediately apparent.' *State v Carter*, 200 Or App 262 (2005), *aff'd*, 342 Or 39 (2006)." *State v Currin*, 258 Or App 715 (2013) (plain white envelope contents do not meet plain-view exception).

4.8.14 Container That Announces its Contents

"In some circumstances, a container by its nature or transparency 'announces its contents' so that there is no privacy interest to protect, and an examination of the contents by the state is not a search for constitutional purposes" under *State v Owens*, 302 Or 196, 206 (1986). "Some

containers, those that by their very nature announce their contents (such as by touch or smell) do not support a cognizable privacy interest under Article I, section 9." *Id*. at 206. Thus, "the examination of the contents of containers that 'announce their contents' is not a search at all" and "an officer needs neither probable cause nor an exception to the warrant requirement to examine the container's contents." *State v Garcia-Cruz*, 287 Or App 516, 521 (2017) (quoting *State v Fugate*, 210 Or App 8, 14 (2006)).

This "exception to the warrant requirement is 'analogous to the plain view exception; it depends only on the nature of the container itself – i.e. whether by its smell, appearance, or other directly observable features, it "announces its contents" – and is thus independent of the context in which the container was found or the subjective knowledge and experience of the officer who found it.' * * * The nature of the container, however, must be such as to announce 'that contraband is [its] sole content.'" *State v Edmiston*, 229 Or App 411 n 3 (2009) (quoting *State v Stock*, 209 Or App 7, 12 (2006) and *State v Krucheck*, 156 Or App 617, 622 (1998), *aff'd by an equally divided court*, 331 Or 664 (2001)).

Containers that announce their contents have included: a clear plastic baggie with leafy greens, a transparent vial with powder, and a ripped-out magazine page folded into a one-inch by one-half-inch container with a "unique shape and character." Such containers give probable cause to believe that the containers contain contraband. In contrast, a plain white envelope is "uniquely associated with drugs, for the universe of items that tends to be contained in a purse or an envelope is vastly larger than that which tends to be contained in a small paperfold." *State v Currin*, 258 Or App 715 (2013).

> ***State v Garcia-Cruz***, 287 Or App 516 (8/30/17) (Shorr, Garrett, Haselton SJ) (Washington) Defendant was arrested for a parole violation and taken to the jail. As part of the Beaverton PD inventory policy, the officer inventoried defendant's possessions for valuables. That policy does not allow officers to open closed containers, including folded pieces of paper, found in wallets. The officer opened defendant's wallet, removed two folded pieces of paper, opened both, and found meth inside one. Defendant moved to suppress the meth evidence.
>
> At the suppression hearing, the officer testified that, when he found the folded paper containing meth in defendant's wallet, it felt like it contained a granulated crystal-like substance that the officer believed was "more likely than not" meth. The officer also noted that he was not "100 percent" certain of his conclusion. He stated that he believed that the folded paper could have also contained "tiny gems" or "some other" similar item. The officer testified that it was "rare" to find meth in folded paper because "probably 90 percent of the time" he finds meth in plastic bindles. He testified that the remaining 10 percent of the time he finds it in "whatever [was] available," including paper. The officer stated that "seeing a piece of paper" did not "immediately alert" him to the idea that defendant possessed meth. He developed his opinion that the folded paper contained meth only after observing that the paper was folded "in a way to contain" something, rather than being folded "to fit into a pocket," and feeling the substance inside it through the paper.
>
> The trial court denied defendant's motion to suppress, concluding that the container announced its contents and thus a warrant or a warrant exception was not required.

The Court of Appeals reversed and remanded. "The Article I, section 9, right against warrantless searches and seizures "protects both possessory and privacy interests in effects." *State v Heckathorne*, 347 Or 474, 482 (2009). As a result, a search or seizure must be justified by 'probable cause *and* either a judicially authorized warrant or a justification under an exception to the warrant requirement.' *Id*. (emphasis in original)." *Id*. at 520.

The court continued: "Some containers, those that by their very nature announce their contents (such as by touch or smell) do not support a cognizable privacy interest under Article I, section 9." *State v. Owens*, 302 Or 196, 206 (1986). As a result, "the examination of the contents of containers that 'announce their contents' is not a search at all" and "an officer needs neither probable cause nor an exception to the warrant requirement to examine the container's contents." *State v Fugate*, 210 Or App 8, 14 (2006). "Whether a container 'announces it[s] contents' depends on whether those contents are so plainly obvious that there is no privacy interest to protect." *Id*. at 520-21 (quoting *State v Stock*, 209 Or App 7, 12 (2006).

"[I]n *Heckathorne*, the smell of ammonia *unambiguously* disclosed the opaque cylinder's contents—that is ammonia. Where, however, neither the characteristics of an opaque container nor the noninvasively observable or perceptible characteristics of its contents, as informed by an officer's training and experience, are uniquely identifiable with contraband, then the container does not 'reveal its contents' for purposes of Article I, section 9." *Id*. at 522 (emphasis by court).

The court concluded: "In sum, notwithstanding that it was highly probable that the folded paper contained methamphetamine, that opaque receptacle did not reveal its contents. Consequently, [the officer conducting the inventory], in opening the folded paper so as to expose its contents to view, conducted a warrantless search that was not justified by an exception to the warrant requirement." *Id*. at 524-25.

4.8.15 Lost-and-Found Property

Lost property is property that an owner has involuntarily parted possession with, "through neglect, carelessness, or inadvertence." ***State v Woods***, 288 Or App 47 (2017) "To search lost property, officers need to have a good faith, subjective belief that the property is lost and that belief needs to be objectively reasonable under the circumstances." *Id.* (citation omitted). Factors to determine if property is lost include "the location in which [the property] was found, the manner in which [the property] was found, the potential or possible amount of time the property may have been separated from its owner, and the presence or absence of any other measure taken to determine ownership before searching it." *Id*. at 54.

Finders of lost property have a duty to try to return lost-and-found property to its owner. ORS 98.005. *State v Pidcock*, 306 Or 335 (1988), *cert denied*, 489 US 1011 (1989). The "finder" may claim lost property if the owner is unknown. When a finder turns property over to officers, the officers become the "finder" with the duty to identify the owner. When a private citizen as a finder gives officers the found property, and officers open the property to try to identify the owner (rather than opening it to search) without a warrant, police may be excused from the warrant requirement.

A “person who loses property does not relinquish her constitutionally protected interests in the property to the same extent as a person who discards property.” *State v Brown*, 273 Or App 347, 353 n 6 (2015).

An “officer’s subjective belief that the property is lost must be objectively reasonable under the circumstances.” *State v Pidcock*, 306 Or 335 (1988), *cert denied*, 489 US 1011 (1989) did not expressly require an “objective reasonableness” element in the “lost property” exception, but the Court of Appeals concluded that it implicitly did, or should. The “objectively reasonable” element includes what, where, and how the property was found, plus how long it may have been separated from its owner, and “the presence or absence of any other measure taken to determine ownership before searching it.” *State v Vanburen*, 262 Or App 715 (2014); see also ORS 98.005, 164.065.

Note: The Oregon Court of Appeals has applied *State v Pidcock*, 306 Or 335, 340 (1988), *cert denied*, 489 US 1011 (1989) inconsistently, as both “lost property” and “abandoned property.” For example, in *State v Rowell*, 251 Or App 463, *rev den* 353 Or 127 (2012), the Court of Appeals wrote:

> *Pidcock* was a case “involving *lost*, as opposed to *abandoned* property” and it allows officers to open a closed container to determine ownership of lost property. But “[n]either *Pidcock* nor any other case establishes an exception to the warrant requirements that would allow police to open a closed container in order to determine whether its contents were or were not stolen, and we decline to create such an exception here.” *State v Rowell*, 251 Or App 463, *rev den* 353 Or 127 (2012).

But in *State v Stinstrom*, 261 Or App 186 (2014), the Court of Appeals cited *Pidcock* as an “abandonment of property” case, stating that in *Pidcock*, “defendant did not abandon his briefcase, which fell out of his truck, until he stopped actively trying to locate it.” *See also State v Morton*, 110 Or App 219, 222 (1991) (interpreting *Pidcock* as meaning that “a finder of lost or abandoned property has a statutory duty * * * to return it to its owner and, should that finder turn the property over to the police, they in turn are placed in the position of the finder”).

State v Woods, 288 Or App 47 (9/27/17) (Marion) (Shorr, DeVore, Garrett) Just as a small-town police department was closing, Officer Nelson saw a white SUV in its parking lot. He ran the plates; nothing was registered. After the SUV departed, the police department’s finance director told Nelson that a woman had come into the police station, said she had just kicked a man out of her home, and the man had left a phone behind. He said the woman had told him that she was forfeiting the phone to the police so that the man would not return to her home to retrieve it. The finance director said that he had not obtained any further information except the woman was driving a white vehicle. Nelson knew almost everyone in the small town. He opened the phone, found no identifying information in texts, so he looked at the pictures file. He saw an image of a naked minor female in a lewd sexual position. Nelson immediately stopped searching the phone, closed the photos folder, and shut the phone’s call log. While shutting down the call log, Nelson saw a text message screen that included the name “Wood.” Nelson recognized that name as the last name of defendant, whom he had met earlier that day when responding to a call of an unwanted subject located in a woman’s house. At that point, Nelson believed that the phone belonged to defendant. He removed the phone’s battery and “put the phone into evidence.” Nelson then went to the home. The woman confirmed that defendant owned the phone. She

handed Nelson a purple file that she said was defendant's child pornography. Nelson accepted the folder and did not open it yet. He returned to the police station and applied for a warrant to search both defendant's cell phone and the file folder. That warrant was issued, and, based on the results of the executed search, defendant was charged by indictment with 15 counts of encouraging child sexual abuse in the second degree. He moved to suppress. The state argued "lost property" exception to the warrant requirement. The trial court denied defendant's motion to suppress.

The Court of Appeals reversed. "[E]ven assuming that police otherwise would have been authorized under ORS 98.005 to search the phone, the state failed to prove the predicate for a permissible warrantless search pursuant to that statute: that it was objectively reasonable for the police to believe that the phone was, in fact, 'lost property' within the meaning of ORS 98.005 and *Pidcock*." A woman delivered the phone to the police station minutes before it closed for the day. The woman knew the phone's owner and her purpose was not to ask the police to identify the owner of the phone but, rather, to ensure that the owner did not return to her house to retrieve it. Further, there is no evidence that the police department's finance director attempted to obtain defendant's or the woman's identity from the woman when she dropped off the phone. Thus it was unreasonable for Nelson to quickly regard the phone as "lost" and begin searching it without waiting a reasonable time for the phone's owner to come forward.

The Court of Appeals explained the law and its reasoning in this block quote:

An exception to the Article I, section 9, warrant requirement exists when an officer, while attempting to discover the owner of lost or misplaced property, searches a piece of property "in an attempt to identify the owner" of the property. State v. Pidcock, 306 Or 335, 340, 759 P2d 1092 (1988), cert den, 489 US 1011 (1989). In Pidcock, the Supreme Court noted that officers' authority to search lost property for its owner's identity comes from ORS 98.005. 306 Or at 339. ORS 98.005, by its own terms and as interpreted by previous case law, applies in very specific circumstances. That statute provides:

> "(1) If any person finds money or goods valued at $250 or more, and if the owner of the money or goods is unknown, such person, within 10 days after the date of the finding, shall give notice of the finding in writing to the county clerk of the county in which the money or goods was found. Within 20 days after the date of finding, the finder of the money or goods shall cause to be published in a newspaper of general circulation in the county a notice of the finding once each week for two consecutive weeks. Each such notice shall state the general description of the money or goods found, the name and address of the finder and final date before which such goods may be claimed.
>
> "(2) If no person appears and establishes ownership of the money or goods prior to the expiration of three months after the date of the notice to the county clerk under subsection (1) of this section, the finder shall be the owner of the money or goods." ORS 98.005 (emphases added).

Thus, as the Supreme Court noted in *Pidcock*, ORS 98.005 "place[s] a burden on the finder of lost property to discover the owner of the property" when the property owner is unknown to the property's finder. 306 Or at 340. However, "[i]f the owner [of the lost property] is known [to the finder], ORS 98.005 does not apply." *Id.*; *see also State v Paasch*, 117 Or App 302, 306, 843 P2d 1011

(1992) ("[P]olice may search lost property to identify the owner[,] but ** * the search must stop when identification is found."). Oregon case law has recognized two situations in which officers are authorized to search lost property for the owner's identifying information under ORS 98.005. First, in *Pidcock*, the Supreme Court noted that officers are authorized to search lost property when a finder of property, who has the burden to discover the property's owner under ORS 98.005, "turn[s] [that property] over to [those officers], on the finder's own initiative." 306 Or at 339; *see also* *State v Vanburen*, 262 Or App 715, 722, 337 P3d 831 (2014) ("[T]he Supreme Court's reasoning in Pidcock focuses on the rights and duties that accrue to law enforcement officers who are simply assisting the finder of the property to ascertain the identity of the owner or to determine if the owner of the property was indeed unknown, as described in ORS 98.005." (Internal quotation marks and brackets omitted.)). Second, in *Vanburen*, we "assume[d]—as [did] the parties [in that case]—that *Pidcock* [also] authorize[s] police to search lost property that they discover directly, so long as the purpose of the search [is] to identify the owner and not to locate contraband related to criminal activity." 262 Or App at 723 (emphasis added).

The evidence must be suppressed unless the state establishes an exception to the exclusionary rule. Here, the state attempted to prove inevitable discovery, but failed. "To satisfy its burden under the inevitable-discovery doctrine, the state [is] required to show by a preponderance of the evidence (1) that certain proper and predictable investigatory procedures would have been utilized in the instant case, and (2) that those procedures inevitably would have resulted in the discovery of the evidence in question." *State v. Hensley*, 281 Or App 523, 535 (2016). The state cannot meet this burden by merely showing that evidence might or could have been otherwise obtained. Instead, "[a] conclusion that predictable investigatory procedures would have produced the evidence at issue must be substantiated by factual findings that are fairly supported by the record."

4.8.16 Community Caretaking – Fourth Amendment

A "community caretaking" exception to the warrant requirement exists under the Fourth Amendment. *Cady v Dombrowski*, 413 US 433, 441 (1973) (police officers sometimes may "engage in what may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."). *See MacDonald v Town of Eastham*, 745 F3d 8, 14 (1st Cir 2014) ("the scope and boundaries of the community caretaking exception are nebulous.").

No such exception has been recognized under the Oregon Constitution. *State v Bridewell*, 306 Or 231, 239-40 (1988); *State v Christenson*, 181 Or App 345 (2002); *State v Bistrika*, 261 Or App 385 (2014); *State v Martin*, 222 Or App 138, 146, *rev den*, 345 Or 690 (2009).

An Oregon statute, ORS 133.033, allows officers to perform certain "community caretaking functions." But Article I, section 9, limits that statute. Oregon's "community caretaking statute does not authorize an officer to enter or remain on private property without a warrant or an exception to the warrant requirement." *State v Bistrika*, 261 Or App 385 (2014). ORS 133.033 authorizes only "lawful acts that are inherent in the duty of the peace officer to serve and protect the public." *State v Lange*, 264 Or App 126 (2014) (quoting *State v Martin*, 222 Or App 138, 146, *rev den*, 345 Or 690 (2009) (emphasis in *Martin*)).

Impounding and inventorying a car without a warrant, rather than leaving it in a high-crime area, may be justified under the Fourth Amendment's "community caretaking" exception to the warrant requirement. *State v ONeill*, 251 Or App 424 (2012).

4.8.17 Other Fourth Amendment Exceptions

See **Section 4.8.10 (Schools)** and **Section 4.8.12 (Parole and Probation)**.

In *Ashcroft v al-Kidd*, 563 US 731 (2011), the United States Supreme Court explained its reasoning behind warrant exceptions that require courts to consider the government actors' intent:

> Fourth Amendment reasonableness "is predominantly an objective inquiry." [*City of Indianapolis v Edmond*, 531 US 32, 47 (2000)]. We ask whether "the circumstances, viewed objectively, justify [the challenged] action." *Scott v United States*, 436 US 128, 138 (1978). If so, that action was reasonable "whatever the subjective intent" motivating the relevant officials. *Whren v United States*, 517 US 806, 814 (1996). This approach recognizes that the Fourth Amendment regulates conduct rather than thoughts, *Bond v United States*, 529 US 334, 338, n2 (2000); and it promotes evenhanded, uniform enforcement of the law, *Devenpeck v Alford*, 543 US 146, 153-154 (2004).
>
> Two "limited exception[s]" to this rule are our special-needs and administrative-search cases, where "actual motivations" do matter. *United States v Knights*, 534 US 112, 122 (2001) (internal quotation marks omitted). A judicial warrant and probable cause are not needed where the search or seizure is justified by "special needs, beyond the normal need for law enforcement," such as the need to deter drug use in public schools, *Vernonia School Dist. 47J v Acton*, 515 US 646, 653 (1995) (internal quotation marks omitted), or the need to assure that railroad employees engaged in train operations are not under the influence of drugs or alcohol, *Skinner v. Railway Labor Executives' Assn*., 489 US 602 (1989); and where the search or seizure is in execution of an administrative warrant authorizing, for example, an inspection of fire-damaged premises to determine the cause, *Michigan v Clifford*, 464 US 287, 294 (1984) (plurality opinion), or an inspection of residential premises to assure compliance with a housing code, *Camara v. Municipal Court of City and County of San Francisco*, 387 US 523, 535-538 (1967). (Held: "We hold that an objectively reasonable arrest and detention of a material witness pursuant to a validly obtained warrant cannot be challenged as unconstitutional on the basis of allegations that the arresting authority had an improper motive.").

The U.S. Supreme Court described the "Special Needs" exception to the warrant requirement in *Skinner v Railway Labor Executives' Ass'n*, 489 US 602, 619-20 (1989):

> "We have recognized exceptions to this rule, however, when 'special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable.' *Griffin v Wisconsin*, 483 US 868, 873 (1987), quoting *New Jersey v T.L.O.*, 469 US at 351 (Blackmun, J., concurring in judgment). When faced with such special needs, we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable cause requirements in the particular context. *See, e.g., Griffin v. Wisconsin, supra*, at 873 (search of probationer's home); *New York v Burger*, 482 US 691, 699-703 (1987) (search of premises of certain highly regulated

> businesses); *O'Connor v. Ortega,* 480 US at 721-725 (work-related searches of employees' desks and offices); *New Jersey v T.L.O., supra,* at 337-342 (search of student's property by school officials); *Bell v Wolfish,* 441 U.S. 520, 558-560 (1979) (body cavity searches of prison inmates)."

The "special needs" exception to the warrant requirement in the Fourth Amendment is "an exception to the general rule that a search [or seizure] must be based on individualized suspicion of wrongdoing." *Friedman v Boucher,* 580 F3d 847, 853 (9th Cir 2009) (quoting *City of Indianapolis v Edmond,* 531 US 32, 54 (2000)). "Under this exception, suspicionless searches [and seizures] may be upheld if they are conducted for important non-law enforcement purposes in contexts where adherence to the warrant-and-probable cause requirement would be impracticable." *Id.*; *see also Griffin v Wisconsin,* 483 US 868, 873 (1987) ("[W]e have permitted exceptions when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."

Sometimes courts apply other Fourth Amendment exceptions to the warrant requirement using phrases other than "Special Needs," but the application is essentially "Special Needs." One example is in the Third Circuit, in *Heffner v Murphy*, 745 F3d 56 (3d Cir. 2014), *cert denied* 135 S Ct 220 (2014). In that case, the court determined that the funeral industry is a "closely regulated industry" so that the state regulatory board may conduct warrantless inspections as long as those inspections are "reasonable" and that inspectors' discretional authority is limited.

Some courts have recognized a "workplace exception" to the warrant requirement as "special needs" cases under the Fourth Amendment. A plurality in *O'Connor v Ortega*, 480 US 709, 722 (1987) concluded that a warrantless search of a public employee's office, desk, or file cabinets in a public workplace for work-related reasons did not violate the Fourth Amendment, because requiring a government employer to obtain a warrant would be "simply unreasonable" and "would be unduly burdensome." That opinion appears to rest on the "special needs" doctrine.

See Al Haramain Islamic Foundation v United States, 686 F3d 965 (9th Cir 2012) ("We hold that the "special needs" exception does not apply to the seizure of AHIF–Oregon's assets" by the Office of Foreign Assets Control).

New York has followed *O'Connor v Ortega* and has applied it to random urinalysis testing of police officers, *Caruso v Ward*, 72 NY2d 432 (1988). New York courts have applied it when the state of New York attached a GPS tracker to a public employee's car 24 hours/day for 30 days. That was considered a "workplace search" but in that case, it was unconstitutionally unreasonable in scope because "it tracked petitioner on all evenings, on all weekends and on vacation" and "surely it would have been possible to stop short of seven-day, twenty-four hour surveillance for a full month. *Cunningham v New York Dep't of Labor*, 2013 NY Slip Op 04838 (2013).

On "Special Needs" reasoning in the 11-member Foreign Intelligence Surveillance Court, known as the FISA court, see Eric Lichtblau, *In Secret, Court Vastly Broadens Powers of N.S.A.*, N.Y. TIMES, page A1 (July 07, 2013):

> "The special needs doctrine was originally established in 1989 by the Supreme Court in a ruling allowing the drug testing of railway workers, finding that a minimal intrusion on

privacy was justified by the government's need to combat an overriding public danger. Applying that concept more broadly, the FISA judges have ruled that the N.S.A.'s collection and examination of Americans' communications data to track possible terrorists does not run afoul of the Fourth Amendment, the officials said.

"That legal interpretation is significant, several outside legal experts said, because it uses a relatively narrow area of the law — used to justify airport screenings, for instance, or drunken-driving checkpoints — and applies it much more broadly, in secret, to the wholesale collection of communications in pursuit of terrorism suspects. 'It seems like a legal stretch,' William C. Banks, a national security law expert at Syracuse University, said in response to a description of the decision. 'It's another way of tilting the scales toward the government in its access to all this data.'"

4.8.18 Roadblocks

A Court of Appeals dissent characterized three Oregon Supreme Court cases as teaching that "ORS 181.030 can never support an implication of authority for police to conduct roadblocks. IN the absence of a statute or an ordinance establishing an administrative scheme for a particular roadblock, there is no authority for the police to conduct one." *State v Gerrish*, 96 Or App 582, 589 (1989) *aff'd*, 311 Or 506 (1991) (Joseph, CJ, dissenting) (citing *State v Boyanovsky*, 304 Or 131 (1987), *State v Anderson*, 304 Or 139 (1987), and *Nelson v Lane County*, 304 Or 97 (1987)).

The Oregon Supreme Court has noted what it calls "the 'roadblock' cases of *State v Boyanovsky*, 304 Or 131, 743 P2d 711 (1987); *State v. Anderson*, 304 Or 139, 743 P2d 715 (1987); and *Nelson v Lane County*, 304 Or 97, 743 P2d 692 (1987)." *State v Gerrish*, 311 Or 506, 509 n 1 (1991). The Supreme Court distinguished *Gerrish* from those "roadblock cases": "In this case, the police officer was attempting to communicate with witnesses to a specific recent crime or possibly to apprehend the criminal. Unlike those cases, there is no issue regarding the officer's authority to conduct a criminal investigation. ORS 181.030, which charges members of the Oregon State Police with the enforcement of all criminal laws, specifically directs Oregon State Police officers to "[p]ursue and apprehend offenders and obtain legal evidence necessary to insure the conviction in the courts of such offenders." See also *State v Powell*, 288 Or App 660, 664 n 1 (2017) (footnoting *Gerrish*).

4.9 Remedies

When the state has obtained evidence following the violation of a defendant's rights under Article I, section 9, courts presume "'that the evidence was tainted by the violation and must be suppressed.' *State v. Jackson*, 268 Or App 139, 151, 342 P3d 119 (2014) (citing *State v. Unger*, 356 Or 59, 84, 333 P3d 1009 (2014)). The state may rebut that presumption by proving * * * that the police did not exploit the unlawful police conduct to obtain the challenged evidence— that is, that the unlawful police conduct was "independent of, or only tenuously related to" the disputed evidence. [*State v Hall*, 339 Or 7, 35 (2005)]; *see Unger*, 356 Or at 84 (adhering to that requirement, as stated in *Hall*). Stated another way, the evidence in this case must be suppressed unless the state proves attenuation—that is, that the violation of defendant's rights had such a tenuous factual link to the disputed evidence that the unlawful police conduct cannot be properly viewed as the source of that evidence." *State v Benning*, 273 Or App 183, 197 (2015).

Suppression is not necessarily required for statutory violations. ORS 136.432 precludes courts from excluding evidence for statutory violations. *State v Holdorf*, 355 Or 812, 819 (2014); *State v Rodgers*, 347 Or 610, 621 (2010) ("ORS 136.432 prohibits the judicial branch from excluding evidence obtained by government conduct that exceeds statutory authority.").

"[S]uppression of evidence obtained through a search is not required under Article I, section 9, unless the search violated the defendant's personal rights by interfering with his or her protected 'privacy interests.' [*State v Tanner*, 304 Or 312, 319-22 (1987)]; *see also State v Makuch/Riesterer*, 340 Or 658, 670, 136 P3d 35 (2006) (defendants could not challenge the searches of their lawyer's home or their lawyer's personal organizer under Article I, section 9, because, even if the searches were unlawful, they had no 'possessory or privacy interest' in either)." *State v Snyder*, 281 Or App 308, 314 (2017).

In cases of consent to search, even if officers unlawfully extend a traffic stop, or intentionally trespass onto a person's back porch, and obtain evidence used against the person in court during that misconduct, the evidence may still be admissible. The state must prove that the consent was both voluntary and not the product of police exploitation. *State v Musser*, 356 Or 148, 150 (2014) (citing *State v Unger*, 356 Or 59, 74-75 (2014)); *cf. State v Quigley*, 270 Or App 319, 323 (2015) (state failed to elicit evidence at trial of inevitable discovery); *State v Kelly*, 274 Or App 363, 377-78 (2015) (considering factors in the exploitation or attenuation analysis: timing, intervening circumstances, police threats or promises, intrusiveness, purpose, and flagrancy).

4.9.1 The "Fourth-Fifth Fusion"

In *Weeks v United States*, 232 US 383 (1914), the United States Supreme Court established the rule that excludes in a federal criminal prosecution evidence obtained by federal agents in violation of a defendant's Fourth Amendment rights. Professor Akhil Amar cites Justice Black's concurrence in *Mapp* for the idea that Justice Black "had come to believe that the exclusionary rule flowed from the Fourth Amendment in tandem with the Fifth Amendment self-incrimination clause." Akhil Reed Amar, AMERICA'S UNWRITTEN CONSTITUTION 176 (2012). But the Fifth Amendment is an "exclusionary" amendment, whereas the Fourth Amendment is not, textually or historically. *Id*. at 114-15, 172-83. *Mapp* fused two "distinct amendments" that do not "add up to form a proper exclusionary rule." *Id*. at 180. When *Mapp* was decided, 24 states rejected an exclusionary rule, 4 others had only limited exclusion, and those 28 states accounted for about 55% of the U.S. population. *Id*. at 115 (*Mapp* was unusual in that, unlike other constitutional rights the Supreme Court extended to the States through its cases, *Mapp* did not "merely codify a preexisting national consensus" and had "no deep roots in America's lived Constitution").

Nevertheless, in 1961, when *Mapp v Ohio*, 367 US 643 (1961) extended *Weeks* through the Fourteenth Amendment to the States, 26 states had adopted *Weeks*' exclusionary rule. See *State v Davis*, 234 Or 227, 234 n 7 (1983) (citing *Elkins v United States*, 363 US 206 (1960)).

4.9.2 Oregon's Exclusionary Rule

4.9.2.A Purpose

Oregon's exclusionary rule "is constitutionally mandated and serves to vindicate a defendant's personal right to be free from unreasonable searches and seizures." *State v Unger*, 356 Or 59, 67

(2014). That is in contrast with a "rights-based approach" under the federal constitution which is "premised on deterring police misconduct." *Id*. at 67, 82.

"Every rule of law, of course, is intended to deter contrary conduct, and it is successful when it achieves that objective. But . . . 'the deterrent effect on future practices against others, though a desired consequence, is not the constitutional basis for respecting the rights of a defendant against whom the state proposes to use evidence already seized. In demanding a trial without such evidence, the defendant invokes rights personal to himself.' *State v McMurphy*, 291 Or 782, 785 (1981). Thus this court has looked, rather, to the character of the rule violated in the course of securing the evidence when deciding whether the rule implied a right not to be prosecuted upon evidence so secured." *State v Davis*, 295 Or 227, 234-35 (1983).

In *State v Unger*, 356 Or 59 (2014), the Oregon Supreme Court at least superficially ratified its previously stated purpose of the exclusionary rule under Article I, section 9. The Oregon Supreme Court has held that the purpose of the exclusionary rule is to protect individuals' rights and to restore individuals to the positions they would have had if the "government's officers had stayed within the law." *State v Davis*, 295 Or 227, 234 (1983); *State v Hall*, 339 Or 7, 2425 (2005); *State v Murphy*, 291 Or 782, 785 (1981) (Under Oregon's Constitution, "the deterrent effect on future practices against others, though a desired consequence, is not the constitutional basis for respecting the rights of a defendant against whom the state proposes to use evidence already seized. In demanding a trial without such evidence, the defendant invokes rights personal to himself.").

However, in *Unger*, the Oregon Supreme Court criticized *Hall*: "Although the court in *Hall* reiterated the 'rights-based' rationale of Article I, section 9, and contrasted it with the 'deterrence' rationale of the Fourth Amendment * * * it did not explain why 'purpose and flagrancy' is not compatible with the 'rights-based' approach. On reflection, we think that it is." *State v Unger*, 356 Or 59, 81-82 & n 9 (2014). The *Unger* Court mimicked Fourth Amendment analysis (under the Fourth Amendment, courts are to consider the "purpose and flagrancy" of police misconduct to determine if evidence should be suppressed; the *Unger* Court liked that and imported it into Article I, section 9). The *Hall* Court had stated that the "purpose and flagrancy" test applied only to Fourth Amendment rules and does not apply to Article I, section 9. But continuing a backwards slide toward concealed dependence on federal courts, the *Unger* Court took Fourth Amendment rationale for suppression while claiming to adhere to "the rights-based rationale underlying Article I, section 9."

Justice Landau, concurring in *Unger*, wrote: "The problem is that the personal rights rationale for Oregon's exclusionary rule is incomplete. * * * Sometimes, regardless of whether a defendant consented, the court should exclude evidence otherwise unlawfully obtained to prevent police from reaping the benefits of their misconduct." *Id*. at 95. "[T]his court, in staking out the position that deterrence has no role in determining whether evidence must be excluded, stands almost alone. Nearly all the state courts that have adopted an exclusionary rule under their state constitutions recognize that deterrence is, at the very least, a relevant consideration". *Id*. at 98 & n 1 (only Oregon, New Mexico, and Pennsylvania have rejected deterrence as a justification for a state exclusionary rule." "In my view, the personal rights explanation for exclusion fails to explain why a defendant's voluntary consent does not suffice to justify the search." *Id*. at 101.

4.9.2.B Statutory Remedy

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.")

4.9.2.C Constitutional Remedies

Oregon case law permits the state to establish that suppression is not required. Usually that is when the state shows that the constitutional violation did not make a difference. Three situations within that theory are clustered as follows:

i. inevitable discovery
ii. independent source
iii. attenuation

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).

The basics are stated in *State v Woods*, 288 Or App 47, 55 (2017):

> "Whenever the state has obtained evidence following the violation of a defendant's Article I, section 9 rights, it is presumed that the evidence was tainted by the violation and must be suppressed." *State v Jackson*, 268 Or App 139, 151, 342 P3d 119 (2014). However, "[t]he state may rebut that presumption by establishing that the disputed evidence did not derive from the preceding illegality." *Id*. (internal citation marks omitted). The state may prove that the evidence did not derive from the illegality by showing either that "(1) the police inevitably would have obtained the evidence through lawful procedures; (2) the police obtained the evidence independently of the illegal conduct; or, *** (3) the illegal conduct was independent of, or only tenuously related to, the disputed evidence." *State v Unger*, 356 Or 59, 64, 333 P3d 1009 (2014) (internal quotation marks omitted).

If the state did violate Article I, section 9, suppression may not be the remedy – there might be no remedy. In 2014, the Oregon Supreme Court "disavowed" parts of *State v Hall*, 339 Or 7 (2005) in *State v Unger*, 356 Or 59 (2014). *Unger* is a significant change in Article I, section 9, analysis when consent follows illegal police conduct. Just four years earlier, the Oregon Supreme Court had written:

> "A defendant gains nothing from having a constitutional right not to be seized if the police can seize him and – by definition – use the circumstance of that seizure as a guarantee of an opportunity to ask him to further surrender his liberty. There was a

> minimal factual nexus between defendant's illegal seizure and his decision to consent." *State v Ayles*, 348 Or 622, 631-32 (2010).

But now, under *Unger*:

> "[W]hen a defendant has established that an illegal stop or an illegal search occurred and challenges the validity of his or her subsequent consent to a search, the state bears the burden of demonstrating that (1) the consent was voluntary; and (2) the voluntary consent was not the product of police exploitation of the illegal stop or search." *State v Unger*, 356 Or 59, 75, 85 (2014). Even "if the consent is voluntary, the court must address whether the police exploited their prior illegal conduct to obtain the evidence." *Id*. at 86. A "voluntary consent to search that is prompted by an officer's request can be sufficient to demonstrate that the consent is unrelated or only tenuously related to the prior illegal police conduct." *Id*. at 79. In determining "exploitation," if the illegal police "conduct is intrusive, extended, or severe, it is more likely to influence improperly a defendant's consent to search. In contrast, where the nature and severity of the violation is limited, so too may be the extent to which the defendant's consent is 'tainted.'" *Id*. at 81. Another "concern relevant to whether a defendant's consent resulted from exploitation of police misconduct is the 'purpose and flagrancy' of the misconduct. The 'purpose and flagrancy' inquiry comes from *Brown v Illinois*, 422 US 590, 603-04 (1975)." *Id*. at 81. The federal "purpose and flagrancy" inquiry is compatible with the federal deterrence rational for suppression and also with the rights-based rationale under the state constitution. *Id*. at 82. "Flagrancy" includes excessive use of force, unlawful forcible entry into a home, lengthy in-custody interrogation "is more likely to affect the defendant's decision to consent than more restrained behavior." *Ibid*. "Purpose" can be "expressed through conduct or comments." *Id*. at 83.

"Exploitation may be found" if there is "a direct causal connection between the prior illegal stop and the consent" if "the request for consent itself (and the evidence gathered) resulted from police knowledge of the presence" of the evidence itself. *Id*. at 86. Further, "evidence may be subject to suppression if the police obtained the consent to search through less direct exploitation of their illegal conduct." *Ibid*. Close timing between the illegal police conduct and consent, the presence of intervening or mitigating circumstances, plus "the nature, extent, and severity of the constitutional violation are relevant, as are the purpose and flagrancy of the misconduct." *Id*.

That inquiry applies even when it is undisputed that police trespassed onto the threshold of a man's bedroom door at his back yard without a warrant, *State v Unger*, 356 Or 59 (2014), or when police trespass by opening an apartment's front door, then knock on a bedroom door from the threshold of the apartment front door without a warrant, *State v Lorenzo*, 356 Or 134, 145 (2014).

4.9.2.C.i Inevitable Discovery

> "'To satisfy its burden under the inevitable-discovery doctrine, the state [is] required to show by a preponderance of the evidence (1) that certain proper and predictable investigatory procedures would have been utilized in the instant case, and (2) that those procedures inevitably would have resulted in the discovery of the evidence in question.'

State v Hensley, 281 Or App 523, 535, 383 P3d 333 (2016) (internal quotation marks omitted). The state cannot meet this burden by merely showing 'that evidence might or could have been otherwise obtained.' *Id.* (internal quotation marks omitted). Instead, '[a] conclusion that predictable investigatory procedures would have produced the evidence at issue must be substantiated by factual findings that are fairly supported by the record." *Id*. (internal quotation marks omitted).'" *State v Woods*, 288 Or App 47, 55 (2017).

4.9.2.C.ii Independent Source

4.9.2.C.iii Attenuation

The "attenuation test set forth in *Unger*" evaluates "the temporal proximity between the unlawful police conduct and the discovery of the challenged evidence; the presence of mitigating circumstances; the presence of intervening circumstances; the purpose and flagrancy of the unlawful police conduct; and the nature and extent of the constitutional violation." *State v Jones*, 275 Or App 771, 775 (2015) (citations omitted). "Thus, whether we are evaluating attenuation under Article I, section 9, or the Fourth Amendment, we consider essentially the same factors to determine whether the state has met its burden to demonstrate attenuation." *Ibid*. *Unger* disavowed the "minimal factual nexus" part of the test in *State v Hall*, 339 Or 7, 34-35 (2005). *Id*. at 776 n 5.

The Court of Appeals has explained attenuation: Article I, section 9, guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure." When the state has obtained evidence following the violation of a defendant's rights under Article I, section 9, "it is presumed that the evidence was tainted by the violation and must be suppressed." *State v. Jackson*, 268 Or App 139, 151, 342 P3d 119 (2014) (citing *State v. Unger*, 356 Or 59, 84, 333 P3d 1009 (2014)). "The state may rebut that presumption by proving, as relevant here, that the police did not exploit the unlawful police conduct to obtain the challenged evidence—that is, that the unlawful police conduct was 'independent of, or only tenuously related to' the disputed evidence." *State v. Benning*, 273 Or App 183, 194, 359 P3d 357 (2015) (quoting *State v. Hall*, 339 Or 7, 35, 115 P3d 908 (2005), overruled in part on other grounds by *Unger*, 356 Or at 59). The state must therefore prove that "the violation of defendant's rights had such a tenuous factual link to the disputed evidence that the unlawful police conduct cannot be properly viewed as the source of that evidence." Id. "To determine whether the state proved attenuation under the totality of the circumstances, we consider the temporal proximity between the unlawful police conduct and the discovery of the challenged evidence; the presence of mitigating circumstances; the presence of intervening circumstances; the purpose and flagrancy of the unlawful police conduct; and the nature, extent, and severity of the constitutional violation. The underlying question those factors aim to address is whether police exploited or took advantage of or traded on their unlawful conduct to obtain the challenged evidence, or—stated another way—whether the challenged evidence was tainted because it was derived from or was a product of the unlawful conduct." *State v. Jones (A154424)*, 275 Or App 771, 778, 365 P3d 679 (2015) (internal quotation marks and citations omitted)." *State v Riley*, 288 Or App 264, 271 (2017) ("Under the totality of the circumstances, we conclude that the state met its burden of showing

that the evidence obtained as a result of [witness] statements to the police was sufficiently attenuated from any minimally invasive violation of defendant's Article I, section 9, rights. Thus, the trial court did not err in denying defendant's motion to suppress.").

4.9.3 Fourth Amendment Remedies

4.9.3.A Exclusionary Rule

> "The criminal is to go free because the constable has blundered." *People v Defore*, 242 NY 13, 21-22 (1926) (Cardozo, J.).

"The exclusionary rule exists to deter police misconduct. *Davis v. United States*, 564 US 229, 236–237 (2011)." *Utah v Srieff*, 579 US __ slip op 8 (2016).

The "exclusionary rule is only an evidentiary remedy, which prohibits the use of certain evidence at criminal trial." *Lingo v City of Salem*, 832 F3d 953 n 3 (9th Cir 2016). Generally, the Fourth Amendment "says nothing about suppressing evidence obtained in violation" of the right of people to be secure against unreasonable searches and seizures. "That rule – the exclusionary rule – is a 'prudential doctrine' * * * created by [the Supreme] Court to 'compel respect for the constitutional guaranty." *Davis v United States*, 131 S Ct 2419, 2426 (2011) (quotations omitted). "Exclusion is 'not a personal constitutional right,' nor is it designed to 'redress the injury' occasioned by an unconstitutional search." *Ibid*. "The rule's sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations." The rule's "bottom-line effect, in many cases, is to suppress the truth and to set the criminal loose in the community without punishment * * *. Our cases hold that society must swallow this bitter pill when necessary, but only as a last resort." *Ibid*. (quotations omitted).

The Oregon Supreme Court recognized that "the United States Supreme Court has held that the exclusionary rule does not apply in most proceedings outside traditional criminal prosecutions." *State v W.L.P.*, 345 Or 657, 668 (2009) (and forfeiture proceedings due to "quasi-criminal" nature of such proceedings) (citations omitted for parole revocation proceedings, civil deportation hearings, civil tax proceedings, and grand jury proceedings). The "federal exclusionary rule does not apply in juvenile dependency proceedings." *Id*. at 669.

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

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

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

The U.S. Supreme Court first announced the exclusionary rule in *Boyd v United States*, 116 US 616 (1886). *Boyd* involved a quasi-criminal forfeiture proceeding. In *Boyd*, the Court concluded that compelling a defendant to produce private papers was equivalent to an unlawful search and seizure and therefore unconstitutional, linking the Fourth and Fifth Amendments. *See* Heather A. Jackson, *Arizona v. Evans: Expanding Exclusionary Rule Exceptions and Contracting Fourth Amendment Protection*, 86 J. CRIM. L. & CRIMINOLOGY 1201, 1202-03 (1995-1996), here.

The Supreme Court applied the exclusionary rule to the States through the due process clause of the Fourteenth Amendment in *Mapp v Ohio*, 367 US 643 (1961).

The Oregon Supreme Court characterizes the Fourth Amendment's exclusionary rule as follows: "The federal exclusionary rule is 'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect.' *United States v Calandra*, 414 US 338, 348 (1974). Because of its remedial nature, courts must 'weigh the likely social benefits of excluding unlawfully seized evidence against the likely costs' to determine whether the rule applies. *INS v Lopez-Mendoza*, 468 US 1032, 1042 (1984) (quotation omitted). The exclusionary rule applies not only to the 'direct products' of unconstitutional invasions of Fourth Amendment rights, but also to the indirect or derivative 'fruits' of those invasions. [*See Wong Sun v United States*, 371 US 471 (1963)." *State v Bailey*, 356 Or 486, 495 (2014).

The Oregon Supreme Court has acknowledged three exceptions (there are more than three) to the Fourth Amendment's exclusionary rule: "There are three recognized exceptions to the Fourth Amendment exclusionary rule: (1) the inevitable discovery exception; (2) the independent source exception; and (3) the attenuation exception. *United States v Smith*, 155 F3d 1051, 1060 (9th Cir 1998)." *State v Bailey*, 356 Or 486, 496 & n 4 (2014). The others are a good-faith exception and an impeachment exception (and perhaps others, depending on how they are categorized).

4.9.3.B Exceptions to the Exclusionary Rule

The United States Supreme Court has explained the basics in *Utah v Strieff*, 579 US __ , 136 S. Ct. 2056 (2016), slip op at 5):

> "Under the [United States Supreme] Court's precedents, the exclusionary rule encompasses both the 'primary evidence obtained as a direct result of an illegal search or seizure' and . . . 'evidence later discovered and found to be derivative of an illegality,' the so-called 'fruit of the poisonous tree.' *Segura v United States*, 468 US 796, 804 (1984). But the significant costs of this rule have led us to deem it 'applicable only . . . where its deterrence benefits outweigh its substantial social costs' *Hudson v Michigan*, 547 US 586,

591 (2006) (internal quotation marks omitted). 'Suppression of evidence . . . has always been our last resort, not our first impulse.' *Ibid*. We have accordingly recognized several exceptions to the rule. Three of these exceptions involve the causal relationship between the unconstitutional act and the discovery of evidence. First, the independent source doctrine allows trial courts to admit evidence obtained in an unlawful search if officers independently acquired it from a separate, independent source. See *Murray v. United States*, 487 US 533, 537 (1988). Second, the inevitable discovery doctrine allows for the admission of evidence that would have been discovered even without the unconstitutional source. *See Nix v Williams*, 467 US 431, 443–444 (1984). Third . . . is the attenuation doctrine: Evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that 'the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.' *Hudson, supra*, at 593." *Utah v Strieff*, 579 US __ slip op 5 (2016) (attenuation exception to suppression applies where the intervening circumstance that the State relies on is the discovery of a valid, pre-existing, and untainted arrest warrant).

See *State v Bailey*, 356 Or 486 (2014), describing "three recognized exceptions to the Fourth Amendment exclusionary rule: (1) the inevitable discovery exception; (2) the independent source exception; and (3) the attenuation exception."

i. **Inevitable Discovery**: "The doctrine of inevitable discovery allows admission of unlawfully obtained evidence if the government can 'establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means.' *Nix v Williams*, 467 US 431, 444, 448 (1984).

ii. **Independent Source**: The independent source doctrine applies when a "search pursuant to [a] warrant was in fact a genuinely independent source of the information and tangible evidence" that would otherwise be s subject to exclusion because they were found during an earlier search. The independent source doctrine permits the introduction of evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from activities untainted by the initial illegality. *Murray v United States*, 487 US 533, 542 (1988).

iii. **Attenuation:** *Nardone v United States*, 308 US 338, 341 (1939) addressed *not* excluding evidence when the Fourth Amendment violation is sufficiently far from the discovery of the evidence so as to "dissipate the taint." In *Brown v Illinois*, 422 US 590, 603 (1975), the Court listed three relevant factors: (1) the length of time between the illegality and the seizure of evidence; (2) the presence of additional intervening factors; and (3) the degree and purpose of the official misconduct. *See also Utah v Strieff*, 579 US __ (2016).

iv. **Good Faith**: Under *United States v Leon*, 468 US 897 (1984), evidence seized under a defective warrant will not be suppressed if an officer acts in "objectively reasonable reliance on the warrant." *Id*. at 922. The purpose of the exclusionary rule under the Fourth Amendment is deterrence of police misconduct. *Id*. at 906. Four situations *per se* fail to meet the "good faith" exception: (1) where an affiant recklessly or knowingly placed false information in the affidavit that misled the judge; (2) where a judge wholly abandons his judicial role; (3) where the affidavit is so lacking in indicia of probable

cause that believing it is unreasonable; and (4) where the warrant is so facially deficient (i.e. failing to particularize the place to be searched of the things to be seized) that the officers cannot presume it to be valid. *Id*.; *Illinois v Krull*, 480 US 340, 349-55 (1987) (even if a statute is later found to be unconstitutional, an officer "cannot be expected to question the judgment of the legislature.").

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

An Oregon federal district court has addressed exceptions to the good-faith exception to suppression: "Under the good faith exception, evidence obtained pursuant to a search under a warrant lacking probable cause is not suppressed if the officer acts in objectively reasonable reliance on the warrant. *United States v. Patton*, No. 3:12-CR-00652-KI, 2013 WL 5223649, at *13 (D. Or. Sept. 16, 2013) (citing *United States v Underwood*, 725 F.3d 1076, 1085 (9th Cir. 2013)). There are four situations that per se fail to satisfy the good faith exception:

> 1) where the affiant recklessly or knowingly placed false information in the affidavit that misled the issuing judge;
> 2) where the judge wholly abandons his or her judicial role;
> 3) where the affidavit is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and
> 4) where the warrant is so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid. *Underwood*, 725 F.3d at 1085 (citing *United States v. Leon*, 468 U.S. 897, 922 (1984))." *United States v Ford*, 3:14-cr-00045-1-HZ (D Or 2016).

v. **Grand Jury**, see *Pennsylvania Board of Probation and Parole v Scott*, 524 US 357, 363-64 (1998).

vi. **Civil Tax Cases**, see *Pennsylvania Board of Probation and Parole v Scott*, 524 US 357, 363-64 (1998).

vii. **Civil Deportation**, see *Pennsylvania Board of Probation and Parole v Scott*, 524 US 357, 363-64 (1998).

viii. **Parole Revocation**, see *Pennsylvania Board of Probation and Parole v Scott*, 524 US 357, 363-64 (1998).

ix. **Section 1983 Claims**, *Lingo v City of Salem*, 832 F3d 953 (9th Cir 2016) (and cases cited therein). See **Section 4.9.3.C**, *post*.

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

"Where the search at issue is conducted in accordance with a municipal 'policy' or 'custom,' Fourth Amendment precedents may also be challenged, without the obstacle of the good-faith exception or qualified immunity, in civil suits against municipalities. See 42 USC §1983; *Los Angeles County v Humphries*, 131 S Ct 447, 452 (2010) (citing *Monell v New York City Dep't of Social Svcs*, 436 US 658, 690-91 (1978))." *Davis v United States*, 131 S Ct 2419, 2433 n 9 (2011).

In *Miranda v City of Cornelius*, 429 F3d 858 (9th Cir 2005), the court held that it was unreasonable under the Fourth Amendment for a Cornelius police officer to impound a car. That court did not declare ORS 809.720 or the city code unconstitutional – it just concluded that impounding a defendant's car for community-caretaking purposes was unreasonable under the Fourth Amendment. Then in 2007, a Cornelius Police Department officer saw defendant commit a traffic infraction. Defendant turned into his own driveway, told the officer his license was suspended, and gave him an expired insurance card. Officer decided to impound the vehicle per a city code and ORS 809.720 that purport to allow for impounding a vehicle driven by a driver with a suspended license or without insurance. Officer also decided to inventory the vehicle and found cocaine. Defendant moved to suppress. The trial court denied the motion reasoning that what "what [officer] did was reasonable." The Court of Appeals reversed: the good-faith exception to the exclusionary rule does not justify the officer's illegal impounding in this case. The officer may properly be charged with knowledge that the seizure of defendant's car in his driveway pursuant to ORS 809.720 or the city code provision was unconstitutional.

4.9.3.C Section 1983 Claims

Section 1983 provides that "[e]very person," who, under color of state law causes the violation of another's federal rights shall be liable to the party injured by his conduct. 42 U.S.C. § 1983.

In section 1983 claims for police fabrication, failure to disclose exculpatory evidence, or malicious prosecution, an interesting question remains as to the Fourth and Fourteenth Amendment protections and remedies, as the Third Circuit has observed: "The boundary between Fourth Amendment and Fourteenth Amendment claims is, at its core, temporal. The Fourth Amendment forbids a state from detaining an individual unless the state actor reasonably believes that the individual has committed a crime—that is, the Fourth Amendment forbids a detention without probable cause. *See, generally, Bailey v United States*, — US —, 133 S Ct 1031, 1037 (2013). But this protection against unlawful seizures extends only until trial. *See Schneyder v Smith*, 653 F3d 313, 321 (3d Cir 2011) (observing that post-conviction incarceration does not implicate the Fourth Amendment). The guarantee of due process of law, by contrast, is not so limited as it protects defendants during an entire criminal proceeding through and after trial. *Pierce v Gilchrist*, 359 F3d 1279, 1285–86 (10th Cir 2004) ("The initial seizure is governed by the

Fourth Amendment, but at some point after arrest, and certainly by the time of trial, constitutional analysis shifts to the Due Process Clause." (internal citation omitted)). *Halsey v Pfeiffer*, 2014 US App LEXIS 7696 (3d Cir 2014).

"Section 1983 does not contain a statute of limitations. Thus, to determine the timely filing of a § 1983 claim, courts borrow the statute of limitations from the most analogous state-law cause of action. See 42 U.S.C. § 1988(a). For § 1983 suits, that cause of action is a personal-injury suit. See *Owens v Okure*, 488 US 235, 249–50 (1989)." *Owens v Baltimore City State's Attorney's Office*, 767 F3d 379 (4th Cir 2014) (failure to disclose exculpatory evidence—a due process claim that clearly arises pursuant to *Brady v Maryland*, 373 US 83 (1963)).

Lingo v City of Salem, 832 F3d 953 (2016 WL 3525209) (9th Cir 20116) Oral argument here. This is a section 1983 action. Lingo and her neighbor were in an ongoing dispute about a dog. Both called Salem police. Police went to Lingo's property, but rather than knock on the front door, they walked through her carport and knocked on her rear door in the carport. When Lingo's visitor opened the door, police immediately smelled marijuana. Lingo said it was an herbal incense. Two young children were in the home. Lingo repeatedly denied the police officer's requests to enter the home. Police arrested Lingo for endangering the welfare of a minor. Police obtained a warrant to search the home. Bongs, 1.8 grams of marijuana, packaging, and Klonopin were in the home. Lingo moved to suppress, contending that by entering her carport and approaching the back door, the police violated her Fourth Amendment rights. The evidence is fruit of that unlawful search, she argued. The trial court granted the motion to suppress. The charges against Lingo were dropped.

Lingo then filed this section 1983 action against the officers and the City of Salem, alleging First, Fourth, and Fourteenth Amendment violations for false arrest and "wrongful separation from her children," seeking "compensatory and punitive damages." Defendants filed for summary judgment. Lingo moved against them for partial summary judgment. The trial court appeared to anticipate that if Lingo prevailed on her motion, she would try to stop defendants from introducing evidence they had obtained against her. The trial court sought additional briefing on whether the exclusionary rule applies to Section 1983 claims.

The trial court concluded that the officers had violated Lingo's Fourth Amendment rights by entering her home's curtilage. However, it concluded that the exclusionary rule does not apply to Section 1983 claims. The court granted summary judgment for all defendants.

The Ninth Circuit panel affirmed. It joined several other circuits in reasoning that "standing to invoke the exclusionary rule has been confined to situations where the Government seeks to use such evidence to incriminate the victim of the unlawful search." (citation omitted). In a section 1983 suit, "the need for deterrence is minimal." Applying the exclusionary rule in section 1983 cases "would prevent state actors merely from defending themselves against a claim for monetary damages. * * * It would simply increase state actors' financial exposure in tort cases that happen to involve illegally seized evidence. In effect, section 1983 plaintiffs would receive a windfall allowing them to prevail on tort claims that might otherwise have been defeated if critical evidence had not been suppressed. Even if such application of the rule might in some way deter violative conduct, the deterrence would impose an extreme cost to law enforcement officers that is not generally countenanced by the doctrine." (citation omitted).

The panel noted that the US Supreme Court has held that the exclusionary rule does not apply to grand jury proceedings, civil tax proceedings, civil deportation proceedings, or parole revocation proceedings. "Fruit of the poisonous tree" doctrine and the exclusionary rule are "judicially created remedies." Exclusion of illegally obtained evidence remedies the wrong of invading an individual's privacy. "[N]othing within the fruit-of-the-poisonous tree doctrine suggests that an officer must ignore facts that would give him probable cause to arrest a person merely because those facts were procured through an unlawful search."

4.9.3.D Qualified Immunity Defense

A Third Circuit panel, *Brown v Battle Creek Police Department*, __ F3d __ (2017), explained qualified immunity in a Fourth Amendment case:

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v Fitzgerald*, 457 U.S. 800, 818 (1982)). Qualified immunity provides government officials "breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law." *Messerschmidt v Millender*, 132 S. Ct. 1235, 1244 (2012) (internal citations and quotation marks omitted). "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v Creighton*, 483 U.S. 635, 639 (1987) (citation omitted).

Chapter 5: Self-Incrimination

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

5.1 Origins

The Oregon Supreme Court has summarized: "Article I, section 12, of the Oregon Constitution was based on Article I, section 14, of the Indiana Constitution of 1851. Charles Henry Carey, THE OREGON CONSTITUTION 468 (1926). Those provisions are similar to provisions that appear in the constitutions of 48 states. John William Strong, ed., 1 MCCORMICK ON EVIDENCE § 115, at 425 (4th ed 1992). Although the wording of the different constitutional provisions varies, the variations commonly are not considered to convey different meanings because the provisions share a common origin. John Henry Wigmore, 8 WIGMORE ON EVIDENCE § 2263, at 378 (McNaughton rev 1961). The right against compelled self-incrimination was firmly established in the American colonies by the mid-eighteenth century. Leonard W. Levy, ORIGINS OF THE FIFTH AMENDMENT 368-404 (1968). However, there is some indication that the right was recognized in the colonies as early as 1650. R. Carter Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA L REV 763, 775 (1935). In 1776, a self-incrimination clause was incorporated into the Virginia state constitution, and seven other states followed suit shortly thereafter. Levy, ORIGINS OF THE FIFTH AMENDMENT at 405-09. The Fifth Amendment to the United States Constitution, drafted in 1789, was based on those provisions of state constitutions. *Id*. at 422. The right against compelled self-incrimination was imported to the United States as a part of the common law of England. *Id*. at 368." *State v Fish*, 321 Or 48, 54 (1995).

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

"Surveys have shown that large majorities of the public are aware that individuals arrested for a crime have a right to remain silent (81%), a right to a lawyer (95%), and have a right to an appointed lawyer if the arrestee cannot afford one (88%)." *J.D.B. v North Carolina*, 131 S Ct 2394 n 13 (2011) (Alito, J dissenting).

5.2 Self-Incrimination

5.2.1 Fifth Amendment Right to Remain Silent

“We sometimes forget how long it has taken to establish the privilege against self-incrimination, the sources from which it came and the fervor with which it was defended. Its roots go back into ancient times. * * * Thirteenth century commentators found an analogue to the privilege [against self-incrimination] grounded in the Bible. ‘To sum up the matter, the principle that no man is to be declared guilty on his own admission is a divine decree.’ Maimonides, Mishneh Torah (Code of Jewish Law), Book of Judges, Laws of the Sanhedrin, c. 18, 6, III Yale Judaica Series 52—53. *See also* Lamm, *The Fifth Amendment and Its Equivalent in the Halakhan*, 5 JUDAISM 53 (Winter 1956).” *Miranda v Arizona*, 384 US 436, 458 & n 27 (1966).

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

The Fifth Amendment “privilege protects a person from being compelled to testify in any proceeding -- including civil proceedings -- when the answers may incriminate the person in a future criminal prosecution. The privilege pertains not only to inquiries that would be directly incriminating, but also 'embraces those which would furnish a link in the chain of evidence' needed to prosecute a crime." *Redwine v Starboard LLC*, 240 Or App 673, 682-83 (2011).

The *Redwine* court collated the following Fifth Amendment protections against self-incrimination:

- The Fifth Amendment privilege protects a person from being compelled to testify in any proceeding when the answers may incriminate him in a future criminal prosecution. *Maness v Meyers*, 419 US 449, 464 (1975).

- The privilege protects testimony that would "furnish a link in the chain of evidence" needed to prosecute a crime. *Hoffman v United States*, 341 US 479, 486 (1951).

- The inquiry is whether the testimony "would provide evidence of a particular crime." *Empire Wholesale Lumber Co. v Meyers*, 192 Or App 221, 226-27 (2004).

- The privilege is not abrogated just because the government may have access from another source to the same information. *Grunewald v United States*, 353 US 391, 421-22 (1957).

- The privilege can extend to documentary production if there is a "protected testimonial aspect" to the documents such as where by producing documents pursuant to a

subpoena, "the witness would admit that the papers existed, were in his possession or control, and were authentic." *United States v Hubbell*, 530 US 27, 36 n 19 (2000).

● The witness claiming the privilege bears the burden of establishing that an answer could be injurious, and the court must construe the privilege liberally in favor or the right it is intended to secure. *Hoffman v United States*, 341 US 479, 486 (1951).

"Any police interview of an individual suspected of a crime has 'coercive aspects to it.' *Oregon v Mathiason*, 429 US 492, 495 (1977) (per curiam). Only those interrogations that occur while a suspect is in police custody, however, 'heighte[n] the risk' that statements obtained are not the product of the suspect's free choice. *Dickerson v United States*, 530 US 428, 435 (2000)." *J.D.B. v North Carolina*, 131 S Ct 2394 (2011). "Because [*Miranda* warnings] protect the individual against the coercive nature of custodial interrogation, they are required "'only where there has been such a restriction on a person's freedom as to render him 'in custody.'" *Stansbury v California*, 511 US 318, 322 (1994) (per curiam).

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

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

In determining whether a suspect has been interrogated in a custodial setting without being afforded *Miranda* warnings, a court may consider the suspect's age. *J.D.B. v North Carolina*, 131 S Ct 2394 (2011) (child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test.").

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

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

The privilege against self-incrimination is not self-executing, *Minnesota v Murphy*, 465 US 420, 425 (1984). A witness who desires its protection must claim it. *Miranda* is an exception to the general rule that the Government has the right to everyone's testimony, *Garner v United States*, 424 US 648, 658 n 11 (1976). *Salinas v Texas*, 133 S Ct 2174 (2013).

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).

5.2.2 "Booking Question Exception" to *Miranda*

The Oregon Court of Appeals has noted – without any analysis or limitation – what it calls "the 'booking question' exception to *Miranda*." *State v Fink*, 285 Or App 302, 307 n 4 (2017). In *Fink*, the court cited *United States v Foster*, 227 F3d 1096, 1103 (9th Cir 2000) and wrote: The "trial court's statement appears to acknowledge that, under the 'booking question' exception, 'limited, biographical questions are permitted even after a person invokes his or her *Miranda* rights.'" A few months later, the Court of Appeals again used the phrase "booking-related questions" without any description, writing: "Upon arriving at the jail, [officer] asked defendant a series of booking-related question. Defendant answered those questions. [Officer] then handed defendant the charge list an defendant responded, 'How the hell? Fucking robbery, really?'" *State v Schrepfer*, 288 Or App 429, 433 (2017).

5.2.3 Oregon Constitution

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

"Under Article I, section 12, of the Oregon Constitution, police must cease custodial interrogation when a criminal suspect unequivocally invokes his or her right against self-incrimination. *State v McAnulty*, 356 Or 432, 455, __ P3d __ (2014); *State v Davis*, 350 Or 440, 459, 256 P3d 1075 (2011)." *State v Avila-Nava*, 356 Or 600, 602 (2014).

Oregon courts have had some difficulty deciding how Article I, section 12, and the Fifth Amendment would fit if charted as a Venn diagram. Courts seem to have retreated to the corner of relying on lawyers to provide history and analysis. One statement is as follows: "Although Article I, section 12, confers protections independently of protetions set out in the federal constitution, Oregon courts generally consider Article I, section12, and the Fifth Amendment together when construing the right against self-incrimination, unless a defendant articulates an argument that the two constitutions provide different protections. *State v Scott*, 343 Or 195, 203 (2007)." *State v Anderson*, 285 Or App 355, 356 n 1 (2017).

5.2.3.A History and Purpose

In *State v Davis*, 350 Or 440, 447-48 (2011), the Oregon Supreme Court traced the history and purpose of Article I, section 12, of the Oregon Constitution, quoted here:

The right against self-incrimination stated in that provision of the Oregon Constitution is identical to, and presumed to have been based on, Article I, section 14, of the Indiana Constitution of 1851. Charles Henry Carey, THE OREGON CONSTITUTION 468 (1926). It was adopted by the framers apparently without amendment or debate of any sort. Claudia Burton & Andrew Grade, *A Legislative History of the Oregon Constitution of 1857 -- Part I (Articles I & II)*, 37 WILL L REV 469, 519-20 (2001).

The text of the Indiana provision was taken from Kentucky and Ohio bills of rights, William P. McLauchlan, THE INDIANA STATE CONSTITUTION: A REFERENCE GUIDE 46-47 (1996), which were based on the nearly identically worded Fifth Amendment to the United States Constitution. That amendment provides that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself[.]" US Const, Amend V. 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, which provided that no man can be "compelled to give evidence against himself." Va Declaration of Rights § 8 (1776). *See generally Soriano*, 68 Or App at 646-47 (tracing history of wording of state constitutional self-incrimination provisions).

The historical roots of the Fifth Amendment, and of the state constitutional provisions on which it was based, are matters of some controversy. *See, e.g.,* John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 Mich L Rev 1047, 1071-72 (1994) ("The history of the privilege against self-incrimination at common law has long been a murky topic."). The conventional view, originally proposed by John Wigmore and later developed by Leonard Levy, is that the origins of the right may be traced to sixteenth-century English protestant objections to the infamous ex officio oaths administered by the Star Chamber and the ecclesiastical Court of High Commission, which had required suspects to swear in advance to answer truthfully to questions about their religious and political beliefs. The practice forced the suspects either to lie under oath and thereby risk eternal damnation or to refuse to take the oath and thereby risk less eternal, but no less objectionable, temporal punishment (for example, being whipped and pilloried). Puritans, in particular, claimed the benefit of the ancient maxim nemo tenetur prodere seipsum ("no man is obligated to accuse himself") and refused either to swear or to testify. *See generally* John Henry Wigmore, 8 EVIDENCE IN TRIALS AT COMMON LAW § 2250, 267-89 (John T. McNaughton rev ed 1961); Leonard W. Levy, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION (1968). In 1641, Parliament sided with the Puritans and abolished the courts of Star Chamber and High Commission and forbade the ecclesiastical courts from employing the ex officio oath. The fall of the Star Chamber came to be seen as a triumph of the nemo tenetur principle.

More recently, scholars have questioned the thesis that the right against self-incrimination represents a simple confirmation of the common-law nemo tenetur principle. Those scholars have suggested that, instead, the history of the right consists of a more complex convergence of a number of common-law antecedents that had fairly limited effect until the late-nineteenth century.

Although scholars may debate the precise genealogy of the privilege, they do not appear to debate its animating principle, namely, an aversion to compelled testimony. Levy, for

example, emphasized that the "traditional English formulation of the right against self-incrimination" pertained to a right "against compulsory self-incrimination. The element of compulsion or involuntariness was always an essential ingredient of the right." Levy, ORIGINS OF THE FIFTH AMENDMENT at 327-28 (emphasis in original); *see also* Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH L REV 1086, 1100 (1994) (nemo tenetur privilege concerned "the inappropriateness of physical and spiritual coercion[,] * * * casting weight onto the scale against the practice of judicial torture").

5.2.3.B Voluntariness of Confessions or Statements

Statute

ORS 136.425(1) provides: "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." The purpose of that statute "is to exclude unreliable confessions." *State v Powell*, 352 Or 210, 222 (2012); *State v Belle*, 281 Or App 208, 212 (2016).

"ORS 136.425(1) and Article I, section 12, 'do not differ in any respect that bears on' the issue of voluntariness.'" *State v Rodriguez-Moreno*, 273 Or App 627, 633 n 6 (2015) (citation omitted).

Constitution

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); *State v Cazarez-Hernandez*, 280 Or App 312, 314 (2016); *State v Rodriguez-Moreno*, 273 Or App 627 (2015).

"In Oregon, a confession is initially deemed involuntary. Before a confession can be received in evidence, the state must show that it was voluntarily given, that is, made without inducement through fear or promises, direct or implied." *State v Mendacino*, 288 Or 231, 235 (1980); *State v Rodriguez-Moreno*, 273 Or App 627, 634 (2015). The state must meet its burden to prove voluntariness by a preponderance of the evidence. *Mendacino*, 273 Or App at 635. In "the absence of police overreaching, challenges to the voluntariness of a defendant's statements or confessions have consistently failed." *Ibid*. (citation omitted).

A criminal defendant has a right to remain silent under Article I, section 12, of the Oregon Constitution." *State v Wederski*, 230 Or 57, 62 (1962). To receive protection of the self-incrimination clause in Article I, section 12, of the Oregon Constitution, the person's statements or conduct must be: (1) testimonial; (2) compelled; and (3) potentially used against the person in a criminal prosecution. *State v Fish*, 321 Or 48, 53 (1995). Even if evidence is testimonial, the right against self-incrimination is not implicated in noncompelling circumstances. *State v Davis*, 350 Or 440, 446-47 (2011); *State v Fish*, 321 Or 48, 56 (1995).

"Testimonial"

A breath test does not yield testimonial evidence. *State v Banks*, 286 Or App 718, 724 (2017) ("putting defendant to the choice between producing the BAC evidence or not did not violate his right against self-incrimination") (citing *State v Earley*, 78 Or App 646 (1986) (evidence of a defendant's refusal to consent to a breath test is not subject to suppression); *State v Gefre*, 137 Or App 77 (1995), *rev den* 323 Or 483 (1996);). *Banks* summarized:

> "'Under Article I, section 12, of the Oregon Constitution, individuals may not be compelled to disclose their beliefs, knowledge, or state of mind'—referred to as 'testimonial evidence'—'to be used in a criminal prosecution against them.' *State v Fish*, 321 Or 48, 56, 893 P2d 1023 (1995). The constitutional privilege against self-incrimination 'appl[ies] to only testimonial evidence'; it does not apply to nontestimonial evidence related to the 'defendant's physical characteristics, such as identity, appearance, and physical condition.' *State v. Tiner*, 340 Or 551, 561, 135 P3d 305 (2006), *cert den*, 549 US 1169 (2007). Evidence of the results of a breath test is not testimonial. A breath test yields only 'physical evidence of intoxication,' which is not testimonial, because it conveys nothing about the person's 'beliefs, knowledge, or state of mind.' *State v Nielsen*, 147 Or App 294, 304, 936 P2d 374, *rev den*, 326 Or 68 (1997). In contrast, evidence of a person's refusal to take a breath test is testimonial evidence because it 'inferentially may communicate the person's belief' that he or she will fail the test. *Fish*, 321 Or at 56." *Banks*, 286 Or App at 721-22.

"Compelled"

The test for what is "compelling" is whether defendant's will was overborne and whether his capacity for self-determination was critically impaired, per *State v Acremant*, 338 Or 302, *cert denied*, 546 US 864 (2005).

"The right not to testify against oneself does not prevent the state from using a defendant's out-of-court statements or other communicative activity as evidence. Rather, it prevents the state from requiring a defendant to provide such statements or activity. Thus, inculpatory statements to friends, relatives, accomplices and others are generally admissible if there is no improper governmental activity in procuring them. Statements to police or other authorities are also admissible if voluntarily made, either before custodial interrogation begins or, if made during custodial interrogation, after a knowing and voluntary waiver of *Miranda* rights." State v. Green, 68 Or App 518, 523, 684 P2d 575 (1984), overruled on other grounds by State v. Panichello, 71 Or App 519, 692 P2d 720 (1984)" *State v Banks*, 286 Or App 718, 722-23 (2017).

Where detectives did not repeatedly state or suggest to defendant that a brain-damaged baby's treatment would suffer without a confession, detectives did not appeal to defendant's "acute vulnerability" (defendant-abuser was not impaired by drugs or alcohol and detectives did not invoke religion), detectives provided *Miranda* warnings and refreshed those warnings, and detectives did not present defendant with an "illusory choice" between confessing for a lesser charge and no confession for a higher charge, no error in admitting evidence of defendant's confession. *State v Rodriguez-Moreno*, 273 Or App 627 (2015).

Note: In 2016, the Oregon Supreme Court wrote: "this court has not addressed whether, absent custody or compelling circumstances, a defendant's invocation of the right to silence in response to police questioning may be admitted as substantive evidence at trial. This court also has not

addressed whether a defendant who remains silent must expressly invoke the right to silence, or whether, and under what circumstances, an invocation may be implied. Nor has this court decided whether invocation, express or implied, is necessary to trigger the protections of Article I, section 12." *State v Schiller-Munneman*, 359 Or 808, 813 (2016); *see also State v House*, 282 Or App 371, 375 n 3 (2016) (quoting same).

5.2.3.C Compelling Circumstances and Interrogation

See also Section 5.5 on "Derivative Rights"

"'*Miranda* warnings' are those warnings 'required to effectuate the protections afforded by Article I, section 12,' so named for the United States Supreme Court's decision, *Miranda v Arizona*, 384 US 436 (1966)." *State v Bielskies*, 241 Or App 17, 19 n 1, *rev denied* 350 Or 530 (2011) (citing *State v Vondehn*, 348 Or 462, 470 (2010)).

Under Article I, section 12, *Miranda* warnings must be given to a person subjected to custodial interrogation who is in "full custody" and also to a person in circumstances that create a setting which judges would and officers should recognize to be compelling. *State v Roble-Baker*, 340 Or 631, 638 (2006); *State v Jarnagin*, 351 Or 703, 713 (2013); *State v Smith*, 310 Or 1, 7 (1990); *State v Magee*, 304 Or 261, 265 (1987).

"Compelling" circumstances are determined by "how a reasonable person in [the defendant's] position would have understood * * * her situation." *State v Shaff*, 343 Or 639, 645 (2007). Four factors in the encounter: (1) location; (2) length; (3) pressure on defendant; and (4) defendant's ability to terminate the encounter. *Roble-Baker* at 640-41; *Shaff*, 343 Or at 645 (same). No single factor is dispositive. *Roble-Baker*, 340 Or at 641. Courts "also examine the number of officers and police cars at the scene, the demeanor of the investigating officer, and the use of physical force or confinement during the questioning." *State v Heise-Fay*, 274 Or App 196, 202 (2015).

Regarding location: generally questioning at a suspect's home is not "compelling." *State v Smith*, 310 Or 1, 7-8 (1990); *State v Esquiel*, 288 Or App 755, 759 (2017).

Regarding the length of the encounter: "any consideration of the durational factor" depends "on the character or quality of the interaction." State v Northcutt, 246 Or 239, 250 (2011). Fifteen minutes "tends to suggest" noncompelling circumstances. *State v Esquivel*, 288 Or App 755, 760 (2017).

Regarding the pressure exerted on a suspect: Just questioning a person as a crime suspect does not inherently create a compelling setting. *State v Smith*, 310 Or 1, 11 (1990); *State v Stone*, 269 Or App 745, 751 (2015); *State v Heise-Fay*, 274 Or App 196, 204 (2015). When a officer asks "open-ended questions" that are not coercive or "based on an assumption of the defendant' guilt" are not coercive. *State v Stone*, 269 Or App 745, 753 (2015). But "expressly confronting a suspect with evidence of probable cause to arrest may make the circumstances sufficiently compelling to require *Miranda* warnings." *Id*. at 205; *State v Nelson*, 285 Or App 345, 350 (2017) (so noting, holding no *Miranda* violation during drunk-driving traffic stop with minimal restraint and where officer "did not confront defendant with circumstantial or testimonial evidence that would alert defendant that [the officer] had probable cause for a DUII arrest"). Confronting a suspect at her home for 15 minutes by stating that there was video of her stealing from a store and that

sufficient evidence existed for an arrest warrant if she did not cooperate is "sufficiently coercive" to require *Miranda* warnings. *State v Esquivel*, 288 Or App 755, 761 (2017) ("a reasonable person in defendant's position would have felt compelled to cooperate with the officer in order to avoid going to jail").++++

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The Oregon Court of Appeals has written: "*Miranda* warnings are not, as a matter of course, required upon initiating a traffic stop or an investigation of a possible crime. An investigatory detention does not usually create compelling circumstances. *State v Nevel*, 126 Or App 270, 276, 868 P2d 1338 (1994)." *State v Nelson*, 285 Or App 345, 350 (2017) (no *Miranda* violation during drunk-driving traffic stop in defendant's driveway).

"The definition of interrogation extends 'only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response." *Rhode Island v Innis*, 446 US 291, 301-02 (1980); *State v Bradbury*, 80 Or App 613, 616 n 1, *rev den* 302 Or 342 (1986) (adopting *Innis*'s definition for Article I, section 12); *State v Doyle*, 262 Or App 456, 466 (2014) (so noting). "This court * * * borrowed from federal case law in determining what constitutes 'interrogation' for Article I, section 12, purposes." *State v Boyd*, 360 Or 302, 314 (2016).

Article I, section 12, does not prohibit police from attempting to obtain incriminating information from a suspect at a time that he is not in custody or in compelling circumstances, even if he has invoked his right against self-incrimination and even if the police use subterfuge in obtaining statements from the suspect. *State v Davis*, 350 Or 440 (2011); *State v Anderson*, 285 Or App 355 (2017). Further, circumstances do not become "compelling" just because a defendant admits he possesses contraband, or if an officer suggests that he thinks a defendant might possess contraband. *State v Stone*, 269 Or App 745 (2015).

A "hospital setting is not, in and of itself, a compelling environment." *State v Lowell*, 275 Or App 365, 379 (2015).

During a traffic stop for suspected DUI, the suspect handed the officer a preprinted card stating: "The Holder Of This Card Invokes Their Right to Remain Silent. They Will NOT Make Any Statements Without First Consulting an Attorney." Then after consenting to perform field sobriety tests, she twice asked to talk to an attorney. The officer said she was not under arrest and could talk to an attorney if she was under arrest. She moved to suppress the results of her urine and Intoxilyzer results and her statements and other evidence. The trial court denied the motion. The Court of Appeals affirmed. She was not in custody or compelling circumstances. Officers "were permitted to question defendant even after her invocation of her constitutional right against self-incrimination and her right to counsel" and "such questioning did not render her statements involuntary."

Demonstrating how a person walks in court is not testimonial. "'[T]estimonial' evidence is not limited to in-court testimony under oath." Instead, "testimonial" evidence "communicates by words or conduct an individual's beliefs, knowledge, or state of mind," in contrast with "physical characteristics such as identity, appearance, and physical conditions," under *State v Tiner*, 340 Or 551, 561-62 (2006), *cert denied*, 549 US 1169 (2007) such as photographing tattoos, handwriting, standing in court, blood sample admission, field sobriety tests, and wearing a stocking mask. *State v Fivecoats*, 251 Or App 761 (2012).

A defendant must be re-advised of his *Miranda* rights if "a reasonable person could believe that his or her rights have changed since the time they were originally given." *State v Hurtado-Navarrete*, 258 Or App 503 (2013); *State v Avila-Nava*, 257 Or App 364 (2013).

State v Courville, 267 Or App 672 (2016) The Court of Appeals affirmed the trial court's denial of defendant's motion to suppress oral and written statements to the police officer who interviewed defendant in a yard at his house about a sex-abuse victim's allegations without giving any *Miranda* warnings.

State v Anderson-Brown, 277 Or App 214 (2016) The Court of Appeals affirmed a trial court's denial of defendant's motion to suppress all statements he made to officers after he was arrested on outstanding warrants at Portland State University. An officer saw defendant in a high-drug-use area of campus and asked defendant what he and his companions were doing. He said he intended to "get high" on "heroin." Defendant said he'd "shot up" 5-10 minutes before the officers had arrived. The officer saw a scale, a tin cooker, and two used syringes on the ground. After that arrest, defendant asked the officer if he could give his friend his backpack. The officer asked if he could search it first, and defendant consented. The officer found a metal tin with heroin inside and a scorched spoon with heroin residue. The officer gave the backpack to the friend but kept the spoon and tin. *Miranda* warnings were not given.

State v Harryman, 277 Or App 346 (2016) The Court of Appeals affirmed a trial court's denial of defendant's motion to suppress statements that he made to police while he was being treated for injuries he sustained during a fight. Defendant was at Fred Meyer store, in line, behind a victim's wife who had their 9 year old grandson with them. The wife had some trouble paying, and defendant moved close to her with his arm on the checkout counter. The victim told defendant to "back his ass up" and defendant declined to do so, instead giving the victim the finger. A fight ensued between the two overweight men who were in their 60s (see Oregonian article here). Defendant pulled out a .38 handgun and shot the victim in the leg. Defendant was restrained by store personnel, and then transported to the hospital with a police officer who did not know what had happened. The officer read defendant his *Miranda* rights and told him he was recording defendant's statements, and asked him if he understood. Defendant said, "I don't know." Defendant kept talking incoherently, unresponsively, conversationally, and that he had "hurt somebody" and that he had a gun and hoped he had not shot anyone. He also said things like, "We got overrun, didn't we?" and "Are you in the 88th or the 9th?" and "I'm in the States?" A second encounter ensued at the hospital, with *Miranda* warnings issued two more time. Defendant said "I'll do that" but also said the word "lawyer." Defendant moved to suppress all statements during the ambulance ride and at the hospital. The trial court suppressed anything he said after the word "lawyer." The Court of Appeals affirmed.

State v Rose, 278 Or App 551 (2016) The Court of Appeals affirmed a trial court's denial of defendant's motion to dismiss statements he made during a police interrogation. A child reported that defendant (her mother's boyfriend) had sexually abused her and recorded the sex abuse with his mobile phone). When the child was taken to the hospital, defendant arrived, and an officer seized his phone. Detectives arrested defendant, gave

him *Miranda* warnings, and interrogated him at the police department for an hour. After defendant took a cigarette break, detectives confronted him with photos from his mobile phone and asked why those pictures were on his phone, he said, "I don't have nothing to say." Detectives showed him more photos, including an explicit video with his voice in the background. Defendant made incriminating statements. He was indicted for 14 counts (and was convicted). The trial court concluded that saying, "I don't have nothing to say" is not an invocation of his right against compelled self-incrimination. And it was not equivocal. The Court of Appeals affirmed that conclusion: "The trial court correctly concluded that a reasonable officer would have understood defendant's statement as indicating literally that he could not formulate an explanation as to the photographs in the detectives' possession."

State v Schiller-Munneman, 359 Or 808, 813 (2016): "this court has not addressed whether, absent custody or compelling circumstances, a defendant's invocation of the right to silence in response to police questioning may be admitted as substantive evidence at trial. This court also has not addressed whether a defendant who remains silent must expressly invoke the right to silence, or whether, and under what circumstances, an invocation may be implied. Nor has this court decided whether invocation, express or implied, is necessary to trigger the protections of Article I, section 12."

State v Cazarez-Hernandez, 280 Or App 312 (2016): The Court of Appeals reversed and remanded defendant's convictions because "the state failed to meet its burden to proof [sic] that defendant received adequate *Miranda* warnings, translated in Spanish." "A suspect who does not understand the rights conveyed to him or her by the *Miranda* warnings has not validly waived them." In this case, the record contains no evidence that could support the trial court's implicit finding that "the *Miranda* concepts" that defendant's relative – a police translator – had translated to defendant were constitutionally adequate. The error was not harmless.

State v Codon, 282 Or App 165 (2016) Defendant was read *Miranda* warnings at the beginning of his interrogation with Cuevas, at approximately 5:00 p.m. on the day of his arrest. Defendant was not readvised of those rights before a DHS worker identified herself as such and began asking him questions at 9:00 a.m. the following morning. The DHS worker informed defendant that she was "doing an investigation" and reminded him that he was under no obligation to speak with her given the pending criminal charges against him. Defendant was either in the presence of the police or in custody from the time that he was advised of his *Miranda* rights until his interview with the DHS worker, which was 16 hours. He admitted raping his stepdaughter multiple times. Defendant alleged that his *Miranda* rights were violated when the DHS worker questioned him without re-*Mirandizing* him. The trial court denied his motion to suppress. He was convicted of multiple counts of first-degree rape. The Court of Appeals affirmed. It concluded that "a reasonable person in defendant's circumstances would not have had any reason to believe that his rights had changed from the time of his *Miranda* warnings the previous evening to when [the DHS worker] began her questioning." The court identified the relevant law as follows:

> "Under Oregon law, to determine whether a defendant must be readvised of his *Miranda* rights, we look to whether, under the totality of the circumstances, a reasonable person could believe that his or her rights have changed since the time the warnings were originally given. *State v. Field*, 231 Or App 115, 121, 218 P3d 551 (2009). The test under federal law is largely the same. *Id*. ("[U]nder federal law, we must consider the totality of the circumstances to determine whether successive interrogations require a suspect to be re-advised of his *Miranda* rights[.]"); *see also United States v. Rodriguez-Preciado*, 399 F3d 1118, 1128 (9th Cir 2005) ("The Supreme Court has eschewed per se rules mandating that a suspect be re-advised of his rights in certain fixed situations in favor of a more flexible approach focusing on the totality of the circumstances."); *United States v. Andaverde*, 64 F3d 1305, 1312 (9th Cir 1995) ("The courts have generally rejected a per se rule as to when a suspect must be re-advised of his rights after the passage of time or a change in questioners.").

5.2.3.D Equivocal?

> "*It's not something I want to talk about.*" – Murder suspect to police detective questioning him about his wife's suspicious fall off a cliff. *State v Nichols*, 361 Or 101 (2017)
>
> "*I'm done talking*." "*So shut your fucking mouth and quit talking to me*." Robbery suspect to interrogating officer. *State v Schrepfer*, 288 Or App 429 (2017)

"If the invocation [of the right to silence] is unequivocal, there is only one permissible response: interrogation must immediately cease." *State v Schrepfer*, 299 Or App 429, 436 (2017); *State v Sanelle*, 287 Or App 611, 617 (2017) ("Under Article I, section 12, a suspect in custody has a right against self-incrimination and a derivative right to counsel").

If the request is equivocal, and officers choose not to stop questioning, "there is only one permissible response: the officers 'are required to ask follow-up questions to clarify' the equivocal nature of the suspect's statement." *Schrepfer*, 288 Or App at 436.

In *Schrepfer*, defendant told the interrogating officer: "*Shut your fucking mouth and quit talking to me*." The officer kept talking with him. Defendant said, "*I'm done talking*." The court held that defendant had unequivocally invoked his right to silence and did not subsequently waive it when the officer started talking again 10 minutes after the invocation; error was not harmless.

To determine if the request was equivocal versus unequivocal, courts "consider a suspect's words in context, including the preceding words of the suspect as well as the interrogating officer, the suspect's demeanor, gestures, and speech pattern as well as the demeanor and tone of the interrogating officer up and until the suspect invoked the right against self-incrimination." *State v Schrepfer*, 299 Or App 429, 436 (2017) (citing *State v Avila-Nava*, 356 Or 600, 614 (2014)).

> ***State v Nichols***, 361 Or 101 (03/02/17) (Balmer) (Hood River) This case addresses whether a murder suspect unequivocally invoked his right to silence during a custodial interrogation after he had been *Mirandized*. The Supreme Court held that defendant unequivocally invoked, and therefore the statements he made to detectives after the invocation are to remain suppressed.

In 2009, defendant and his much-younger girlfriend (the mother of his child) went hiking in the Columbia River Gorge. She ended up dead from a fall. The cause of her fall was unknown. In 2014, while defendant was in China with their child, defendant was charged with her murder. An arrest warrant issued. Detectives from the San Mateo County Sheriff's Office arrested defendant at the San Francisco Airport. It seems detectives detained defendant in handcuffs "at some point" at the airport and interviewed defendant, "who apparently was still handcuffed" and who "also had not slept for an extended period of time." *Id*. at 102. A detective told defendant he was not free to leave and read him his *Miranda* rights, which defendant understood. The pertinent part of the questioning is as follows:

> "Q: Okay. Do you have any idea why there's a warrant for your arrest for a homicide for * * * the mother of your daughter?
> A: I don't.
> Q: None at all?
> A: No.
> Q: Well, obviously something happened. Do you know the circumstances behind her death?
> D: Yeah.
> Q: Can you tell me about it?
> A: It's not something I want to talk about. It's –"

After that point, defendant told the detective that the woman had died about six years earlier after falling off a cliff. It was a three-hour interview. *Id*. at 105.

Defendant moved to suppress all of his statements under the state and federal constitutions after he said, "It's not something I want to talk about."

The trial court concluded that defendant had equivocally invoked but detectives then failed to clarify his intent about his invocation and forged ahead with their questioning, thereby violating defendant's Article I, section 12 right against compelled self-incrimination and requiring suppression of his subsequent statements. On the state's appeal (ORS 138.060(2)(a)), the Oregon Supreme Court affirmed the trial court's suppression order but for a different reason: defendant had unequivocally invoked and "the interrogation should have ended when defendant made that invocation." *Id*. at 102.

In so concluding, the Court explained its reasoning to determine whether the invocation was equivocal or unequivocal: "We begin with the words that defendant identifies as having amounted to an unequivocal invocation: 'It's not something I want to talk about.' Viewed in isolation, those words are, at least arguably, ambiguous: A reasonable officer could have understood that defendant was invoking his right under Article I, section 12, or, alternatively, that defendant was expressing a desire to not discuss, or at least a reluctance to discuss, the circumstances of the victim's death." Id. at 109.

The state had countered that defendant's words did not clearly convey any intent to invoke the right, and quoted several of the Court's prior cases that the Court had concluded were unequivocal invocations (to separate those from this case). But the Court wrote: "The unequivocal invocations in those cases all share a commonality that this case

does not: In each case, the defendant expressed his or her intent by first self-identifying as the actor ("I") and then by clearly stating the desired action or view relating to the right in question (won't answer questions, don't want to talk, need a lawyer). Simply stated, each of those cases involved classic and easily understood words of invocation. By contrast, defendant's statement did not focus on defendant as the actor taking an action; rather, it focused on the topic of [the detective's] question ('*It's* not something I want to talk about.' (Emphasis added.)) That is, on its face, it did not directly convey—at least not as clearly as the statements in the cases just noted—an intention on defendant's part to take the affirmative action of either invoking his right against compelled self-incrimination under Article I, section 12, or expressing the desire to do so. As the trial court observed, defendant's words, standing alone, could have been understood by a reasonable officer to be an unequivocal invocation or, alternatively, as an equivocal invocation or a reluctance to discuss an emotionally charged topic. Of course, particular or precise wording is not required to invoke the right in question. *See generally Davis v. United States*, 512 US 452, 459, 114 S Ct 2350, 129 L Ed 2d 362 (1994) (to invoke derivative right to counsel, criminal suspect not required to 'speak with the discrimination of an Oxford don'; rather, suspect must articulate his or her desire sufficiently clearly, such that a reasonable police officer in the circumstances would understand the request). Nevertheless, when isolated from its context, defendant's statement plausibly could be construed in more than one way." *Id.* at 110.

"When we analyze defendant's statement in the context in which it was made, however, we conclude that defendant unequivocally expressed an intent to invoke his right against compelled self-incrimination, which a reasonable officer would have understood as an invocation of that right." Id. at 111. The context includes defendant's invocation during the beginning of the detectives' interview. It also includes the detective's question preceding the invocation, in that the detective had asked about the death. "When defendant clearly expressed a desire not to speak about the alleged crime that had prompted his arrest, a reasonable law enforcement officer should have understood that defendant was invoking his right against compelled self-incrimination as to the entire interview." *Id*. at 112.

5.2.3.E Trial References to Defendant's Invocation of Right to Silence

The Oregon Court of Appeals has held that, at trial, the introduction of a defendant's silence in response to a rape victim's text messages is not an impermissible comment on his right to remain silent, where defendant was not in compelling circumstances, so no right to remain silent was violated per *State v Davis*, 350 Or 440 (2011). *State v Schiller-Munneman*, 270 Or App 22 (2015), *reversed on statutory grounds*, 359 Or 808 (2016). See also ***State v House***, 282 Or App 371 (2016).

In 2016, the Oregon Supreme Court wrote:

"[T]his court has not addressed whether, absent custody or compelling circumstances, a defendant's invocation of the right to silence in response to police questioning may be admitted as substantive evidence at trial. This court also has not addressed whether a defendant who remains silent must expressly

invoke the right to silence, or whether, and under what circumstances, an invocation may be implied. Nor has this court decided whether invocation, express or implied, is necessary to trigger the protections of Article I, section 12." ***State v Schiller-Munneman***, 359 Or 808, 813 (2016).

The "Oregon Constitution does not permit a prosecutor to draw the jury's attention to a defendant's exercise of the right to remain silent." *State v Larson*, 325 Or 15, 22 (1997). However, a "prosecutor has the right * * * to reply to argument made by opposing counsel, and, in doing so, statements may be made which otherwise would be improper." *State v Gurlitz*, 134 Or App 262, 270, *rev den* 321 Or 560 (1995); *State v Reineke*, 266 Or App 299 (2014). The prosecutor's right "is limited and confines the prosecutor's response to evidence or argument that rebuts the impression created by the defendant." *Reineke*, 266 Or App at 309. In short: "even if a defendant opens the door to evidence of the defendant's silence, a prosecutor cannot argue that the defendant is guilty because he or she invoked the right to remain silent." *Id*. (citing *United States v Gant*, 17 F3d 935, 941 (7th Cir 1994)). Further, it is "usually reversible error to admit evidence of the exercise by a defendant of the rights" in the constitution". *Id*. (quoting *State v Smallwood*, 277 Or 503, 505-06, *cert den* 434 US 849 (1977)).

State v House, 282 Or App 371 (11/23/16) (Multnomah) (Lagesen, Hadlock, Ortega) Defendant, driving home from a bar, drove for 50 yards on MAX rail tracks then got stuck on the track. An officer noted that she smelled of alcohol. She said she was not going to answer anything he asked. After further questioning, she admitted she felt unsafe to drive. The officer arrested her, gave *Miranda* warnings, and took her to the police station. She said she was a "Jack and Coke person," but she refused to answer other questions, refused field sobriety tests, and refused to give a breath sample. The officer recorded his conversation with her. She was charged with DUI and reckless driving. Pretrial, the court suppressed her statements after she said she was not going to answer any questions (basically suppressing her statement that she felt unsafe to drive), but did not suppress her post-*Miranda* statements. She testified at her trial that she was not intoxicated, that she'd had three O'Doul's nonalcoholic beers that night, and she felt safe to drive. The prosecutor asked her why she hadn't told the officer about the O'Doul's. The prosecutor also argued in closing that her story was false. She'd objected to both of those prosecutorial statements as violating her right to remain silent, but the trial court overruled her objections. The jury convicted her of DUI and the trial court convicted her of reckless driving (she'd waived her jury right).

The Court of Appeals reversed and remanded the DUI. The state argued that by taking the stand and claiming to have had three O'Doul's, the prosecutor was allowed to impeach her on that point, and also she "opened the door" by testifying that she felt safe to drive that night. The court wrote "the state is correct that it was entitled to impeach defendant's testimony about the O'Doul's with her prior inconsistent statements on the night in question" but "that is not what the prosecutor did." The prosecutor "repeatedly impeached defendant with her silence about consuming the O'Doul's." The state did not even dispute that her silence was "the product of defendant's invocation of her constitutionally protected right to remain silent." That "strategy of impeachment, which calls attention to a defendant's failure to make certain statements [when] she has invoked her right to remain silent, is not constitutionally impermissible. That is because it puts a defendant in the position of either explaining to the jury that she invoked her right to

remain silent or, alternatively, not explaining to the jury that she invoked" and allowing the jury to "draw the prejudicial inference that the prosecutor posited based on her silence." *Id*. at 378.

A prosecutor may "limit her questions and argument to pointing out that defendant made affirmative statements on the night of the incident that were inconsistent with defendant's trial testimony." *Id*. at 378. Also, "a defendant may be impeached with the fact that she invoked her right to remain silent if she testifies at trial and her trial testimony implies that she would have made an exculpatory statement at the time of arrest, had officers given her the opportunity." *Id*. at n 5 (citations omitted).

This is reversible error: the prosecutor's question and repeated argument "permitted the jury to draw a negative inference regarding defendant's credibility from the fact that she had chosen to remain silent." *Id*. at 379. Defendant had failed to request a curative instruction or move for a mistrial, but defendant was not required to request those remedies "once the court had overruled her objections in order to preserve her contention that the trial court committed reversible error." *Id*. at 380.

State v Villar, 287 Or App 656 (9/07/17) (Lagesen, Egan, Schuman) (Multnomah) Defendant was arrested for trespassing. An officer asked defendant what had happened. Defendant said he had nothing to say.

At trial, the prosecutor asked a police officer to recount her interaction with defendant. When asked whether defendant was cooperative, the officer testified that, when she "gave [defendant] the opportunity to give his version of what happened, he said 'I have nothing to say.'" Defendant immediately objected, stating only "objection." The trial court directed Baxter to continue with her testimony. The officer then testified, "Yeah. All he said is—actually I think he said, 'I got nothing to say.'" In closing argument, the prosecutor urged the jury to discredit defendant's version of events because he had refused to recount his version of events to the officer:

> "Why didn't he tell Sergeant * * * his side of the story? He didn't. He didn't have any of that at the time and now, months later, gets on the stand and tells you this story about how, oh, he wanted to leave, 'The officers bum rushed me. They didn't give me a chance. They said hateful things. They tased me without reason.' And he wants you to believe that."

The Court of Appeals reversed and remanded, as error apparent on the face of the record. The court wrote that it is undisputed that defendant was in custody when he said "I have nothing to say" and had a constitutional right, under Article I, section 12, and the Fifth Amendment, not to answer the officer's question. His statement to the officer was an unequivocal invocation of that right, under *State v Avila-Nava*, 356 Or 600, 618 (2014), and that evidence of that invocation was not admissible at his criminal trial under *State v Smallwood*, 277 Or 503, 505-06, *cert den*, 434 US 849 (1977) (holding that evidence of a defendant's invocation of the right to remain silent ordinarily is not admissible at the defendant's criminal trial); *see also State v Ragland*, 210 Or App 182, 186-88 (2006) (discussing principle).

5.2.3.F Field Sobriety Tests

"Because a field sobriety test constitutes a search under Article I, section 9, *State v Nagel*, 320 Or 24, 31 (1994), a warrant is required, or the search must come within a recognized exception to the warrant requirement, *State v Paulson*, 313 Or 346, 351 (1992). Under an exception for exigent circumstances, the officer must have probable cause to believe that an individual is driving under the influence. *State v Stroup*, 147 Or App 118, 122 (1997)." *State v Miller*, 265 Or App 442, 445 (2014). That probable cause has a subjective and an objective element. *Id.* "The fact that there were other possible, lawful explanations for a person's behavior, such as frustration, does not preclude the conclusion that there was probable cause." *Id*. (citations omitted).

"Field sobriety test" is defined in ORS 801.272 as "a physical or mental test * * * that enables a police officer or trier of fact to screen for or detect probable impairment from intoxicating liquor, a controlled substance, an inhalant, or any combination of intoxicating liquor, an inhalant and a controlled substance." *State v McCrary*, 266 Or App 513 n 1 (2014).

Oregon's field sobriety tests are set forth in OAR 257-025-0020(1), online at http://arcweb.sos.state.or.us/pages/rules/oars_200/oar_257/257_025.html.

A driver implicitly consents to submit to field sobriety tests as a condition of driving or biking on Oregon public roadways, see ORS 813.135. But before field sobriety tests are administered, the driver must be informed of the consequences of refusing or failing those tests. Those consequences include using the refusal against the driver in a criminal or civil action, see ORS 813.136. The purpose of that information is to pressure suspected drunk or drugged drivers to take the field sobriety tests. *State v Trenary*, 316 Or 172, 177 (1993); *State v Adame*, 261 Or App 11, 16 (2014). The "statute is directed at drivers who refuse to take the test, not at drivers who do take the test." *Trenary* at 178; *Adame* at 16. ORS 813.126 provides a choice to drivers: perform the tests or have the refusal used as evidence. *State v Fish*, 321 Or 48, 58 (1995).

In *Fish*, the Oregon Supreme Court concluded that some of Oregon's field sobriety tests "involve verbal statements that communicate information regarding an individual's state of mind. Many of the field sobriety tests authorized by OAR 2570-25-010(1) draw upon the individual's memory, perception, and ability to communicate, i.e., his or her testimonial capacity. For example, the tests involve counting[,] answering questions relating to [] residence and date of birth[,], estimating a period of time[,] and reciting the alphabet[.] There can be no doubt that those aspects of the field sobriety tests require the individual to communicate information to the police about the individual's beliefs, knowledge, or state of mind. Accordingly, we conclude that at least those aspects of the field sobriety tests are clearly 'testimonial' under Article I, section 12, of the Oregon Constitution." *Fish* at 60; *Adame* at 18.

But the Oregon Court of Appeals has "repeatedly held" that *Fish* "did not require that all field sobriety tests be considered testimonial and therefore subject to the protection of Article I, section 12." *Adame* at 18 (citations omitted). Tests that do not require an individual to reveal his or her thoughts, beliefs, or state of mind are not testimonial. *State v Nielsen*, 147 Or App 294, 306, *rev den* 326 Or 68 (1997); *Adame* at 18. The "heel-to-toe walk test and the physical aspects of the one-leg stand and modified Romberg tests are not testimonial and, therefore, can be compelled by the state." *Id*.

"[T]esting for a resting or natural nystagmus constitutes a search" because a "natural or resting nystagmus * * * is not a physical characteristic that is plainly manifested to the public." *State v McCrary*, 266 Or App 513 (2014). "Nystagmus is not an observation that is made or understood as a matter of common knowledge." *Id*.

See ***State v Eskie***, 277 Or App 93 (2016), a very convoluted opinion, concluding that a driver's refusal to perform field sobriety tests is not admissible under ORS 813.136 unless that person was advices under ORS 813.135 of the consequences of refusal.

5.2.4 Waiver

> "Yes," defendant said he understood his *Miranda* rights. Then "he said he was a sasquatch and he was from a family of sasquatches." *State v Norgren*, 287 Or App 165, 166 (2017).

The Oregon Supreme Court has stated that Article I, section 12, rights may be waived. *State v Davis*, 350 Or 440, 447-48 (2011), is quoted below:

> "Of course, the rights guaranteed by Article I, section 12, may be waived. To ensure the validity of any such waiver, this court suggested early on, in [*State v Andrews*, 35 Or 388, 391-92 (1899)], that proper warnings may be required. Meanwhile, in *Miranda v Arizona*, 384 US 436, 444, 86 S Ct 1602, 16 L Ed 2d 694 (1966), the United States Supreme Court decided that, to ensure the validity of a waiver of an individual's right against self-incrimination under the Fifth Amendment, police must warn the individual of, among other things, the rights to remain silent and to be represented by counsel. The Court concluded in *Miranda* that the warnings were required of state law enforcement officials as a requirement of due process under the Fourteenth Amendment. *Id*."

"A suspect who does not understand the rights conveyed to him or her by the *Miranda* warnings has not validly waived them." *State v Cazarez-Hernandez*, 280 Or App 312, 314 (2016) (citing *State v Ruiz*, 251 Or 193, 195 (1968)).

> ***State v Norgren***, 287 Or App 165 (8/02/17) (Washington) (Tookey, Armstrong, Shorr) Officer encountered defendant in a heavily wooded area, bleeding, unconscious, naked, lying in a fetal position. Officer handcuffed him, read Miranda warnings, defendant said he understood, then told the officer, "he was a sasquatch and he was from a family of sasquatches." A Mental Health Response Team interviewed defendant, concluding It was obvious [that] defendant was having a break from reality."
>
> The Court of Appeals reversed the trial court's denial of defendant's motion to suppress, concluding that defendant's waiver of *Miranda* was not knowing and intelligent. There was "legally insufficient evidence to demonstrate that . . . defendant's state of mind was such that he maintained the requisite level of comprehension to waive his rights." The error was not harmless.

5.2.5 Remedies

The "Oregon Constitution requires suppression of statements made without the benefit of *Miranda* warnings." *State v Vondehn*, 348 Or 362, 472 (2010); *State v Magee*, 304 Or 261 (1987); *State v Jarnagin*, 351 Or 703, 713 (2012).

"When an officer obtains evidence in violation of Article I, section 12, the court suppresses 'not only statements that a suspect makes in direct response to unwarned questioning but also evidence that derives from or is a product of that constitutional violation.'" *State v Heise-Fay*, 274 Or App 196, 208 (2015) (quoting *State v Jarnagin*, 351 Or 703, 713 (2012)). The Oregon Supreme Court suppresses evidence on a "rights based" approach under Article I, section 12. *State v Jarnagin*, 351 Or 703, 716-17 (2012); *State v Finonen*, 272 Or App 589, 600-01 (2015).

The *State v Hall*, 339 Or 7, 24-24 (2005) methodology does not apply in the context of Article I, section 12. *State v Jarnagin*, 351 Or 703, 717 n 9 (2012). "A consent to search is not an incriminating statement subject to suppression for a *Miranda* violation." *State v Anderson-Brown*, 277 Or App 214, 224 (2016) (quoting *State v Brown*, 100 Or App 204, 208 n 4, *rev den* 309 Or 698 (1990)).

A "defendant's uncounseled statements are inadmissible for impeachment purposes, when the defendant made those statements during custodial interrogation and 'no warnings were given and no request for a lawyer was ever made.'" *State v Finonen*, 272 Or App 589, 591-92 (2015).

5.2.6 Statute on Coerced Confessions

Under ORS 136.425(1), "A confession or admission of a defendant, whether in the course of judicial proceedings or otherwise, cannot be given in evidence against the defendant when it was made under the influence of fear produced by threats." That statute has existed since 1864 and was amended in 1957. The statute's goal is to exclude involuntary, and therefore unreliable, confessions. *State v Powell*, 352 Or 210, 222 (2012) "ORS 136.425(1) continues to apply to confessions induced by and made to private parties." *Id.*

Although the statute uses the word "threats," it also bars "inducement through fear or promises." *State v Mendacino*, 288 Or 231, 235 (1979).

Statutory issues are considered before constitutional issues. *State v Foster*, 303 Or 518, 526 (1987); *State v Ruiz-Piza*, 262 Or App 563 (2014). But "in the absence of arguments" by either the state or defendant that Article I, section 12, and the statute "differ in any respect that bears" on a case, the Court of Appeals has "proceeded with that understanding." *Ruiz-Piza* (held: no suppression required because detectives induced the confession).

Under ORS 136.425(1), admissions are presumed involuntary. It is the state's burden to show by a preponderance of the evidence that any statement it offers into evidence was made voluntarily. *State v Ely*, 237 Or 329, 332 (1964); *State v Hogeland*, 285 Or App 108, 114 (2017) (held: trial court erred in denying defendant's motion to suppress statements made involuntarily due to implicitly promising leniency "while simultaneously exploiting his vulnerabilities as a husband and a father").

5.3 False Pretext Communications

Article I, section 12, does not prohibit police from attempting to obtain incriminating information from a suspect when/if he is not in custody or in compelling circumstances, even if he has invoked his right against self-incrimination and even if the police use subterfuge in obtaining statements from the suspect. When Article I, section 12 was adopted, "the constitutional right against self-incrimination generally was understood to limit the means by which the state may obtain evidence from criminal defendants by prohibiting compelled testimony." And from "very early on, this court's cases held that the focus of Article I, section 12, is whether a defendant's testimony was compelled, or, conversely, whether it was voluntarily given* * * "[C]ompulsion is the principal underpinning of the protection." *State v Davis*, 350 Or 440 (2011).

Note: In *State v Schiller-Munneman*, the Oregon Supreme Court wrote: "this court has not addressed whether, absent custody or compelling circumstances, a defendant's invocation of the right to silence in response to police questioning may be admitted as substantive evidence at trial. This court also has not addressed whether a defendant who remains silent must expressly invoke the right to silence, or whether, and under what circumstances, an invocation may be implied. Nor has this court decided whether invocation, express or implied, is necessary to trigger the protections of Article I, section 12." *State v Schiller-Munneman*, 359 Or 808, 813 (2016); *see also State v House*, 282 Or App 371, 375 n 3 (2016) (quoting same).

5.4 Polygraph Testing & Compulsory Treatment Disclosures

Polygraph testing is not admissible in civil or criminal trials. *State v Brown*, 297 Or 404 (1984). But 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).

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).

Defendant had prior convictions for sex offenses. His sex offender treatment program for that prior conviction involved a "full disclosure polygraph test" that included his sexual history. "Although [defendant] did not assert his Fifth Amendment right against self-incrimination at the time of the disclosures, that right is self-executing where its assertion 'is penalized so as to foreclose a free choice.' *Minnesota v Murphy*, 465 US 420 (1984)." *United States v Bahr*, __ F3d __ (9th Cir 2013).

5.5 Right to Counsel as Derivative Right

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

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

5.5.1 Tenets

See Erin J. Snyder, Open Courts and Public Trial, OREGON CONSTITUTIONAL LAW MANUAL (2013), www.osbar.org/secured/barbooks/viewchapter.asp?bid=85&cid=2349

"Although by its terms" Article I, section 12, "is a guarantee against self-incrimination, encompassed within it is a derivative or adjunct right to have the advice of counsel in responding to police questioning." *State v Turnidge*, 359 Or 364, 399 (2016) (citations omitted). "The right to counsel that flows from Article I, section 12, applies only when a suspect is placed in 'full custody' or when circumstances 'create a setting which judges would and officers should recognize to be "compelling",' i.e., the same 'compelling circumstances' that give the right to *Miranda* protections more generally." *Id.* at 400 (citations omitted).

"Article I, section 12, requires the police to give a defendant who is in custody or in compelling circumstances *Miranda*-like warnings before questioning." *State v Moore/Coen*, 349 Or 371, 382 (2010), *cert denied*, 563 US __ (2011); *State v Doyle*, 262 Or App 456, 465 (2014). "Once a suspect asserts the right to counsel," questioning must cease. *State v Isom*, 306 Or 587, 593 (1988); *Doyle*, 262 Or App at 465.

Once "a suspect has invoked the rights to remain silent and to counsel under Article I, section 12, police must cease interrogation unless the suspect initiates further conversation with police." *State v Boyd*, 360 Or 302, 318 (2016) (citing *State v Isom*, 306 Or 587, 593 (1988). To determine if a defendant "initiates" further conversation, the "test is whether a defendant's questions or statements indicate that he or she 'was willing to enter into a generalize discussion of the substance of the charges without the assistance of counsel.'" *Id*. (quoting *State v Meade*, 327 Or 335, 340 (1998). Whether "police questioning constitutes unlawful 'interrogation' for Article I, section 12, purposes depends on whether 'the substance of the questions posed to [the] defendant and the manner in which those questions were asked' demonstrated that they were 'likely to elicit some type of incriminating response.'" *Id*. at 319 (quoting *State v Scott*, 343 Or 195, 203-04 (2007).

Article I, section 11, does not prohibit police from continuing a criminal investigation of a suspect, by attempting to obtain information from the suspect himself, before the initiation of any criminal prosecution, even if the suspect announces that he has retained counsel and will not speak with police without the presence of counsel. *State v Davis*, 350 Or 440 (2011) (In *Davis*, the defendant was not under arrest and no formal charges had been brought, thus he was not an "accused" in a "criminal prosecution" under Article I, section 11).

The "Sixth Amendment, like a number of parallel provisions of existing state constitutions, refers to a right of 'the accused' that may be exercised during 'criminal prosecutions,' which suggests that the focus of the amendment is on the rights of a defendant at trial or, at the earliest, following formal charging." *State v Davis*, 350 Or 440 (2011). Thus when Article I, section 11, was adopted, "the constitutional right to counsel would have been understood to guarantee a right to counsel at trial and, perhaps, some measure of preparation for trial following the commencement of formal adversary proceedings * * * [E]ven when state and federal courts began to extend the right to counsel to stages of a criminal prosecution before the trial itself – nearly a century after the adoption of the Oregon Constitution – they uniformly adhered to the conclusion that the text of the guarantee and its underlying purpose could not justify extending the right to encounters before the initiation of formal criminal proceedings." *Id.*

> ***State v Swan***, 276 Or App 192 (2016) The Court of Appeals affirmed the trial court's denial of defendant's motion to suppress his 0.18 BAC breath test results because the officer did not violate defendant's right against self-incrimination under Article I, section 12 – the officer provided defendant with a reasonable opportunity to consult with counsel.
>
> ***State v Cavallaro***, 276 Or App 866 (2016) The Court of Appeals reversed the trial court's denial of defendant's motion to suppress, based on its conclusion that after previously unequivocally and completely invoking his right to counsel, defendant had reinitiated a conversation with police in a way that indicated a desire to have a general discussion about the sex abuse investigation against him. Defendant's subsequent reinitiation of conversation was too ambiguous.
>
> ***State v Brooke***, 276 Or App 885 (2016) The Court of Appeals reversed the trial court's denial of his motion to suppress statements he made after unequivocally invoking his right to counsel. Defendant, in custody, asked, "Can I call my mom? She's a lawyer." The court explained that a reasonable police officer wanted to call his mom "*in her capacity as an attorney*." (Emphasis by court).
>
> ***State v Beltran-Solas***, 277 Or App 665 (2016) The Court of Appeals reversed and remanded the trial court's denial of defendant's motion to suppress evidence of rifles after police executed a search warrant of his house, which he shared with extended family, and apparently operated a meth lab. No meth lab was found, but guns, heroin, meth, and drug items were found, including a gun in defendant's bedroom. Officers questioned defendant, who was not named in the warrant, about a pending menacing charge that defendant had retained counsel for. Defendant made statements in response. The officer may have been able to question defendant about the gun in his bedroom in a way that did not violate his derivative right to counsel, but here, the officer connected the current investigation with the prior charge, and thus violated his right to counsel under Article I, section 11. The gun evidence is suppressed.
>
> ***State v Turnidge***, 359 Or 364 (2016) This death-penalty case involves the son in a father-son bombing-murder escapade. In this 160-page opinion with 151 assignments of error, the Oregon Supreme Court affirmed defendant's convictions for aggravated murder and his sentence of death. Defendant and his father made a bomb that exploded, causing

“horrific injuries” and death to two law enforcement personnel. A police chief survived with one leg severed off and a fourth police officer was wounded.

Defendant made statements to two plain-clothes law enforcement after law enforcement officers read him his *Miranda* rights and informed him that he was not under arrest and was free to leave. Officers spoke with him at his front door and on his front porch, then the three moved to an officer’s unmarked patrol car right in front of defendant’s home. The officers had asked to talk to defendant in his home, but he declined that and agreed to talk in the officer’s car instead. Defendant sat in the front seat. Defendant refused the officers’ offer to talk to them at the police station. Then officers photographed defendant’s truck while defendant stood there smoking. Officers repeatedly told defendant he did not have to talk to them. Eventually defendant told them that he would not speak to them until he consulted an attorney. Multiple officers were present at the perimeter of the property. Officers arrested him. The entire episode occurred at or in close proximity to defendant’s home with his girlfriend in view.

Defendant claimed at trial and on review that his derivative right to counsel was violated; that is, if he invoked his right to have counsel present while being questioned, officers were required to stop asking questions. *State v Roble-Baker*, 340 Or 631, 641 (2006) sets out the relevant factors to determine if circumstances are a “police-dominated atmosphere.” Despite Supreme Court precedent showing that being interviewed in or near his own home “reduces significantly the likelihood that the circumstances were inherently compelling for Article I, section 12, analysis,” defendant contended that he was “isolated” from his home. But “defendant made the choice to speak privately” with the law enforcement officers “somewhere other than in his home.” The Court noted: “That is not the kind of police-forced isolation that increases the potential for the circumstances to be compelling.”

“Equally important” is the law enforcement officer’s interaction. Id. at 403. It was “not overbearing.” The officers accepted defendant’s refusal to speak to them in the house and “readily accepted the boundaries” defendant set. Defendant contended that the multiple officers at the perimeter of the property made the circumstances “compelling.” But the trial court found that the one officer who secured the perimeter and one officer who had a weapon drawn had not been visible to defendant. Searching defendant for weapons had nothing to do with converting a noncompelling cirecumstance into a compelling one.

State v Boyd, 360 Or 302 (2016) Defendant was in custody for beating his girlfriend to death in the street. He was given *Miranda* warnings and arrested. At the police station, he said he couldn’t remember what happened, but said “please don’t talk to me anymore on that aspect until you bring me a lawyer.” As he changed into jail clothes, he asked why he was arrested. An officer told him his girlfriend was dead and he was arrested for murder. He started asking questions. Seven hours later, another officer went to check on him. Defendant again asked why he was in jail. The officer asked defendant if he recalled the detective earlier telling him why he’d been arrested and that he recalled the detective telling him why he had been arrested. Defendant became agitated and said he wanted to talk to the detective, who arrived within minutes. Detective advised defendant that he’d asked for a lawyer, defendant said he didn’t want a lawyer, but

wanted to talk, and detective again advised defendant of his *Miranda* rights. Defendant made incriminating statements, then he asked for a lawyer. Questioning ceased. Charged with murder, he moved to suppress his statements to the detective, on Article I, section 12, compelled self-incrimination grounds, and under the Fifth Amendment. The trial court denied the motion, concluding that defendant had waived his right to counsel. At trial defendant did not dispute that he killed his girlfriend, but that he "lacked the requisite culpable mental state." He took the stand.

The Court of Appeals affirmed. The Oregon Supreme Court reversed the Court of Appeals' and remanded to the trial court. First, it disagreed with defendant's idea that any questions are prohibited: "The notion that all forms of direct questioning constitute 'interrogation' for constitutional purposes is unrealistic. Some types of questions – 'Would you like a glass of water?' – are often innocuous and do not implicate the constitutional concerns that form the underpinnings of Article I, section 12, and Fifth Amendment rights." *Id*. at 317. "The heart of both state and federal constitutional guarantees, after all, is protecting against compelled incrimination." *Id*. (emphasis by court).

Once "a suspect has invoked the rights to remain silent and to counsel under Article I, section 12, police must cease interrogation unless the suspect initiates further conversation with police." *State v Boyd*, 360 Or 302, 318 (2016) (citing *State v Isom*, 306 Or 587, 593 (1988). To determine if a defendant "initiates" further conversation, the "test is whether a defendant's questions or statements indicate that he or she 'was willing to enter into a generalize discussion of the substance of the charges without the assistance of counsel.'" *Id*. (quoting *State v Meade*, 327 Or 335, 340 (1998). Whether "police questioning constitutes unlawful 'interrogation' for Article I, section 12, purposes depends on whether 'the substance of the questions posed to [the] defendant and the manner in which those questions were asked' demonstrated that they were 'likely to elicit some type of incriminating response.'" *Id*. at 319 (quoting *State v Scott*, 343 Or 195, 203-04 (2007).

In this case, defendant did not "initiate" further conversation merely by asking why he was in custody. Id. at 318. And police responded to defendant's question by "interrogating" him with questions of their own. The police should have known that such questions were reasonably likely to elicit an incriminating response. Id. at 320. And finally, defendant did not waive his rights – "there was a causal connection" between the officer's interrogation and defenadnt's request to talk to the detective. Error was not harmless.

State v Hensley, 281 Or App 523 (2016) The trial court denied defendant's motion to suppress confessions he'd made during a police interrogation while he was represented by counsel for a charge of being a felon in possession of a firearm. Police did not notify counsel before questioning defendant. Defendant confessed to the pending charge plus five armed robberies that he had not yet been charged with. The court cited *State v Prieto-Rubio*, 359 Or 16, 36 (2016). The Court of Appeals accepted the state's concession that police violated defendant's right to counsel under Article I, section 11, when they questioned him.

Suppression is the remedy for violations of the right to counsel, unless the state demonstrates that the evidence was not the product of the constitutional violation. *Id*. at 543. The Court of Appeals rejected the state's request for affirmance because there is insufficient evidence that in the absence of the unlawful interrogation, predictable investigatory procedures would have inevitably produced his confessions. "Inevitable discovery" requires the state to show by a preponderance of the evidence that certain proper and predictable investigatory procedures would have been utilized in the instant case and those procedures inevitably would have resulted in the discovery of the evidence in question. *Id*. at 535. There are very few cases addressing the inevitable-discovery doctrine when the disputed evidence is a voluntary statement. The "state did not clearly raise an attenuation argument." Reversed and remanded.

5.5.2. Equivocal?

"*Where's the lawyer?*" Murder suspect to detective, in response to detective asking him "Do you understand each of the rights I've explained to you?" *State v Sanelle*, 287 Or App 611, 617 (2017)

Two constitutional rights are (1) the right to remain silent and (2) the right to counsel, both under Article I, section 12, of the Oregon Constitution and the Fifth Amendment. Article I, section 12, does not use the word "counsel" (Article I, section 11, does). But Oregon courts enfold an extra-textual "right to counsel" into the textual right against compelled self-incrimination – both under Article I, section 12. *State v Doyle*, 262 Or App 456 (2014). "The right to have an attorney present during interrogation is derived from the Article I, section 12, right against self-incrimination." *State v Sanelle*, 287 Or App 611, 623 (2017) (citing *State v Scott*, 343 Or 195, 200 (2007)). Suspects in custody, or in compelling circumstances, are provided with *Miranda* warnings to protect that right. *Ibid*. (citing *State v McAnulty*, 36 Or 432, 454 (2014), *cert denied* 136 S Ct 34 (2015)).

When "a suspect in custody makes an unequivocal request to talk to a lawyer, all police questioning must cease." *State v Meade*, 327 Or 335, 339 (1998); *State v Charboneau*, 323 Or 38, 54 (1996), *cert den*, 520 US 1233 (1997); *State v Turnidge*, 359 Or 364, 400 (2016); *State v Sanelle*, 287 Or App 611, 617 (2017).

An "equivocal" request for counsel is made "when it is unclear or ambiguous if the suspect is unwilling to answer any questions without counsel present." *State v Turnidge*, 359 Or 364, 400 (2016). Courts "determine whether a defendant has made an unequivocal request for counsel by analyzing the request in light of the totality of the circumstances to determine whether a reasonable officer in the circumstances would have understood that the suspect was invoking his right to counsel." *State v Alarcon*, 259 Or App 462 (quoting *State v Field*, 231 Or App 115, 123 (2009)); *State v Martinez*, 263 Or App 653 (2014). In *Alarcon*, the Court of Appeals concluded that when a defendant asks, during a custodial interrogation, "when she could call a lawyer," an officer should reasonably understand that defendant is invoking her right to counsel, and no further questioning should occur. 259 Or App at 468 (but harmless error).

The analysis under Article I, section 12, and the Fifth Amendment "differ when a suspect makes an equivocal request for a lawyer. Under Article I, section12, when a suspect makes an equivocal request for counsel, the police may ask only 'further questions seeking clarification of the suspect's intent.' *State v Charboneau*, 323 Or 38, 54 (1996). Under the Fifth Amendment, if a

suspect's request is ambiguous or equivocal, the police are not obligated to pose clarifying questions and may continue the interrogation. *Davis v United States*, 512 US 542, 461-62 (1994)." *State v Brown*, 276 Or App 308 (2016).

State v Sanelle, 287 Or App 611 (9/07/17) (Washington) (Ortega, Lagesen, Garrett) petition for review filed 11/16/17

Defendant lived with a girlfriend and the victim in a polyamorous arrangement. Defendant said he made the two young women beat each other up as their "workouts." The victim had stopped speaking to her family. One day police received a 911 call from the girlfriend about the victim. Paramedics arrived. The victim was clinically dead. Her head had been broken and her torso had been stomped or slammed and her entire body was injured as if she'd been thrown from vehicle or beaten to death with a baseball bat. Defendant told police that she'd slipped on his sweat, then pinwheeling her arms around, fell and hit her head, then got up and started cleaning the kitchen. (Both defendant and the other girlfriend were named as beneficiaries on the victim's life insurance policy. The girlfriend received $88,000 after the victim's death. After this criminal case, the victim's parents sued for wrongful death and that jury awarded them $3.3 million from the two defendants. All of those facts were taken from Oregonian reports.).

Defendant was interrogated in a custodial setting on a Saturday. A detective read him his *Miranda* rights then asked him if he understood those rights. Defendant said, "*Where's the lawyer?*" The detective asked, "Have you got a lawyer? Have you hired a lawyer?" Defendant said no, he could not afford one. The detective said he'd be appointed an attorney at his arraignment on Monday and asked again, "Do you understand your rights?" and asked if defendant would be willing to talk to detectives. Defendant answered, "*Yes, absolutely*."

Defendant moved to suppress his statements to police officers during that interview. The trial court denied the motion. Defendant was convicted of murder and sentenced to life in prison.

The Court of Appeals reversed and remanded, concluding that defendant equivocally invoked his right to counsel. Thus, detectives must stop interrogating or follow up with questions to clarify if the suspect intended to invoke or not. The state bears that burden of proving that defendant waived his right to counsel. Here, timing was especially important. Defendant's request was equivocal because it was made immediately after, in direct response to the detective asking if defendant understood his rights. The "detectives were required to clarify whether defendant meant to assert that he had a right to a lawyer's assistance during the interview." *Id*. at 627. Moreover, the "clarification that officers must obtain is whether a suspect intended to invoke the right to counsel derived from the right against self-incrimination under Article I, section 12. * * * Here, by contrast, the detectives' questions did not clarify whether defendant intended to invoke his Article I, section 12, right to counsel. The detective's response, at most, clarified defendant's right to court-appointed counsel under the Sixth Amendment or Article I, section 11. Moreover, once defendant equivocally invoked his right to counsel, just repeating the question whether defendant understood his rights is not sufficient. * *

* Nor was it sufficient to ask defendant whether he was willing to talk to the officers, without clarifying that defendant had a right to have a lawyer assist him during the interview." *Id*. at 627-28. Defendant did not initiate conversation with detectives or cut off their questions, as has been the situation in other cases. *Id*. at 629-30. The error is not harmless.

The state filed a petition for review on November 16, 2017.

5.5.3 Arrested Drivers

The right against self-incrimination in Article I, section 12, includes the "derivative right" to the assistance of counsel during custodial interrogation under Article I, section 11. *State v Scott*, 343 Or 195, 200 (2007). When an arrested driver invokes his right to counsel, Oregon appellate courts require police and judges to address this question: Whether "a reasonable officer in the circumstances would have understood that defendant was invoking his limited right to counsel under Article I, section 11, or his derivative right to counsel under Article I, section 12." *State v Martinez*, 263 Or App 65, 665 (2014); *State v Acremant*, 338 Or 302, 322, *cert denied*, 546 US 864 (2005). For an example of that very convoluted analysis, see *State v Martinez*, 263 Or App 658, 667 (2014) ("In light of the totality of the circumstances, we conclude that a reasonable officer in the circumstances would have understood that defendant was invoking his limited right to a reasonable opportunity to obtain legal advice before deciding whether to submit to a breath test under Article I, section 11. Accordingly, we conclude that a reasonable officer in the circumstances would not have understood that defendant was invoking the derivative right to the assistance of counsel under Article I, section 12.")

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); *State v Martinez*, 263 Or App 658 (2014). "The right under Article I, section 11, 'includes the right to confer privately with counsel' and does not require an arrested driver to specifically request privacy; rather, 'the request for counsel, by itself, indicates that the arrested driver wants the essential elements that inhere in that right, including the opportunity for confidential communication.'" *Id*. (quoting *Durbin*, 335 Or at 189-91). Police may limit the duration of the opportunity to talk with an attorney. *Spencer*, 305 Or at 74; *State v Robinson*, 244 Or App 368, 373 (2011), *rev den*, 352 Or 33 (2012). The degree of privacy also may be limited. *Martinez*.

That right, however, "is triggered by a request for legal advice, not merely a request to talk with an individual who happens to be a member of a bar association." *State v Burghardt*, 234 Or App 61 (2010). "The requirement of confidentiality is a consequence of the privileged nature of conversations between an attorney and his or her client." *Id*. Asking a person to take field sobriety tests or breath tests is not "interrogation" under the state or federal constitution. *State v Highley*, 236 Or App 570 (2010) (citing *South Dakota v Neville*, 459 US 553, 564 n 15 (1983)); *State v Gardner* 236 Or App 150, 155, *rev den* 349 Or 173 (2010); and *State v Cunningham*, 179 Or App 498, 502, *rev den* 334 Or 327 (2002)).

The state has the burden to show that a defendant was afforded a reasonable opportunity to consult with counsel in private. *State v Carlson*, 225 Or App 9, 14 (2008). "However, the motorist does not have an absolute right to speak with counsel, but only the right to a reasonable opportunity to do so." *State v Groner*, 260 Or App 255, 260 (2013). "Police must scrupulously honor a motorist's right to a reasonable opportunity to consult with an attorney, but they are not required to ensure the motorist exercises that right." *Id*. "Although 15 minutes is frequently cited as a typical amount of time necessary for a reasonable opportunity to obtain legal advice, that time period is meant to guarantee that a defendant will have at least 15 minutes to look for and talk with an attorney if the defendant wishes. If the defendant elects not to use 15 minutes to contact an attorney, as is the case here, there is no 'ticking clock,' and the actual duration of the opportunity is not relevant." *Id*.

"When that right is violated, the remedy is to suppress the results of (or refusal to take) the breath test." *State v Groner*, 260 Or App 255 (2013); *State v Spencer*, 305 Or 59, 74-75 (1988).

5.5.4 Private Communications

Cases involving a right to consult an attorney before taking a breath test at a police station are addressed separately, see **Section 5.5.3**.

Article I, section 11, provides no express reference to a defendant's right to consult privately with counsel. *State v Durbin*, 335 Or 183 (2003). But "confidentiality is inherent in the right to consult with counsel." *State v Penrod*, 133 Or App 454, 457 (1995); *State v Russum*, 265 Or App 103 (2014).

In *State v Russum*, 265 Or App 103 (2014) a jail official and a detective inadvertently opened mail from the incarcerated defendant to his attorney. The Court of Appeals held that "no presumption of prejudice arises in the absence of evidence of a purposeful intrusion that conveys the content of attorney-client communication to the prosecution. If the intrusion is inadvertent, defendant must offer some evidence to show prejudice to his constitutional rights, such as the disclosure of trial strategy to the prosecution or the production of tainted evidence. If a purposeful intrusion takes and conveys privileged information, it will remain for another case[.]"

5.5.5 "Factually Unrelated Episodes"

When a person is "charged with a crime," he "is entitled to the benefit of an attorney's presence, advice, and expertise in any situation where the state may glean involuntary and incriminating evidence or statements for use in the prosecution of its case against defendant." *State v Sparklin*, 296 Or 85, 93 (1983); *State v Plew*, 255 Or App 581 (2013).

The Article I, section 11, "right to an attorney is specific to the criminal episode in which the accused is charged. The prohibitions placed on the state's contact with a represented defendant do not extend to the investigation of factually unrelated criminal episodes." State v Gilmore, 350 Or 380, 385 (2011); *State v Sparklin*, 296 Or 85, 95 (1983); *State v Plew*, 255 Or App 581 (2013); *State v Potter*, 245 Or App 1 (2011), rev den, 351 Or 586 (2012).

Ordinarily, "there can be no interrogation of a defendant concerning the events surrounding the crime charged unless the attorney representing the defendant on that charge is notified and

afforded a reasonable opportunity to attend." *State v Gilmore*, 350 Or 380 (2011); *State v Randant*, 341 Or 64 (2006); *State v Sparklin*, 296 Or 85 (1983).

5.5.6 Waiver of Right to Counsel

Even "after an Article I, section 12, violation, a suspect retains the power to validly waive the right against self-incrimination 'as long as that waiver is knowing, intelligent, and voluntary under the totality of the circumstances.'" *State v Schrepfer*, 299 Or App 429, 437 (2017) (citations omitted). The state bears the burden of proving that a defendant validly waived the right after invocation. *Ibid*. The state can do that two ways. First, through time: officers can wait, "re-Mirandize" then let the suspect talk. Second, through talk: the suspect can reopen discussion "by making unprompted statements that indicate[] a willingness to have a generalized discussion regarding the substance of the charges or investigation." *Schrepfer*, 299 Or App at 437. "More generalized questions about why the suspect has been taken into custody will not suffice [to establish voluntary waiver]." *Ibid*. (citations omitted).

In ***State v Boyd***, 360 Or 302 (2016), police unlawfully interrogated a criminal defendant after he invoked his rights to counsel and against compelled self-incrimination, guaranteed by Article I, section 12, of the Oregon Constitution. Defendant asked why he had been taken into custody and whether he could make a phone call. There was nothing particularly confusing about the requests. Police responded with questions that were reasonably likely to—and did—elicit incriminating evidence. The incriminating evidence should have been suppressed.

Chapter 6: Accusatory Instruments and Grand Juries

"(1) The Legislative Assembly shall provide by law for: (a) Selecting juries and qualifications of jurors; (b) Drawing and summoning grand jurors from the regular jury list at any time, separate from the panel of petit jurors; (c) Empaneling more than one grand jury in a county; and (d) The sitting of a grand jury during vacation as well as session of the court.

"(2) A grand jury shall consist of seven jurors chosen by lot from the whole number of jurors in attendance at the court, five of whom must concur to find an indictment.

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

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

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

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

"(7) In civil cases three-fourths of the jury may render a verdict." – Article VII (Amended), section 5, Or Const

6.1 Origins

"Article VII (Amended), section 5, has a lengthy history" that traces to 1857, in Article VII (Original), section 18, which was repealed in 1958. *State v Reinke*, 354 Or 98, 107-08 & n 7, *modified on recons*, 354 Or 570 (2013). "The people enacted the current version of Article VII (Amended), section 5, in 1974 after the legislature referred an amendment to that section to the voters. *See* Or Laws 1973, SJR 1." *Id.* at 106.

6.2 Purpose

The "grand jury's role serves as a check on the power of the district attorney." *State v Antoine*, 269 Or App 66, 80, *review denied* (2015) (citing *State v Kuznetsov*, 345 Or 479, 484 (2008)).

The stated purpose of Article VII (Amended), section 5, in 1974 "was to give prosecutors greater latitude to charge by information." *State v Reinke*, 354 Or 98, 112, *modified on recons*, 354 Or 570

(2013). Section 5 "requires the grand jury to find and plead only the elements of the crime as defined by the legislature." The "legislature has provided that a prosecutor need not plead sentence enhancement facts in the indictment" in ORS 136.765. "Timely written notice will suffice." *Id*. at 113.

"The current version of Article VII (Amended), section 5, consists of seven subsections that, among other things, authorize the legislature to provide for the selection of jurors and grand jurors, specify the number of grand jurors who comprise the grand jury, and determine the number of jurors necessary to render a verdict in civil cases." *State v Reinke*, 354 Or 98, 105 (2013) (citing section 5, subsections 1, 2, and 7).

"In Oregon, the state may charge a defendant with a felony by an indictment issued by a grand jury, by a prosecutor's information if the defendant waives indictment, or by a prosecutor's information followed by a preliminary hearing." *State v Reinke*, 354 Or 98, 101 n 1 (2013) (Article VII (Amended), section 5).

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

Article VII (Amended), section 5(6) "does not require that a grand jury find facts that pertain only to sentencing." There "is no requirement that facts that pertain only to sentencing be pleaded in the indictment." *State v Williams*, 237 Or App 377 (2010), *rev den*, 350 Or 131 (2011).

Subcategory facts that pertain only to sentencing need not be submitted to the grand jury; the "Oregon Constitution does not require that a grand jury find facts that pertain only to sentencing. That is because a fact that pertains only to sentencing is not a matter that is essential to show that an offense has been committed." *State v Williams*, 237 Or App 377, 383 (2010), *rev den*, 350 Or 131 (2011) (Article VII (Amended), section 5).

The "Oregon Constitution does not require that enhancement factors be set forth in the indictment." *State v Sanchez*, 238 Or App 259, 267 (2010), *rev den* 349 Or 655 (2011) (Article VII (Amended), section 5).

Note that a charging instrument – including an indictment – must charge only one offense, unless the state alleges the basis for joinder of crimes in the charging instrument. ORS 132.560; *State v Poston*, 277 Or App 137, 144-45 (2016), *adh'd to on recons*, 285 Or App 750 (2017). It can be reversible error if an indictment does not comply with that statute and *Poston*. *State v Clardy*, 286 Or App 745, 68-72 (2017). However, see *State v Warren*, 287 Or App 159 (2017)a case where error was not reversible under Article VII (Amended), section 3.

6.3 Amending an Indictment; Jury Instructions

Article VII (Amended), section 5, provides that a defendant in a criminal trial "has the constitutional right to be tried only for the specific criminal act as to which the grand jury handed down the indictment." *State v Long*, 320 Or 361, 370 n 13 (1994), *cert den*, 514 US 1087 (1995); *State v Guckert*, 260 Or App 50, 57 n 2 (2013).

"A jury instruction that tells the jury that it may convict a defendant on a basis that was not alleged in the indictment violates Article VII (Amended), section 5, of the Oregon Constitution." *State v Warren*, 280 Or App 164 (2016) (citation omitted).

The district attorney may not add "a missing material element to a crime charged in an indictment" because that would be "a substantive amendment" rather than "an amendment that corrects a defect in the form of the indictment." *State v Rodriguez-Rodriguez*, 268 Or App 35, 38 (2014). An indictment that leaves out words will be assessed in context to determine how "a reader" would interpret it. *Id.* at 40 (defendant had conceded that he had adequate notice of the first-degree assault charge despite the absence of the word "weapon" at the end of this sentence: "defendant on or about January 19, 2010, in Washington County, Oregon, did unlawfully and intentionally cause serious physical injury to [the victim] by means of a dangerous.").

A jury instruction can have the effect of amending a grand jury's indictment. *State v Guckert*, 260 Or App 50, 57 (2013). "Such an amendment is permissible if it merely changes the form of the indictment; it will, however, violate Article VII (Amended), section 5, of the Oregon Constitution if it changes the substance of the indictment." *Id*. (citing *State v Wimber*, 315 Or 103, 113 (1992); *State v Long*, 320 Or 361, 370 n 13 (1004), *cert den*, 514 US 1087 (1995)." See also *State v Antoine*, 269 Or App 66, *rev den* (2015). A four-part test determines if the jury instructions amended form (permissible) versus substance (impermissible) under *Wimber*, 315 Or at 114-15:

> (1) Did the amendment alter the essential nature of the indictment against defendant, alter the availability to him of defenses or evidence, or add a theory, element, or crime?
>
> (2) Did the amendment prejudice defendant's right to notice of the charges against him and to protection against double jeopardy?
> (3) Was the amendment itself sufficiently definite and certain?
>
> (4) Did the remaining allegations in the indictment state the essential elements of the offenses?

A jury instruction that added five additional theories that were not alleged in the indictment substantively amended an indictment. *State v Burk*, 282 Or App 638, 645 (2016).

6.4 Secrecy

On the secrecy of grand jury proceedings, and contempt hearings related to grand jury testimony, see **Section 10.5.3**.

"[T]here are several compelling reasons why grand jury proceedings should be kept secret, including protecting the integrity of the grand jury investigation and the safety of witnesses." "Logic dictates that the record of proceedings concerning motions to quash grand jury subpoenas should be closed." "Where the harm caused by disclosure of judicial records outweighs the benefit of disclosure to the public, public access no longer 'plays a significant positive role in the functioning of the particular process in question.' * * * To be sure, the closure of court proceedings is the exception rather than the rule, but grand jury secrecy is a long-standing and

important exception that is codified in [Federal] Rule 6(e) for good reason." *United States v Index Newspapers, LLC*, 2014 WL 436296 (9th Cir 2014).

Chapter 7: Former Jeopardy

"No person shall be put in jeopardy twice for the same offence, nor be compelled in any criminal prosecution to testify against himself." – Article I, section 12, Or Const

7.1 Origins

Article I, section 12, "was borrowed from a similar provision in the Indiana Constitution of 1851" and "the Oregon Constitutional Convention adopted it without any recorded discussion." *State v Selness*, 334 Or 515 (2002) (citing Charles Henry Carey, A HISTORY OF THE OREGON CONSTITUTION 468 (1926)).

7.2 Interpretation

Article I, section 12, is interpreted under the *Priest v Pearce*, 314 Or 411, 415-16 (1992) analysis: its specific wording, case law around it, and historical circumstances that led to its creation. *State v Selness*, 334 Or 515 (2002).

"The meaning of the term "jeopardy" in Article I, section 12, does not advance the inquiry much." *Id*.

"Jeopardy" arises only in criminal proceedings, for Article I, section 12, purposes, although even if a proceeding is labeled as "civil," it may still be "criminal" in nature. *State v Selness*, 334 Or 515 (2002) (held: a forfeiture proceeding is not criminal to constitute jeopardy). In deciding whether a proceeding is "civil" or "criminal" for Article I, section 12, purposes, the Oregon Supreme Court has determined that a case under Article I, section 11 (to determine whether a right to counsel and a right to a jury trial apply) also applies to Article I, section 12. *Id*. (applying *Brown v Multnomah County District Court*, 280 Or 95 (1977)). That is: did the legislature intend to create a civil proceeding? If yes, then the four *Brown* factors are applied to determine if the proceeding is essentially criminal. (See **Section 9.5.1** on Right to Jury Trial).

"The double jeopardy protection embodied in Article I, section 12, * * * is, in principle, the same as that embodied in the Fifth Amendment." *State v Mays*, 269 Or App 599, 616 (2015) (quotations omitted). "That protection is designed to spare a criminal defendant the embarrassment, expense, and harassment of being subjected to successive prosecutions for the same offense." *Id*. (quotations omitted).

7.3 Prosecutorial Misconduct

Retrial may be barred for egregious prosecutorial misconduct when (1) the misconduct cannot be cured by anything other than a mistrial; (2) the prosecutor knew the conduct was improper and prejudicial; <u>and</u> (3) the prosecutor intended or was indifferent to the resulting mistrial or reversal. *State v Kennedy*, 295 Or 260, 276 (1983); *State v Garner*, 234 Or App 486, 491, *rev den*, 348 Or 621 (2010).

In determining whether the state and federal constitutional double jeopardy provisions preclude a retrial, the dispositive issue is whether he prosecutor had the requisite scienter. *State v Mays*, 269 Or App 599, 617 (2015).

State v Criswell, 282 Or App 146 (11/09/16) (Yamhill) (Garrett, De Vore, Ortega) Defendant was charged with multiple counts of sex abuse. He was retried on a remand. After several retrials, he moved to dismiss the current case on double-jeopardy grounds, contending that official misconduct caused a preceding trial. Defendant's theory was that both the prosecutor and a witness had acted with indifference to the risk of a mistrial, amounting to misconduct that prohibited the state from trying defendant again. The trial court denied the motion to dismiss, concluding that the prosecutor did not intend to cause a mistrial, nor was she indifferent to the risk of causing a mistrial. The trial court stated: "In fact, I would say rather the opposite, that all of us, * * * did not want to have the case retried. And I would say that for [defendant], as well as the victims in this case, and not to mention the attorneys, but nobody wanted a mistrial in this case. So I don't think there's any indication that the State was indifferent."

The Court of Appeals upheld the denial of the motion to dismiss because evidence in the record supported the trial court's ruling that neither the witness nor the prosecutor was indifferent to the risk of mistrial. The court wrote:

Article I, section 12, of the Oregon Constitution provides that "[n]o person shall be put in jeopardy twice for the same offence [sic]." When a defendant moves for a mistrial or otherwise consents to termination of the trial, he is generally considered to have waived double-jeopardy protections, unless his decision to move for a mistrial is the product of certain forms of official misconduct. [*State v Mays*, 269 Or App 599, 616 *rev den*, 358 Or 146 (2015)]. In such cases, retrial is barred based on the "'theory that the official misconduct put the defendant to the "Hobson's choice" of either moving for a mistrial or continuing with a jury which was, arguably, favorably disposed to the defendant but is now contaminated by the misconduct.'" *Id*. (quotation omitted). The objective of Oregon's double-jeopardy protections is to "protect defendants against the harassment, embarrassment[,] and risk of successive prosecutions for the same offense," and it is not "a sanction to be applied for the punishment of prosecutorial or judicial error." *State v. Kennedy*, 295 Or 260, 272-73, 666 P2d 1316 (1983) (internal quotation marks omitted). Consequently, Article I, section 12, bars a retrial when the three following conditions are met: (1) the "improper official conduct is so prejudicial to the defendant that it cannot be cured by means short of a mistrial"; (2) "the official knows that the conduct is improper and prejudicial"; and (3) the official "either intends or is indifferent to the resulting mistrial or reversal." *State v. Pratt*, 316 Or 561, 579, 853 P2d 827 (1993) (internal quotation marks omitted). The standard requires "'some conscious choice of prejudicial action before the [double-jeopardy] guarantee bars correction of the error by a new trial. Negligent error, gross or otherwise, is not enough.'" (citation omitted). In determining whether Article I, section 12, precludes a retrial, "the dispositive issue is whether the [official] had the requisite scienter." *See Mays*, 269 Or App at 617.

State v Moore, 361 Or 205 (3/09/17) (Multnomah) (Baldwin) Defendant's arson trial had begun. He was being tried with a co-defendant. The state had called eight witnesses. At

the end of the first trial day, the DA stated that he was still trying to find information on the arson. At the beginning of the second trial day, the DA said he had discovered new witnesses and new evidence to present, specifically, a fire investigator. DA gave the court and defense counsel the investigator's handwritten notes, with names of potential witnesses, who apparently would've testified that the fire was not an accident. Both defendant and the co-defendant moved to exclude that new evidence. Defendant stated that he did not want a mistrial. The trial court ruled that the new evidence was admissible. The co-defendant then moved for a mistrial. Defendant did not join that motion – his counsel stated that he liked how the case was going. The trial court then sua sponte declared a mistrial as to defendant, and granted the co-defendant's motion for a mistrial.

The state reindicted both. Defendant moved to dismiss the indictment on former jeopardy, double jeopardy, and statutory jeopardy (ORS 131.525(1)). The trial court declined to dismiss the indictment: "the state has met its burned of proof to show that there was manifest necessity in declaring the mistrial."

Defendant then petitioned the Oregon Supreme Court for mandamus relief. The cCourt directed the issuance of a peremptory writ of mandamus, requiring the trial court to dismiss the indictment with prejudice.

The Court started with Article I, section 12 (former jeopardy) but wrote that "in doing so, [we] give proper weight to relevant United States Supreme Court opinions that we find persuasive." *Id*. at 213. (<u>Note</u>: the Court did not attempt to explain why it would do so, or what "proper weight" means). It reviewed federal case law and decided to "give those cases proper weight." *Id*. at 218. The state did not meet its burden of proving that the trial court's mistrial order met the "manifest necessity" standard. First, the state mistakenly proceeded into trial before identifying its investigator-witness. That witness went to the core of its case. That was the state's serious mistake, and it was all the state's mistake. Second, eight witnesses had already been examined and cross-examined. The state would have an unfair chance to further prepare its witnesses, having gone through the defense cross already. Here, defendant wanted to keep going with trial with the jury selected, despite the prospect of new evidence. "Thus, we hold, as a matter of law that the trial court's [sua sponte] mistrial order violated defendant's right to be free from a second prosecution for the same offense under Article I, section 12." The Court did not address the federal claim.

7.4 Statute

See ORS 131.515 on former jeopardy. The party seeking dismissal on former jeopardy grounds has the burden to prove each element of former jeopardy. *State v Lyons*, 161 Or App 355, 360 (1999); *State v Hamel-Spencer*, 264 Or App 600 (2014).

Chapter 8: Delays

8.1 Pre-indictment Delay

See Jonathan M. Hoffman and Maureen Leonard, *Remedies Clause and Speedy Trial*, OREGON CONSTITUTIONAL LAW MANUAL (2013), www.osbar.org/secured/barbooks/viewchapter.asp?bid=85&cid=2337.

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

But pre-indictment delay implicates due process rights. *State v Stokes*, 350 Or 44, *cert den*, 132 S Ct 343 (2011); *State v Whitlow*, 262 Or App 329 (2014); *State v Endres*, 196 Or App 197, 200-03 (2004). The defendant must show that the delay actually prejudiced him and the state culpably (inexcusably) caused that delay. *United States v Lovasco*, 431 US 783 (1977); *State v Stokes*, 350 Or 44 (2011); *State v Davis*, 345 Or 551 (2008), *cert den* 558 US 873 (2009).

In one case, the state indicted defendant 58 months after defendant's step-granddaughter reported his sexual assault on her. All delay was attributed to the state. The victim testified "I don't remember" at least 30 times at trial. The investigator was unavailable for trial. The trial court properly dismissed the indictment. *State v Whitlow*, 262 Or App 329 (2014).

8.2 Speedy Trial

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

The Oregon Supreme Court has stated that speedy trial claims under the state and federal constitutions are "similar" but not "identical." *State v Johnson*, 342 Or 596, 606 (2007); *State v Wendt*, 268 Or App 85, 106 n 14 (2014). The Oregon Court of Appeals, however, "equate[s] the speedy trial right granted by Article I, section 10, with the Sixth Amendment to the United States Constitution" and therefore because a defendant suffered no prejudice in a speedy-trial claim under the state constitution, his Sixth Amendment rights were not violated. *State v Chelemedos*, 286 Or App 77, 83 n 2 (2017).

Speedy trial claims under Article I, section 10, are guided by considering (1) the length of the delay and, if it is not manifestly excessive or purposely caused by the government to hamper the defense, (2) the reasons for the delay, and (3) prejudice to the defendant. *State v Harberts*, 331 Or 72, 88 (2000); *State v Berrellez*, 266 Or App 381 (2014) (citing slightly different analysis under *State v Mende*, 304 Or 18, 21 (1987)); *State v Ivory*, 278 Or 499, 501-04 (1977) (taking Sixth Amendment factors from *Barker v Wingo*, 407 Or 514 (1972) for Article I, section 10, use); *State v Lewis*, 249 Or App 480 (2012) (so noting).

Delay Element: "Delay alone can violate a defendant's right to justice without delay if it is so long that it shocks the conscience or if the state purposely caused the delay to hamper the

defense." *State v McDonnell*, 343 Or 557, 572 (2007); *State v Berrellez*, 266 Or App 381 (2014). "When the total delay is manifestly excessive so as to shock the conscience, no further analysis is necessary; the delay alone may establish an Article I, section 10, speedy-trial violation." *State v Wendt*, 268 Or App 85, 100 (2014). On the other side of the spectrum, if the delay is not "substantially greater than the average," then no further inquiry under Article I, section 10, is required. *Ibid*.

Prejudice Element: There are at least three recognized types of prejudice: "(1) the damage from lengthy pretrial incarceration; (2) anxiety and concern resulting from public accusation of a crime; and (3) impairment of the ability to defendant at trial." *State v McDonnell*, 343 Or 557, 573-74 (2007); *State v Berrellez*, 266 Or App 381 (2014).

Article I, section 10, extends to sentencing. The analysis considers: (1) length of delay; (2) reasons for delay; and (3) prejudice to defendant, under *State v Ivory*, 278 Or 499, 501-04 (1977) (taking Sixth Amendment factors from *Barker v Wingo*, 407 Or 514 (1972) for Article I, section 10 use). Length "alone can constitute a violation" of Article I, section 10, "if it shocks the conscience or if the state purposely caused the delay to hamper the defense." As for prejudice, three factors from *State v Harberts*, 331 Or 72, 93 (2000) are considered: (1) damage arising from lengthy pretrial incarceration; (2) anxiety and public suspicion resulting from public accusation of crime; and (3) the hampering of defendant's ability to defend himself. Regarding due process, the court noted that the "United States Supreme Court has not expressly decided whether constitutional speedy trial rights apply to sentencing." *State v Lewis*, 249 Or App 480 (2012).

On appeal of cases involving speedy trial claims, "the trial court's findings of fact concerning the length and reasons for the delay, as well as the type, level, and cause of any anxiety that [the] defendant suffered, are biding if supported by evidence." *State v Wendt*, 268 Or App 85, 88 (2014) (quoting *State v Johnson*, 342 Or 596, 608 (2009)).

In *State v Wendt*, 268 Or App 85 (2014), the period of delay between the indictment to the last date set for trial was 952 days. Defendant consented to 305 of those 952 days. The total uncontested delay was 647 days. The Court of Appeals wrote: "that delay is longer than to be expected in the prosecution of a felony charge." Defendant's constitutional speedy trial claim "rests on his claim that he was prejudiced by the delay." Defendant contended that the delay prevented him from identifying additional favorable witnesses. The court considered defendant's position to be "speculative" because defendant provided no further explanation of how he was prevented from identifying favorable witnesses or how memories would have faded: "Ultimately, all defendant established is what is undoubtedly true in every case where there has been pretrial delay: witness could have remembered events more clearly" nearer to the indictment. But defendant did not show "as he must, specifically how his ability to defend himself was prejudiced by the faded memories." His claims of anxiety and stress and inability to seek out certain kinds of employment also was not enough to support dismissal, even though it is "real." In sum: "none of the factors that come into play under our Article I, section 10, analysis support the conclusion that the state violated defendant's right to a speedy trial."

8.3 Statutory speedy trial

Note: There are several potential remedies for any speedy trial violation.

ORS 135.747 was repealed as of April 1, 2014, see Or Laws 2013, ch 431, section 1; *State v Straughan*, 263 Or App 225 (2014); *State v Wendt*, 268 Or App 85, 87 (2014).

A felony trial must be commenced within 3 years of the date of the filing of the charging instrument and a misdemeanor trial must be commenced within 2 years of the filing date, see https://olis.leg.state.or.us/liz/2014R1/Measures/Text/SB1550/Enrolled.

ORS 135.750 provides: "If the defendant is not proceeded against as provided in ORS 135.745 and sufficient reason therefor is shown, the court may order the action to be continued and in the meantime may release the defendant from custody as provided in ORS 135.230 to 135.290, for the appearance of the defendant to answer the charge or action." (ORS 135.750 formerly was 135.747).

Delays under the Oregon speedy-trial statute, ORS 135.747, are determined under the two-step analysis in *State v Davids*, 339 Or 96, 100-01 (2005). First, the Court determines the amount of delay by subtracting delay that defendant requested or consented to from the total delay. A mere failure to appear does not constitute consent within the statute, rather a defendant gives "consent" to a delay only when the defendant expressly agrees to a postponement that the state or the court requested. Second, the Court determines whether that delay is reasonable. If defendants fail to appear, the delays may be nonetheless reasonable even when they did not consent. *State v Glushko/Little*, 351 Or 297 (2011).

In *State v Emery*, 318 Or 460, 467 (1994), the "court concluded that the purpose of the [speedy trial] statute is not to protect defendants from prejudicial delays – as does the guarantee in Article I, section 10, of the Oregon Constitution – but, rather, is to prevent cases from 'languishing in the criminal justice system * * * without 'prosecutorial action'." (*Emery* interpreted ORS 135.747 which was repealed effective April 1, 2014, see Or Laws 2013 ch 431, § 1, HB 2962).

State v Blevins, 263 Or App 603 (2014) on "crowded dockets" and ORS 1.050 (90-day period for judges to render decisions).

State v Ellis, 263 Or App 250 (2014) on determining when a defendant is "charged" for speedy trial purposes, and the many variations on "charging," such as serial accusatory instruments, dismissals, and recharging.

State v Straughan, 263 Or App 242 (2014) on a total delay of 894 days, with defendant's consent to 251 of those days, means a 643-day delay attributable to the state, which is not reasonable and the state failed to offer any justification. Remedy is remand for entry of judgment of dismissal.

State v Hall, 265 Or App 279 (2014) on the "state-attributable delay" due to "docket congestion for which the trial court gave a detailed and reasonable explanation" for which the Court of Appeals concluded "that defendant was brought to trial within a reasonable amount of time."

> ***State v Burkette***, 275 Or App 135 (12/02/15) (Washington) (Garrett, Ortega, Lagesen) Two years separated defendant's being charged with DUI until trial. The state was responsible for about 21 months of that two-year delay. The Court of Appeals stated: "A delay of 21 months substantially exceeds expectations for bringing a case of this type to

trial." *Id*. at 143. "Thus, the remaining issue is whether that delay was reasonable for the purposes" of the former statute governing speedy trials. The Court of Appeals concluded that 5-1/2 months of that 21 months is "inadequately explained by the record and, therefore, unreasonable." *Id*. at 146. Defendant was entitled to dismissal under the former statute.

Chapter 9: Criminal Trials & Collateral Proceedings

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

9.1 Origins

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

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

Article I, section 11, lists "a panoply of trial-related rights." As compiled in *State v Mills*, 354 Or 350 (2013), those are the rights to:

1. A public trial
2. An impartial jury
3. A trial in the county where the offense was committed
4. Be heard
5. Demand the nature and cause of the accusation
6. Have a copy of the accusation
7. Meet witnesses face to face
8. Have compulsory process.

9.2 Interpretation

The parts of Article I, section 11 that were adopted with the original Constitution are interpreted under the *Priest v Pearce*, 314 Or 411 (1992) analysis. That is: text in context, historical circumstances, and case law. The "goal is to determine the meaning of the constitutional wording, informed by general principles that the framers would have understood were being advanced by the adoption of the constitution." *State v Mills*, 354 Or 350 (2013) (citing *State v Savastano*, 354 Or 64, 72 (2013)).

"Neither the Sixth Amendment to the United States Constitution nor Article I, section 11, of the Oregon Constitution guarantees a right to counsel outside of criminal prosecutions". *Haynes v Board of Parole*, 362 Or 15, 19 n 4 (2017).

9.3 Venue

"In *State v. Mills*, 354 Or 350, 369-70, 372-73, 312 P3d 515 (2013), the Supreme Court held that the right to a trial in a particular place protected by Article I, section 11, of the Oregon Constitution is a procedural "right not to be dragged away to a distant place of trial—a right that would be subject to waiver if not asserted" and resolved in a timely manner before trial. In so doing, the court reversed 90 years of precedent holding that, under Article I, section 11,1 venue was a material element of any criminal offense that had to be proved by the prosecution beyond a reasonable doubt, such that failure to prove venue would mean that a criminal defendant was entitled to entry of judgment of acquittal. *Id*. at 366-74." *State v Schindler*, 281 Or App 86 (2016) (held: reversed conviction and remanded so that defendant can contest venue).

"Article I, section 11, of the Oregon Constitution does not require the state to prove proper venue beyond a reasonable doubt at trial. A defendant must challenge venue in a pretrial motion. *State v Mills*, 354 Or 350, 371-73 (2013). In other words, "unless a defendant raises the issue of venue before trial, the state is not required to prove venue." *State v Hiner*, 269 Or App 447, 452 n 3 (2015).

"Article I, section 11, enumerates a defendant's right to a trial in a particular place: 'the county in which the offense shall have been committed.' It does not codify the common-law rule requiring the state to prove venue as a material allegation. The old common-law rule was one of jurisdiction. The constitutional guarantee is a matter of personal right, which – like other constitutional rights – may be forfeited if not timely asserted." *State v Mills*, 354 Or 350 (2013).

See ORS 131.305(1) (venue is proper in the county in which the offense is committed, with exceptions).

9.4 Compulsory Process and *Brady v Maryland*

9.4.1 Compulsory Process Generally

"The right to compulsory process under Article I, section 11, parallels Sixth Amendment jurisprudence," *State v Mai*, 294 Or 269, 272 (1982), and "the analysis of the two constitutional provisions is the same," *State v Zinsli*, 156 Or App 245, 251-52, *rev den*, 328 Or 194 (1998). Compulsory process review "is absorbed into the due process analysis" of the Fourteenth Amendment." *State v Bray*, 281 Or App 584, 599 (2016) (quoting *State v Zinsli*, 156 Or App 245, 252, *rev den*, 328 Or 194 (1998)).

A Ninth Circuit panel has summarized Compulsory Process under the Sixth Amendment in a Section 1983 case, *Park v Thompson*, __ F3d __ (9th Cir 2017):

> "The Compulsory Process Clause of the Sixth Amendment provides that '[i]n all criminal prosecutions, the accused shall enjoy the right to have compulsory process for obtaining witnesses in his favor.' U.S. Const. amend VI. The right to compulsory process encompasses '[t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary.' *Washington v Texas*, 388 U.S. 14, 18–19 (1967). As 'a fundamental element of due process of law,' the right to compulsory process is

incorporated against the states through the Due Process Clause of the Fourteenth Amendment. *See id*. at 19, 20.

"The Supreme Court has established that the government violates due process when its conduct 'effectively dr[ives a] witness off the stand.' *Webb v Texas*, 409 U.S. 95, 98 (1972) (per curiam) (holding right to present a defense was violated when the trial judge singled out and admonished a defense witness about the risks of perjury in 'unnecessarily strong terms'). We have further explained that, under *Webb*, '[i]t is well established that "substantial government interference with a defense witness's free and unhampered choice to testify amounts to a violation of due process."' *Ayala v Chappell*, 829 F.3d 1081, 1111 (9th Cir. 2016) (quoting *Earp v Ornoski*, 431 F.3d 1158, 1170 (9th Cir. 2005)). Although *Webb* dealt only with judicial misconduct, wrongful conduct by prosecutors or law enforcement officers can also constitute "substantial government interference" with a defense witness's choice to testify. *See, e.g., United States v. Vavages*, 151 F.3d 1185, 1189 (9th Cir. 1998) ('[T]he conduct of prosecutors, like the conduct of judges, is unquestionably governed by *Webb*.'); *United States v. Little*, 753 F.2d 1420, 1439–40 (9th Cir. 1984) (analyzing claim of defense witness intimidation by IRS agents); *see also Ayala*, 829 F.3d at 1111 (explaining that allegations of witness intimidation by detective, taken as true, would amount to constitutional violation).

"The Supreme Court has also made clear that 'the Sixth Amendment does not by its terms grant to a criminal defendant the right to secure the attendance and testimony of any and all witnesses,' but only 'witnesses in his favor.' *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982) (emphasis in original). Consequently, even where there may have been governmental misconduct, a criminal defendant cannot establish a violation of his compulsory process right unless he 'make[s] some plausible showing' of how the potential witness's 'testimony would have been both material and favorable to his defense.' *Id*.; *see also Cacoperdo v Demosthenes*, 37 F.3d 504, 509 (9th Cir. 1994) (holding Sixth Amendment witness interference claim fails without showing of relevance and materiality)."

9.4.2 *Brady*

A *Brady* violation isn't just a "discovery violation." It "is a *constitutional* violation." *Eklof v Steward*, 273 Or App 789, 793 n 2 (2015) (emphasis by court), *rev'd*, 360 Or 717 (2016).

"There are three distinct elements of a *Brady* violation: First, '[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching.' *Strickler v Greene*, 527 US 263, 281–82 (1999). Second, 'that evidence must have been suppressed by the State, either willfully or inadvertently.' *Id.* at 282. Third, 'prejudice must have ensued.' *Id.*" *Shelton v Marshall*, 796 F3d 1075 (9th Cir 2015); *Fisher v Angelozzi*, 285 Or App 541, 548 (2017) (quoting *Strickler v Greene*, 527 US 263, 281-82 (1999)).

Brady applies to "information which had been known to the prosecution but unknown to the defense." *United States v Agurs*, 427 US 97, 103 (1976); *Eklof v Steward*, 360 Or 717, 736 n 9 (2016) (so quoting in an action for post-conviction relief at the summary judgment stage).

"A criminal defendant's entitlement to discovery secured by Article I, section 11, and the Sixth Amendment is limited to information that is both (1) in the possession of the prosecution and (2) material and favorable to a defendant's guilt or punishment. *State v West*, 250 Or App 196, 203, 279 P3d 354 (2012) (citing *Brady v Maryland*, 373 US 83, 87 (1963)); *accord State v Pelham*, 136 Or App 336, 344-46, 901 P2d 972 (1995), *rev den*, 323 Or 264 (1996). Once the prosecution has fulfilled its affirmative duty to disclose material and favorable information in its possession * * * a defendant must make a further showing of favorability and materiality of additional requested material within the prosecutor's possession. *State v Koennecke*, 274 Or 169, 179, 545 P2d 127 (1976)." (held: defendant's "compulsory process argument fails because * * * the DHS records pertaining to the victim's placement in foster care were not in the prosecutor's possession."). *State v Wixom*, 275 Or App 824, (2015), *rev den* 359 Or 166 (2016).

"The right to compulsory process encompasses both a right to discovery and a right to compel the production of evidence. A criminal defendant's constitutional entitlement to discovery is limited to information that is both (1) in the possession of the prosecution and (2) material and favorable to a defendant's guilt or punishment." *State v West*, 250 Or App 196, 203 (2012).

Note: In *West*, the court cited generally to *Brady v Maryland*, 373 US 83, 87 (1963), which is not a Sixth Amendment case but instead is a Fifth Amendment Due Process case. But also the "United States Supreme Court has 'borrowed much of [its] reasoning [in] the Compulsory Process Clause of the Sixth Amendment from cases involving the Due Process Clause of the Fifth Amendment[.]'" *State v Mays*, 269 Or App 599, 620 n 14 (2015) (quoting *United States v Valenzuela-Bernal*, 458 US 858, 872 (1982)).

The *West* court wrote: 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."

A trial court's failure to inform a represented party at a civil commitment hearing of her right to subpoena witnesses, as required under ORS 426.100(1)(d), by using the word "subpoena," is plain error that is not harmless. *State v V.B.*, 264 Or App 621 (2014); *State v Z.A.B.*, 264 Or App 779 (2014).

A "due process right to prosecutorial disclosure of material, exculpatory evidence stems from [*Brady v Maryland*, 373 US 83, 87 (1963)]." The Oregon Court of Appeals has "found no authority for the proposition that the prosecution's *Brady* obligation to disclose material exculpatory evidence extends to evidence in the hands of a private entity such as Google." *State v Bray*, 281 Or App 584, 600 (2016). Where Google information that a criminal defendant seeks is "in neither the actual nor the constructive possession of the prosecution, *Brady* does not require the state to obtain and share it." *Id*. at 603 (held: the trial court did not err in denying defendant's motion to compel the prosecution to obtain and share [a crime victim's] Google information."). However, a crime victim does not have "a constitutional right to withhold material that might contain relevant, exculpatory, unprivileged evidence on the ground that the she [sic] has a privacy interest in that material." *Id*. at 612, 614-18 (limited, relevant, exculpatory, subpoenaed evidence is subject to an *in camera* review by the court and a "neutral expert").

In contrast with Google information, "the prosecutor has a duty to disclose all favorable evidence known to the prosecutor or evidence that the prosecutor could have learned from 'others acting

on the government's behalf in the case, including the police.'" *Fisher v Angelozzi*, 285 Or App 541, 548 (2017) (quoting *Kyles v Whitley*, 514 US 419, 437 (1995)).

In ***State v Cockrell***, 284 Or App 674 (2017), defendant was indicted for murdering his daughter by starvation. Before trial, he moved for disclosure of "the notes of the grand jurors who returned the indictment against him." His basis was that a detective had told him he would not be indicted, but he was indicted, so there must be something inconsistent. The trial court denied the request. Defendant made the same motion for disclosure of grand jury notes during trial. The trial court denied the motion. The Court of Appeals affirmed the trial court's ruling over defendant's claim that he had a due process right, under *Brady v Maryland*, 373 US 83 (1963) as noted in *State v Bray*, 281 Or App 584, 599 (2016), to those grand jury notes. Defendant made no showing that there is any reasonable probability that disclosure of the notes may have made a difference in his trial. Further, due process did not require the trial court to conduct an in camera review of the grand jury notes.

9.5 Jury

"'Jury' means a body of persons temporarily selected from persons who live in a particular county or district, and invested with power to present or indict in respect to a crime or to try a question of fact." ORS 10.010. There are three types of juries: grand, trial, inquest. ORS 10.020.

9.5.1 Right to Jury Trial

See Alycia Sykora, *Right to Jury Trial*, OREGON CONSTITUTIONAL LAW MANUAL (2013), www.osbar.org/secured/barbooks/viewchapter.asp?bid=85&cid=2334.

The right to a jury trial in Article I, section 11, extends to all offenses if they have the character of criminal prosecutions. *Brown v Multnomah County District Court*, 280 Or 95 (1977). Indicia to determine a civil from a criminal proceeding include: the type of offense, the penalty, the collateral consequences, punitive sanctions, and arrest and detention. *Id*. at 102-08.

A person arrested for, and charged with, second-degree criminal trespass (a Class C misdemeanor) is entitled to a jury trial under Article I, section 11, even if the state later reduces that charge to a violation under ORS 161.566. *State v Benoit*, 353 Or 204 (2013).

A person arrested for, and charged with, third-degree theft (a Class C misdemeanor) is entitled to a jury trial under Article I, section 11, even if the state later reduces that charge to a violation under ORS 161.566. *State v Fuller*, 355 Or 295 (2013).

A person charged with and convicted for the traffic infraction of failing to obey a police officer, ORS 811.535, is not entitled to a jury trial under Article I, section 11, because the traffic violation proceeding is not a criminal prosecution under the five factors in *State v Brown*, 280 Or 95 (1977), *State v Benoit*, 354 Or 302 (2013), and *State v Fuller*, 354 Or 295 (2013). *State v Whitten*, 278 Or App 627 (2016). "Arrest, booking, and pretrial detention were not available for failing to obey a police officer." *Id*. at 637. Failing to obey a traffic officer "was not a crime at common law and, like other traffic offenses, was not traditionally regarded as a criminal act." *Id*. at 632. "[A]lthough

prior to the 1975 revision to the Vehicle Code, the same cnduct at issue in this case was punishable as a crime * * *, as with other traffic offenses, the legislature's decision to regulate the conduct by noncriminal means since the revision to the Vehicle Code in 1975 doe not indicate that it did so in an attempt to skirt criminal protections." *Id*. at 633. The maximum fine was $360 (after this case it was increased to $1,000).

"[I]t is apparent that Article I, section 11, and the Sixth Amendment are hardly congruent with respect to entitlement to a jury trial on sentence enhancement facts and that the extent of their overlay, including in specific cases, is a matter of reasonable dispute." *State v Fernaays*, 263 Or App 407, 418-19 (2014) (addressing plain error and Article I, section 11).

A criminal defendant is not entitled to a jury trial regarding the amount of restitution as part of his sentence. *State v Hart*, 299 Or 128 (1985); *State v McMillan*, 199 Or App 398, 401 (2005).

9.5.2 Unanimity Not Required; Jury Concurrence

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

A. Unanimity Not Required

<u>Summary</u>: 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 'ten member' reference in Article I, section 11, does not establish a minimum jury size but, rather, permits 10 members of a 12-member jury to render a valid verdict." *State v Sagdal*, 356 Or 639, 649 (2015).

"In criminal cases, at least 10 jurors must agree on the verdict, except for charges of murder, which require unanimous jury agreement." *State v Pipkin*, 354 Or 513, 517 n 2 (2013) (ORS 136.450 and Article I, section 11).

<u>Originally</u>: In 1857, when "initially adopted, Article I, section 11, did not expressly require that juries be unanimous. Rather, [Article I, section 11] provided only that, '[i]n all criminal prosecutions, the accused shall have the right to public trial by an impartial jury * * *.'" The Oregon Supreme Court "assumed early on that jurors in criminal cases had to be unanimous. See *State v Ivanhoe*, 35 Or 150 (1899)." *State v Pipkin*, 354 Or 513, 526 (2013).

In 1934, all criminal trials in circuit court had 12-member juries. Oregon Code, title XXX, ch 1, § 30-104 (1930); Oregon Code, title XIII, ch 9, § 13-912 (1930). Other Courts such as county and justice courts, used six-person juries. *State v Pipkin*, 354 Or 513, 645 (2013).

<u>1934 Amendment</u>. In 1934, by legislative referral, the text quoted above was added to Article I, section 11, of the Oregon Constitution. Or Laws 1933, SJF 4 (2nd Special Session); *State v Osbourne*, 153 Or 484, 485 (1936); *State v Sagdal*, 356 Or 639, 643 (2015) (so noting). The text

context, and history of that addition to Article I, section 11, suggests and confirms that "voters intended it to provide for nonunanimous verdicts" but "not to mandate a jury of 10 or 12 persons." *State v Sagdal*, 356 Or 639, 643-47 (2015). The "voters would have understood that this constitutional amendment was intended to increase the efficiency of the courts by providing for nonunanimous verdicts." *Id*. at 647.

Interpretation: The Court interprets constitutional amendments referred to the voters "within the same basic framework" that it interprets statutes: "by looking to the text, context, and legislative history of the amendment to determine the intent of the voters." *State v Sagdal*, 356 Or 639, 642 (2015) (quoting *State v Reinke*, 354 Or 98, 106, *adh'd to as modified on recons*, 354 or 570 (2013)). "Context for a referred constitutional amendment includes the historical context against which the text was enacted – including preexisting constitutional provisions, case law, and statutory framework." *Id*. (citing *State v Pipkin*, 354 Or 513, 526 (2013) and *George v Courtney*, 344 Or 76, 84 (2008)). "The history of a referred constitutional provision includes 'sources of information that were available to the voters at the time the measure was adopted and that disclose the public's understanding of the measure,' such as the ballot title, arguments included in the voters' pamphlet, and contemporaneously news reports and editorials." *Id*. at 642-43 (quoting *Ecumenical Ministries v Oregon State Lottery Comm.*, 318 Or 551, 559 n 8 (1994)). The Court is "cautious in relying on statements of advocates." *Id*. at 643 (citing *Northwest Natural Gas Co. v Frank*, 293 Or 374, 383 (1982)).

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.").

U.S. Constitution: 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).

The right to a unanimous jury verdict has been rooted in Article III, § 2, and the Sixth Amendment of the United States Constitution, see *United States v. Gilley*, 836 F2d 1206, 1213 (9th Cir 1988).

B. Jury Instructions

A statute may define a crime but specify alternate ways that the crime can be committed. The jury is instructed that at least ten jurors have to agree on the way that crime was committed. This is a "*Boots*" instruction, from *State v Boots*, 308 Or 371 (1989), *cert denied*, 510 US 1013 (1993). See also *State v King*, 316 Or 437 (1993), *State v Pipkin*, 354 Or 513 (2013), and *State v Teagues*, 281 Or App 182 (2016) (defendant charged with a single crime, but state presented evidence of multiple, separate occurrences separated by time and location; the trial court erred in failing to give a concurrence instruction).

"Case law since *Boots* * * * reinforces the basic idea that, where the jury is presented with evidence of multiple factual occurrences, each of which could independently support a conviction, then either the state must elect which occurrence is to be the basis for the charge or the jury must be instructed that ten jurors must agree on a particular occurrence as a predicate for conviction." *Wilson v Premo*, 280 Or App 372, 383 (2016) (where indictment alleged multiple counts of rape in identical terms and the state presented evidence of multiple occurrences of rape, "petitioner was prejudiced by his counsel's failure to request a *Boots* instruction"; "there is no suggestion on appeal that petitioner's counsel understood that a *Boots* problem existed but made a tactical decision not to request an instruction").

"The jury concurrence requirement derives from the Oregon Constitution, statute, and case law. * * * ORS 136.450(1) requires that 'the verdict of a trial jury in a criminal action shall be by concurrence of at least 10 of 12 jurors.' * * * A jury concurrence instruction (or '*Boots* instruction') prevents juror confusion and ensures that the jurors agree upon the specific factual predicates for the conviction." *State v Frey*, 248 Or App 1 (2012).

But the Oregon Supreme Court has constructed the constitutional aspect of *Boots*: "We read *Boots* as resting primarily on its interpretation of ORS 163.095. *Boots* referred to Article I, section 11, only once. * * * It never quoted, discussed, or analyzed" Article I, section 11." *State v Pipkin*, 354 Or 513 (2013).

If the legislature intended to have two ways of proving a single element of a crime, then Article I, section 11, does not require jury concurrence on alternative means of proving a single element. *State v Pipkin*, 354 Or 513 (2013). But: "The requirement recognized in *Boots* and reaffirmed in *Pipkin* that at least 10 jurors must agree on each legislatively defined element of a crime means that 10 jurors ordinarily must agree whether a defendant committed a crime him or herself or, alternatively, whether the defendant aided and abetted another person's commission of that crime." *State v Phillips*, 354 Or 598, 612-13 (2013) (concluding that "the legislative determination that causation in ORS 163.165(1)(e) can be proved either by directly inflicting an injury or by engaging in acts extensively intertwined with inflicting injury does not violate either Article I, section 11, or the Due Process Clause").

C. No Plain Error

The Court of Appeals has rejected a defendant's claim that the trial court committed plain error by instructing the jury that it could convict him on a nonunanimous agreement. *State v Ferguson*, 247 Or App 747 (2012) (citing *State v Cobb*, 224 Or App 594 (2008) *rev den*, 346 Or 364 (2009) and *State v Bowen*, 215 Or App 199 (2007), *adh'd to as modified on recons*., 220 Or App 380, *rev den* 345 Or 415 (2008), *cert den*, 558 US 52 (2009)), *see also State v Berry*, 261 Or App 824 (2014) (declining to "revisit and overrule" *Bowen*).

9.5.3 Number of Jurors

> "**Provision may be made by law for juries consisting of less than 12 but not less than six jurors."** -- Article VII (Amended), section 9, Or Const

> "**[I]n the circuit court ten members of the jury may render a verdict of guilty or not guilty** * * *." -- Article I, section 11, Or Const

Summary: Article VII (Amended), section 9, addresses jury size. It grants the legislature the authority to determine jury size within the six-to-twelve limit in all types of criminal and civil cases. It does not grant the legislature authority over any other aspect of juries, such as the number of votes required for a valid verdict. *State v Sagdal*, 356 Or 639, 649-52 (2015).

1934 Amendment: Article VII (Amended), section 9, was referred by the legislature for popular vote in 1971 and adopted by the voters in 1972. *State v Sagdal*, 356 Or 639, 649 (2015).

Interpretation: The Court interprets constitutional amendments referred to the voters "within the same basic framework" that it interprets statutes: "by looking to the text, context, and legislative history of the amendment to determine the intent of the voters." *State v Sagdal*, 356 Or 639, 642 (2015) (quoting *State v Reinke*, 354 Or 98, 106, *adh'd to as modified on recons*, 354 or 570 (2013)). "Context for a referred constitutional amendment includes the historical context against which the text was enacted – including preexisting constitutional provisions, case law, and statutory framework." *Id*. (citing *State v Pipkin*, 354 Or 513, 526 (2013) and *George v Courtney*, 344 Or 76, 84 (2008)). "The history of a referred constitutional provision includes 'sources of information that were available to the voters at the time the measure was adopted and that disclose the public's understanding of the measure,' such as the ballot title, arguments included in the voters' pamphlet, and contemporaneously news reports and editorials." *Id*. at 642-43 (quoting *Ecumenical Ministries v Oregon State Lottery Comm.*, 318 Or 551, 559 n 8 (1994)). The Court is "cautious in relying on statements of advocates." *Id*. at 643 (citing *Northwest Natural Gas Co. v Frank*, 293 Or 374, 383 (1982)).

Statute: In criminal cases, if the only charges tried are misdemeanors, "the trial jury shall consist of six persons." ORS 136.210(2) (enacted in 1979 under authority of Article VII (Amended), section 9, of the Oregon Constitution).

U.S. Constitution: A State can, consistently with the Sixth Amendment that applies to the States through the Fourteenth, try a defendant in a criminal case with a jury of six rather than twelve members. *Williams v Florida*, 399 US 78, 86 (1970). That is so, apparently even though "there can be no doubt" that the Sixth Amendment was intended to be composed of twelve jurors. The States may make and enforce their own laws as long as they do not conflict with the Fourteenth Amendment. The right to a 12-person jury is not a privilege or immunity of national citizenship, thus the Seventh Amendment does not preclude the States from enacting laws as to the number of jurors necessary to compose a petit jury in a noncapital criminal case. *Maxwell v Dow*, 176 US 581 (1900).

In *State v Sagdal*, 356 Or 639 (2015), defendant contended that a part of Article I, section 11, enacted in 1934, sets a minimum of ten jurors in all criminal cases. Defendant argued that Article VII (Amended), section 9, enacted in 1972, which allowed for six- to 12-person juries, had no effect on that minimum size, given the word "ten" in Article I, section 11.

The court interpreted the 1934 amendment to Article I, section 11, to mean that when a trial court uses a jury of 12, ten members may render a verdict, except in first-degree murder cases. Article I, section 11, does not impose a constitutional requirement for a jury of 10 or more people in all criminal trials. A unanimous jury of six found defendant guilty of a misdemeanor, as permitted by the legislature under ORS 136.210(2) and Article VII (Amended), section 9. The 1934 amendment to Article I, section 11, does not apply to this case; Article I, section 11, does not establish a minimum jury size, it only defines circumstances where a unanimous verdict is required.

Article VII (Amended), section 9, was adopted in 1972. The text of that 1972 amendment only "grants the legislature the authority to determine the size of the jury within the stated limits." Further, the history of the 1972 amendment "confirms that interpretation, based on the ballot title and the arguments in the voters' pamphlet, despite "some confusion in the voters' pamphlet as to the types of cases to which the measure applied." That confusion was "simply" an "editing error" that "clearly was at odds with the plain text of the amendment, was contradicted by other statements in the same voters' pamphlet, and was addressed by a contemporaneous newspaper editorial available to the voters." The 1972 amendment was not intended to apply to just civil cases as defendant had argued. In sum, the 1972 provision was "clear" that it "was limited to addressing jury size" rather than requiring unanimous verdicts.

9.5.4 Waiver of Jury-Trial Right

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

In 1932, Oregon voters adopted the part of Article I, section 11, that gives defendants in noncapital cases the right to waive a jury trial and be tried by the court. The purpose was to promote the efficient use of judicial resources by changing the former constitutional rule that had required criminal cases to be tried to a jury. Per *State v Baker*, 328 Or 355 (1999), Article I, section 11, "grants to only one person the power to defeat a defendant's choice to be tried by the court sitting without a jury – the trial judge." *State v Wilson*, 240 Or App 708 (2011). In contrast, federal judges must have the government's approval before accepting a defendant's written waiver (in addition to the judge's approval). FRCrP 23(a); *United States v Preston*, 706 F3d 1106 (9th Cir 2013).
ORS 136.001(2) provides: "Both the defendant and the state may elect to waive trial by jury and consent to a trial by the judge of the court alone, provided that the election of the defendant is in writing and with the consent of the trial judge."

Article I, section 11, gives a criminal defendant in a noncapital case the right to waive a jury, but: (1) waiver must be in writing and (2) trial court must consent to the waiver. The text does not limit when a defendant must waive that right. *State v Harrell*, 241 Or App 139 (2011). Holding a bench trial without any written waiver of defendant's right to a jury trial violates Article I, section 11. *State v Barber*, 343 Or 525 (2007) (convictions not sentences at issue); *State v Webster*, 239 Or App 538 (2010). Holding a bench trial with a "Stipulation" that fails to mention the right to a jury trial and that the defendant knowingly and voluntarily relinquished that constitutional right is error apparent on the fact of the record that the Court of Appeals has exercised its discretion to correct. *State v Smith*, 260 Or App 183 (2013).

Appellate courts have no discretion to ignore the error apparent on the face of the record that occurs when a jury trial waiver is not in writing. *State v Bailey*, 240 Or App 801 (2011). *State v Barber*, 343 Or 525, 530 (2007) held that Article I, section 11, requires a written jury waiver to be effective. Article I, section 11, differs from the statutory written-waiver requirement in ORS 136.773(1) and ORS 136.770(1). That means: Although it is plain error to not get a written jury trial waiver, if the basis for the error is a statute (such as ORS 136.773(1) on enhancement facts) rather than Article I, section 11, the Court of Appeals may decline to exercise its discretion to correct statutory error. See *State v Engerseth*, 255 Or App 765, 770 n 6, *rev den* 353 Or 868 (2013) and *State v Fernaays*, 263 Or App 407 (2014). The remedy for an error violating the requirement of a written jury waiver in Article I, section 11 is reversal of conviction and remand. *State v Herrington*, 283 Or App 93 (2016). However, *State v Jeanty*, 231 Or App 341(2009), *rev den*, 348 Or 218 (2010), "clarified that *Barber* does not stand for the proposition that all errors related to a written jury waiver constitute plain error." *Harbert v Franke*, 284 Or App 359, 380 (2017).

"Under the Oregon Constitution, criminal defendants possess both the right to be tried by a jury *and* the concomitant right – albeit bounded by judicial consent – to waive that jury trial guarantee in favor of a bench trial." *State v Harrell/Wilson*, 353 Or 247, 252 (2013). "The state does not have a right to insist upon a jury trial." *State v Austin*, 274 Or App 114, 120 (2015) (citing *State v Baker*, 328 Or 355, 360 (1999)).

Waiver of a jury trial does not foreclose a defendant's right to demand a jury trial on remand. *State v Barajas*, 262 Or App 364 (2014). *Barajas* quoted a federal case with approval: "The right of trial by jury in cases at law, whether in a civil or criminal case, is a high and sacred constitutional right in Anglo-Saxon jurisprudence, and is expressly guarantied [sic] by the United States Constitution. A stipulation for the waiver of such right should therefore be strictly construed in favor of the preservation of the right." *Id*. at n 1 (citation omitted).

9.5.5 "Anonymous" Juries

An "anonymous jury" in Oregon includes both the prospective juror pool and an impaneled trial jury. *State v Washington*, 355 Or 612, 630 (2014) and *State v Rogers*, 352 Or 510 (2012).

An "anonymous jury" includes cases where the trial court requires attorneys to refer to jurors only by number during voir dire and at trial and conceals juror names from the defendants and everyone in the courtroom except attorneys, who to have access to jurors' names and addresses. *Washington*, 355 Or at 630-39.

When a jury is anonymous from a defendant's perspective, "it may prevent the defendant from assisting in identifying jurors who may be biased against him or her." And when a jury perceives itself as anonymous -- "particularly when a jury is aware that anonymity is not the norm – the circumstance may suggest that their identities are being protected because the defendant is dangerous." *Washington,* 355 Or at 636 (citing *State v Rogers*, 313 Or 356, 540-41 (1992), *cert denied*, 507 US 974 (1993)).

"[A]lthough trial courts possess inherent authority to empanel anonymous juries in criminal cases, that authority is limited by a defendant's right to an impartial jury, guaranteed by Article I, section 11, of the state constitution." *Washington*, 355 Or at 633 (citing *State v Sundberg*, 349 Or 608, 617 (2011)).

"[B]efore empaneling an anonymous jury, a trial court must make findings that the particular circumstances of the case provide strong grounds for the practice." That is to ensure "that the trial court carefully considers the justifications for empaneling an anonymous jury in the context of the particular case. *Washington*, 355 Or at 637. In other words, "Article I, section 11, permits an anonymous jury only when the trial court finds that the circumstances of a particular case justify that practice and takes steps to mitigate any prejudice to defendant." *Sundberg*, 349 Or 608.

"[A]nonymous juries are permissible only if the trial court 'concludes that there is a strong reason to believe that the jury needs protection' and the court takes 'reasonable precautions to minimize any prejudicial effects on the defendant and to ensure that his fundamental rights are protected." *State v Sundberg*, 349 Or 608 (2011) (quoting *United States v Paccione*, 949 F2d 1183, 1192 (2nd Cir 1991), *cert denied*, 505 US 1220 (1992)). A nonexclusive list of those factors:

> "(1) the defendants' involvement with organized crime; (2) the defendants' participation in a groups with the capacity to harm jurors; (3) the defendants' past attempts to interfere with the judicial process or witnesses; (4) the potential that the defendants will suffer lengthy incarceration if convicted; and (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation and harassment." *State v Sundberg*, 349 Or 608 (2011) (quoting *United States v Fernandez*, 388 F3d 1199, 1244 (9th Cir 2004), *cert denied*, 544 US 1043 (2005)).

9.5.6 Jury's Duties

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

"[C]riminal defendants are entitled to have the jury instructed in accordance with their theory of the case if the instructions correctly state the law and there is evidence to support giving them, *State v Barnes*, 329 Or 327, 334, 986 P2d 1160 (1999)." *State v Simonov*, 358 Or 531, 533 (2016) (not addressing the constitution); *see also State v McConnell*, 276 Or App 220 (2016).

Article I, section 16, is the result of a compromise at the Oregon Constitutional Convention after intense debate, as noted in Charles H. Carey's *The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857* (1926). *State v Johnson*, 238 Or App 672 (2010).

"Article I, section 16, of the Oregon Constitution, does not apply to civil awards of punitive damages." *Oberg v Honda Motor Co., Ltd.*, 316 Or 263, 275 (1993).

"[U]nder Article I, section 16 * * * it would be error to allow the jury to decide questions of law. Although the text of the provision states, 'In all criminal cases whatever, the jury shall have the right to determine the law, and the facts under the direction of the Court as to the law,' the Oregon Supreme Court long ago explained, 'In order to effectuate the clause in the [C]onstitution, "under the direction of the court as to the law," it is the plain duty of the jury to accept and apply the law as given them by the court.' *State v Wong Si Sam*, 63 Or 266, 272 (1912)." *State v Johnson*, 238 Or App 672 (2010).

"When a court * * * presents only predicate factual questions to a jury but makes the determination regarding the legal effect of those facts on its own – or, in the words of Article I, section 16, directs the jury with respect to legal questions – no violation of Article I, section 16, occurs." *State v Johnson*, 238 Or App 672 (2010).

9.5.7 Fair Trial

9.5.7.A Physical Restraints

See **Section 9.6.2**, *post*.

See also **Section 9.9**, *post*, on Confrontation Clause and witnesses testifying in disguise.

(i). Federal Courts and Other States

"The sight of a shackled litigant is apt to make jurors think they're dealing with a mad dog; and just the contrast between a litigant's wearing prison garb and his opponents' wearing law enforcement uniforms is likely to influence the jury against the prisoner, and has long been recognized as being highly prejudicial." *Maus v Baker*, 747 F3d 926, 927 (7th Cir 2014).

"By 1996, as *Deck v Missouri*, 544 U.S. 622, 626-29 (2005), and cases cited there make clear, the law was well settled, though perhaps not in the U.S. Supreme Court, that placing any kind of visible restraint on a defendant's movement during a criminal trial was permissible only if the particular defendant was too dangerous to be allowed in the courtroom without such a restraint—that is, only if less conspicuous security measures, such as seating one or two guards near but not too near the defendant, would be insufficient to ensure the safety of the persons in the courtroom and prevent the defendant from escaping." *Stephenson v Wilson*, 619 F3d 664, 668 (7th Cir 2010).

"[T]he stun belt is not the perfect solution to the security/fair trial dilemma but neither, as we said, are leg shackles, or a crowd of armed guards. This court has said that the stun belt is a method of restraint that minimizes the risk of prejudice, *United States v Brooks*, supra, 125 F.3d at 502; *Stevens v McBride*, 489 F.3d 883, 899 (7th Cir. 10 No. 09-2924 2007), though several years after the trial in this case the Indiana Supreme Court disapproved its use. *Wrinkles v State*, 749 N.E.2d 1179, 1194-95 (Ind. 2001). Guards remain the preferred alternative to any physical restraint, *Holbrook v. Flynn*, supra, 475 US at 568-69; *Lakin v Stine*, supra, 431 F3d at 964; *Hellum v Warden*, 28 F3d 903, 908 (8th Cir 1994), but too many guards can create the same impression of a dangerous defendant as a physical restraint." *Stephenson v Wilson*, 619 F3d 664, 668 (7th Cir 2010).

California: No prejudicial error in use of stun belt in state court. See *People v Jackson*, 58 Cal.4th 724 (2014).

On shackling during jury and non-jury proceedings in federal court, see *United States v Sanchez-Gomez*, Case No. 13-50561 (9th Cir 2015): "The Supreme Court's most recent decision regarding shackling, *Deck v Missouri*, identified three fundamental legal principles adversely affected by the use of shackling. 544 US 622, 630–31 (2005). These principles are: (1) the presumption of innocence until proven guilty, a presumption that is undermined by shackling before a jury; (2) the right to counsel, which shackles can hinder by interfering with a defendant's ability to communicate with his lawyer and by humiliating and distracting a defendant, potentially impairing his ability to participate in his own defense; and (3) the need for a dignified and decorous judicial process, which may be affronted by the routine use of shackles." *Sanchez-Gomez* held that in non-jury proceedings, Ninth Circuit precedent requires a generalized shackling policy to rest on an adequate justification of its necessity.

"[G]iven their prejudicial effect, due process does not permit the use of visible restraints if the trial court has not taken account of the circumstances of the particular case." *Deck v Missouri*, 544 US 622, 632 (2005). "Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process." *Id.* at 630. Visibility of the shackles is critical to the determination of the due process issue. *United States v Mejia*, 559 F3d 1113, 1117 (9th Cir 2009); *see also Williams v Woodford*, 384 F3d 567, 592 (9th Cir 2004) ("When the jury never saw the defendant's shackles in the courtroom, we have held that the shackles did not prejudice the defendant's right to a fair trial."). A criminal defendant must prove four factors to establish that his shackling at trial amounted to a due process violation: (1) the defendant was physically restrained in the presence of the jury; (2) the shackling was seen by the jury; (3) the physical restraint was not justified by state interests; and (4) he suffered prejudice as result of the shackling. *Ghent v Woodford*, 279 F3d 1121, 1132 (9th Cir 2002).

(ii) Oregon Courts

Under the common law and Article I, section 11, of the Oregon Constitution, the Oregon Supreme Court "long has recognized the right of a criminal defendant to appear free of physical restraints during a jury trial." *State v Washington*, 355 Or 612, 627 (2014) (quoting *State v Bowen*, 340 Or 487, 495 (2006), *cert denied* 549 US 1214 (2007); *State v Wall*, 252 Or App 435, 437-38 (2012), *rev den* 353 Or 280 (2013).

However, it is within the trial court's discretion to order a defendant to wear shackles or a stun belt in court if there is evidence of an immediate and serious risk of dangerous or disruptive behavior. *State v Stoltz*, 259 Or App 212 (2013). In other words: "a trial court has discretion to order physical restraint of a defendant if there is sufficient evidence of a substantial risk of dangerous or disruptive behavior, including the risk of assaultive conduct toward other persons and the risk of an attempted escape from custody." *State v Washington*, 355 Or 612, 628 (2014) (citing *State v Long*, 195 Or 81 (1952)). That evidence should be put into the record during a hearing in advance, and the trial court must make a record of its findings and reasoning. *Ibid*.

Security devices available to restrain a person during trial include: the Stinger Company's REACT Band-it stun device, shackles, handcuffs, and fabric hobbles. Other devices include pepper spray, Tasers, "impact weapons," and guns. *State v Washington*, 355 Or 612, 623 (2014). Stun belts are worn on a limb, or on the lower back, under clothing. They are "neuromuscular incapacitation" devices that deliver an electric shock to the wearer when activated by a person holding the activation device nearby. The stun devices cause pain, loss of mental focus, uncontrollable muscle contractions, and cause people to fall down, freeze, make loud noises, and sometimes urinate or defecate.

In *State v Guzek*, 358 Or 251 (2015), the Oregon Supreme Court affirmed defendant's death sentence in this case. The trial judge required defendant to wear a stun belt. The Court did not identify the type of stun belt used in this case. It was concealed and remotely controlled by an officer in the courtroom. Defendant argued that wearing a belt can affect him "psychologically" and can inhibit him because it might "go off" accidentally. The Oregon Supreme Court concluded that Article I, section 11, and the Sixth and Fourteenth Amendments were not violated by the trial court's stun belt rulings. The constitutional right of a defendant to appear free of physical restraints also applies to penalty-phase proceedings. The Court's holdings include: "A

trial court may require that a defendant be physically restrained in front of the jury" but only after "hearing relevant evidence from the state and defendant on whether the defendant's risk of danger, disruption, or escape justify the restraint. *Id*. at 264.

> ***Sproule v Coursey***, 276 Or App 417 (2016) held that trial counsel was not constitutionally ineffective for not objecting to the use of a leg brace on defendant during his rape trial:
>
> "Criminal defendants have the right to appear in court free from unnecessary restraint. *State v Kessler*, 57 Or App 469, 472, 645 P2d 1070 (1982). The right of an accused to be free from physical restraint during a criminal trial implicates the right to an impartial jury guaranteed by Article I, section 11, and the fair trial requirement in the Due Process Clause of the Fourteenth Amendment. *State v Wall*, 252 Or 435, 437 & n 1, 287 P3d 1250 (2012), *rev den*, 353 Or 280 (2013). Requiring a defendant to appear in court while restrained "impinge[s] on the presumption of innocence and the dignity of the judicial proceedings and may inhibit consultation with his attorney and his decision whether to take the stand as a witness." *Kessler*, 57 Or App at 474. A trial court has "discretion to order the shackling of a defendant if there is evidence of an immediate and serious risk of dangerous or disruptive behavior." *Wall*, 252 Or App at 439 (internal quotation marks omitted). To do so, the court must make an independent assessment of the security risk posed by the defendant and may not rely exclusively on the representations of the prosecutor or sheriff's deputies. *Id*. A determination that a defendant poses a security concern is necessary before a court requires a defendant to appear in court wearing a restraint, even if the restraint is not visible to the jury. See *State v Washington*, 355 Or 612, 627-29, 330 P3d 596, *cert den*, ___ US ___, 135 S Ct 685 (2014) (considering whether the record demonstrated that the defendant posed a security concern where the defendant was required to wear a 'stun belt' under his clothing); *Wall*, 252 Or App at 442 (considering a leg brace and concluding that, 'for purposes of the threshold showing that is required before restraints may be lawfully imposed, the distinction between visible and nonvisible restraints is * * * one without a difference")."
>
> ***State v McCright***, 282 Or App 692 (12/07/16) (Deschutes) (Haselton, Armstrong, Egan) Defendant stole almost $133,000 from his girlfriend's 83-year old mother over five months. (The victim is the widow of the former Bend Bulletin owner and editor, Robert Chandler). He was charged with numerous aggravated theft and identity-theft crimes. He had three prior convictions for state theft felonies and one prior federal theft felony. He waived a jury trial. He appeared for trial in leg and hand restraints. His attorney asked the judge to remove both hand restraints and keep the leg restraints. The judge said that he leaves those decisions to the sheriff. After consulting with the sheriff's deputy, the court said defendant's writing hand could be released. Defense counsel said that would still affect defendant's ability to communicate with defense counsel, and also noted that defendant is in his late 50s and was not a safety risk. The judge said that he was observing defendant with a pen in his right (writing) hand, moving it freely, and was resting his left hand "kind of in a normal manner." The judge said that the sheriff is "responsible for the security of the courtroom and courthouse" and the judge allows "them to make those decisions." The judge invited defense counsel to inform the court if defendant was, or became, unable to communicate due to the left-hand restraint.

Defendant testified at length. He admitted without reservation to all of the charged conduct. There was no jury. The trial court found defendant guilty of all counts. Defendant appealed based on venue and based on the left-hand restraint. The state did not defend the merits of the trial court's ruling on the left-hand restraint, but contended that the error was harmless.

The Court of Appeals affirmed: The trial court erred but the error was harmless. The error was that "the state failed to 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." But the error was harmless because: (1) this was a bench trial, so the trial court was aware of the leg and left-hand restraint; (2) defendant admitted culpability so "the potential for impermissible subconscious skewing of the trial court's essential factual determinations . . . was nonexistent"; (3) defendant testified lengthily, so the restraints did not "inhibit" him from taking the stand; (4) the trial court noted that defendant was writing very freely with his unrestrained right hand so the restraint was not inhibiting his ability to communicate with counsel.

Clark v Nooth, 284 Or App 762 (4/12/17) (Malheur) (Flynn, Duncan, DeVore) This is a post-conviction case. Petitioner lived in a trailer on the victim's mother's property. Petitioner went to a woman's house, injected her with meth, then forcefully raped her after she collapsed. Petitioner's defense was that the victim slipped and fell on his penis.

The trial court required petitioner to wear a mid-calf to mid-thigh hard plastic leg restraint under his pants during his trial, without any evidentiary hearing or fact-finding to support the need for a leg restraint. The jury was unaware of the restraint. A jury convicted him of first-degree rape. In his post-conviction process, petitioner alleged that his trial attorney's failure to object to the leg restraint was constitutionally inadequate. The post-conviction trial court denied all of petitioner's claims of inadequate assistance of counsel.

The Court of Appeals reversed. First, his claim of error could have been raised on direct appeal, see *State v Washington*, 355 Or 612, *cert denied* 135 S Ct (2014), thus it is procedurally barred under ORS 138.550(2). But reversal is required because the post-conviction trial court did not properly assess whether petitioner was prejudiced by the restraint. The jury being unaware of the restraint is not the only measure of prejudice. Other factors include whether the brace inhibited him from taking the stand, or affected his consultation with counsel.

9.5.7B Defendant's Silence

The state, at trial, may not call attention to a defendant's post-arrest silence. A prosecutor's comments to a jury that implicate a defendant's post-arrest silence generally are improper. But under both Article I, section 12, and the Fifth Amendment, a defense attorney during trial cannot

"open the door" to the reason for the defendant's post-arrest silence, and then complain that the prosecutor pointed out the defendant's silence to the jury. *State v Clark*, 233 Or App 553 (2010).

9.5.7.C Defendant's Nationality or Religion

In a case during voir dire, the prosecutor contrasted for the potential jurors a scenario that defendant had asserted he "was out of either Iran or Saudi Arabia" where an alleged rape victim was required to produce five male witnesses to prove the rape. One juror corrected the prosecutor, stating that the prosecutor was describing Sharia law, not the legal system of a country. The prosecutor used a peremptory challenge to remove that juror, a university student who "was of some type of Indian ethnicity," due to the student's "lack of life experience, combined with his chosen field of study" rather than "ethnicity or religious beliefs of the defendant." A jury was empaneled and sworn. Defense counsel asked for a curative instruction: that "the jury be instructed not to use defendant's race, religion, or ethnicity against him in reaching a verdict, and that the prosecutor's reference to Sharia law was merely an illustration of the difference between legal systems." The trial judge, Rick Knapp, "refused to give the proposed instruction, commenting that such an instruction was unnecessary as the jury did not know defendant's ethnicity or religion." The jury convicted defendant. The Court of Appeals reversed. The trial court abused its discretion by failing to give a proffered jury instruction. The "impartial jury" right in Article I, section 11, guarantees "indifference by jurors to matters of race and religion." Regardless of the prosecutor's motives, his was "conduct, blatant or subtle," that may "border[] on an attempt to introduce * * * issues of racial, ethnic, or religious bias." *State v Farokhrany*, 259 Or App 132 (2013).

9.5.8 Jury Selection

Article I, section 11, of the Oregon Constitution guarantees defendants a right to an impartial jury in criminal cases. A trial court determines whether a juror is biased based on "all the circumstances, including the challenged juror's demeanor, apparent intelligence, and candor." *State v Barone*, 328 Or 68, 74, cert denied, 528 US 1135 (2000).

"Because the trial court has the advantage of observing a challenged prospective juror's demeanor, apparent intelligence, and candor, that court's judgment as to the prospective juror's ultimate qualifications is entitled to great weight." *State v Dalessio*, 228 Or App 531, 536 (2009). Stated similarly, the Oregon Supreme Court "accord[s] 'great deference' to the trial court's assessment of a prospective juror's qualifications, because 'the trial court has the advantage of observing a challenged prospective juror's demeanor, apparent intelligence, and candor." *State v Turnidge*, 359 Or 364, 416 (2016) (citation omitted).

Review on challenges for juror's actual bias is for abuse of discretion. *Barone*, 328 Or at 74; *State v Vaughan-France*, 279 Or App 305, 318 (2016).

For a federal judge's limits on attorneys researching jurors in a civil case, see *Oracle America, Inc. v Google, Inc.*, 2016 U.S. Dist. Lexis 39675 (2016).

> ***State v Joshua Abraham Turnidge***, 359 Or 364 (2016). The Oregon Supreme Court affirmed defendant's conviction and sentence of death in this 160-page opinion. One of the 151 assignments of error involved the destruction of juror questionnaires. A trial

court gave written questionnaires to prospective jurors that stated that after voir dire, their completed forms would be destroyed. *Id*. at 406, 418. For the first time, after jurors completed the forms, defense counsel objected to the destruction of those forms, and the state agreed with defense counsel. The trial court rejected the attorneys' offers to scan and preserve the forms, because the trial court had told the prospective jurors the forms would be destroyed. The forms were destroyed. On direct appeal from his death sentence, defendant contended that the forms' destruction violated his due process rights. The Court concluded "only that the trial court was well-intentioned in its reasons for destroying the questionnaires" and the destruction "did not per se deprive defendant or due process." *Id*. at 420. However, the court wrote: "We do not endorse as appropriate the representation on the form that the questionnaires would be destroyed, not do we endorse the practice of destroying the questionnaires pursuant to that representation." *Id*. at 420-21. The destruction was "ill-advised" but did not prejudice defendant. *Id*. at 426. The Court also distinguished this case from a *Batson* challenge. No reversible error because no prejudice.

State v Vaughan-France, 279 Or App 305, *review denied* (2016) This is a kidnapping case where defendant kidnapped, strangled, bit, confined, and shoved knives at a female he held in a Eugene hotel room. During voir dire, attorneys and the court elicited statements from a juror during their colloquy indicating that she initially struggled with the effect that her own personal history would have on her ability to be fair. The juror "initially stated that she had been 'terrorized a lot and it just brings up a lot of emotions,' and that, although she probably could follow the court's instructions, 'I don't think I could be fair.' Defendant moved to dismiss that juror for cause, but the state argued that the motion was premature because the juror had only stated that she thought she could not be fair, but had not absolutely stated that she could not be fair." *Id*. at 318. The juror "later explained that she had a long past experience as a victim of domestic violence and had been raped as a young child. She also volunteered that she was a mental health counselor who worked with male felons. She stated that she did not know defendant and that, in her experience with the felons with whom she worked, she did not 'hold things against them, either.' During this part of the voir dire, she responded to the question whether she could be fair by stating "'I don't know. *** I'm still working on it.'" *Id*. at 317. She finally affirmed, in response to the court's questions, that she could set aside her past from the facts in this case and apply the law. Over defendant's objections to remove that juror for cause, the court included her on the empaneled jury that convicted defendant of numerous crimes.

The Court of Appeals affirmed the trial court's ruling that denied defendant's motion to remove that juror for cause. The Court of Appeals explained the legal standards as follows: "Under Article I, section 11, of the Oregon Constitution and the Sixth Amendment to the United States Constitution, defendants in a criminal trial are guaranteed a right to an impartial jury. ORCP 57 D(1)(g), applicable to criminal trials through ORS 136.210(1), provides that a party may challenge any prospective juror for "actual bias." To determine whether there is actual bias or lack of partiality, the trial court must determine "whether the prospective juror's ideas or opinions would impair substantially his or her performance of the duties of a juror to decide the case fairly and impartially on the evidence presented in court." *State v. Barone*, 328 Or 68, 74, 969 P2d 1013 (1998), *cert den*, 528 US 1135 (2000); see also *Wainwright v. Witt*, 469 US 412, 424, 105

S Ct 844, 83 L Ed 2d 841 (1985) (stating similar test for determining whether a juror should be excused for bias as whether "the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath" (internal quotation marks omitted)). Under our standard of review, "[t]he question whether a juror is biased is one of fact, to be determined by the trial court from all the circumstances, including the challenged juror's demeanor, apparent intelligence, and candor." *Barone*, 328 Or at 74. We have stated that, "[b]ecause the trial court has the advantage of observing a challenged prospective juror's demeanor, apparent intelligence, and candor, that court's judgment as to the prospective juror's ultimate qualifications is entitled to great weight." *State v. Dalessio*, 228 Or App 531, 536, 208 P3d 1021 (2009). As a result, we defer to the trial court's discretion on challenges for actual bias, and the trial court's rulings 'will not be disturbed except for abuse of discretion.' *Barone*, 328 Or at 74." *Id*. at 317-18 (footnotes omitted).

The court footnoted: "ORCP 57 D(1)(g) provides, in part, that a challenge for cause may be taken based on "actual bias," which is "the existence of a state of mind on the part of a juror that satisfies the court, in the exercise of sound discretion, that the juror cannot try the issue impartially and without prejudice to the substantial rights of the party challenging the juror." *Id*. at 317 n 5.

The Court of Appeals concluded that the trial court did not abuse its discretion by not dismissing the juror for actual bias. The court stated: "The juror concluded by affirming that she could apply the law and facts apart from the facts of her own past experience. As this is a factual issue for which the trial court may exercise discretion based on its first-hand observations, we conclude that there is not a clear factual record that [the] juror [] was biased in a manner that 'would impair substantially * ** her performance of the duties of a juror to decide the case fairly and impartially on the evidence presented in court.' *Barone*, 328 Or at 74." *Id*. at 319.

The Court of Appeals further concluded that the trial court did not abuse its discretion by not dismissing the juror for cause. The court stated: "[W]hile [the] juror [] initially made a statement that indicated that she did not think she could be fair, she later vacillated and finally concluded by saying that she could set aside her personal feelings and decide the case on the law and facts." *Id*. at 320.

9.6 Right to Counsel

> "Lawyers in criminal cases are necessities, not luxuries." *United States v Cronic*, 466 US 648, 653 (1984) (Sixth Amendment).
>
> "By the time *Gideon* famously declared the right to appointed counsel for all felony defendants, this right was already settled practice in every federal court as well as in forty-five of the states encompassing roughly 90 percent of the national population. * * * In short, a basic right to appointed counsel was already part of the fabric of America's lived Constitution. Of the twenty-five states that filed or signed onto legal briefs in the Gideon case, twenty-two sided with the indigent defendant." Akhil Reed Amar, AMERICA'S UNWRITTEN CONSTITUTION, p. 112.

See **Section 5.5 on Right To Counsel During Arrest**.

See ORS 151.211 *et seq* on statutory rights to counsel.

Article I, section 11, "mandates the appointment of counsel for all indigent defendants whose convictions may result in a loss of liberty." *Stevenson v Holzman*, 254 Or 94, 104 (1969).

Under Article I, section 11, a criminal defendant has the right to be represented by counsel at all critical states of a criminal proceeding. *State v Sparklin*, 296 Or 85, 94-95 (1983); *State v Erb*, 256 Or App 416, 421 (2013). Arraignment, pretrial hearings, trial, sentencing, and probation revocation all are critical stages of prosecution. *State v Jones*, 293 Or 312, 315 (1982); *State v Erb*, 256 Or App 416, 421 (2013); *State v Easter*, 241 Or App 574 (2011)).

"A criminal defendant has a constitutional right to counsel. US Const, Amend VI and XIV; Or Const, Art I, § 11. That right is predicated on the recognition that a criminal defendant is unlikely to have the skill and knowledge necessary to adequately protect his or her rights or interests. *Gideon v. Wainwright*, 372 US 335, 344 (1963) ('[L]awyers in criminal courts are necessities, not luxuries.'); *id*. (quoting *Powell v. Alabama*, 287 US 45, 68-69, 53 S Ct 55, 77 L Ed 158 (1932) ('The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. *** He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one.'). Criminal defendants rely on their trial counsel; indeed, with respect to certain decisions, they are required to do so. *See, e.g., State v. Dell*, 156 Or App 184, 187-88, 967 P2d 507, *rev den*, 328 Or 194 (1998) (a represented defendant does not have a right, under either the state or federal constitution, to serve as co-counsel); *State v. Becker*, 178 Or App 602, 607, 37 P3d 252, *rev den*, 334 Or 327 (2002) ('a defendant's counsel has full authority to manage the conduct of the trial' and, therefore, 'generally may—without personal endorsement by the defendant on the record—waive rights falling within that province')." *Gutale v State of Oregon*, 285 Or App 39, 44 n 1 (2017).

"Although an indigent criminal defendant has a right to the assistance of appointed counsel, that right is not to appointed counsel of the defendant's own choosing. *United States v Gonzalez-Lopez*, 548 US 140, 151 (2006)." *State v Langley*, 351 Or 652 (2012).

9.6.1 Pretrial and Trial

The right to assistance of counsel exists at arraignment. *State v Jones*, 293 Or 312, 315 (1982); *State v Hunt*, 271 Or App 603, 608 (2015). The right to assistance of counsel attaches "as of the time of charging." *State v Prieto-Rubio*, 359 Or 16, 24 (2016); *State v Savinskiy*, 286 Or App 232, 242 (2017). The right to assistance of counsel applies to pretrial hearings on admissibility of evidence. *State v Erb*, 256 Or App 416, 421 (2013). Trial is a critical stage of a criminal prosecution. The constitutional right to counsel attaches to trial. *State v Jones*, 293 Or 312, 315 (1982); *State v Erb*, 256 Or App 416, 421 (2013).

"Once an attorney is appointed or retained, 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 Newton*, 291 Or 788, 802 (1981); *State v Savinskiy*, 286 Or App 232, 238 (2017).

"Article I, section 11, can also foreclose interrogation of a defendant without his or her attorney present when the interrogation is regarding uncharged conduct and occurs after the defendant has retained counsel for a previously charged offense, if the charged and uncharged conduct is 'sufficiently related.'" *State v Savinskiy*, 286 Or App 232, 238 (2017) (quoting *State v Prieto-Rubio*, 359 Or 16, 36-37 (2016)).

To determine if uncharged conduct is related to charged conduct, the test whether "it is reasonably foreseeable to a person in the position of the questioner that questioning will elict incriminating information involving the charged offense for which the defendant has obtained counsel." *State v Prieto-Rubio*, 359 Or 16, 36-37 (2016); *State v Savinskiy*, 286 Or App 232, 238 (2017). Considerations to that end are time, place, the nature of defendant's conduct, and the nature of the investigation itself, and whether it involves the same or different people. *Savinskiy*, 286 Or App at 238 (citations omitted). The "subjective impressions of the interrogator have no bearing on that test." *Ibid*. (citing *Prieto-Rubio*, 359 Or at 37) (held: it was reasonably foreseeable to a person in the questioner's position that questioning a defendant would elicit incriminating statements about charged offenses, so as to violate defendant's Article I, section 11 rights).

In *State v Prieto-Rubio*, 359 Or 16 (2016), the defendant was arrested for sexually abusing a young family member. Other children reported defendant's sex abuse over ensuing months. A detective went to the jail where defendant was held on charges relating to the first child, knowing that defendant had retained an attorney on those charges but without notifying that lawyer. Defendant made incriminating statements. He was charged with sex crimes related to the other children. The Supreme Court held that the detective's interrogation violated Article I, section 11. The "appropriate test for determining the permissible scope of questioning of a criminal defendant who is represented by counsel is whether it is objectively reasonably foreseeable that the questioning will lead to incriminating evidence concerning the offense for which the defendant has obtained counsel. In this case, the charged and uncharged offenses were so closely related that it was reasonably foreseeable that questioning defendant about the uncharged offenses would elicit incriminating evidence about the charged offense." The remedy for a violation of Article I, section 11, is the exclusion of any prejudicial evidence obtained as a result of that violation." *Id*. at 38 (citing *State v Dinsmore*, 342 Or 1, 10 (2006)).

9.6.2 Uncharged or Other Crimes

This is an uncertain area of law, that is, whether a violation of the right to counsel includes obtaining evidence of uncharged crimes. The Oregon Supreme Court has not squarely ruled on that issue, but the Court of Appeals has. The Oregon Supreme Court wrote, in *State v Sparklin*, 296 Or 85, 93 (1983):

"Once an attorney is appointed or retained, 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." In *State v Prieto-Rubio*, 359 Or 16, 37 (2016), the Court wrote that the *Sparklin* rule applies to any interrogation in which "it is reasonably foreseeable to a person in the position of the questioner that questioning will elicit incriminating information involving the charged offense for which the defendant has obtained counsel." See also *State v Beltran-Solas*, 277 Or App 665, 669 (2016) (quoting same).

In *State v Beltran-Solas*, 277 Or App 665, 669 (2016), the Court of Appeals wrote: "It would seem to follow from [*State v Sparklin*, 296 Or 85 (1983)], that, to the extent that questioning about uncharged offenses may foreseeably lead to *** incriminating information about the charged offense, it is foreclosed by the state constitutional right to counsel." "If a defendant is interrogated in violation of the *Sparklin* rule, then any evidence discovered as result of that unlawful interrogation—including evidence of other crimes—must be suppressed unless the state demonstrates that the evidence was 'obtained by means separate from the' unlawful interrogation. [*State v Staunton*, 79 Or App 332, 339 (1986)]." *Ibid*.

In 2017, the Court of Appeals wrote these statements: "The Article I, section 11, right to counsel does not attached to uncharged crimes." *State v Savinskiy*, 286 Or App 232, 242 (2017). But "'[i]f a defendant is interrogated in violation of' their Article I, section 11, right to counsel, 'any evidence discovered as a result of that unlawful interrogation . . . must be suppressed." *Ibid*. (quoting *State v Beltran-Solas*, 277 Or App 665, 669 (2016). "That includes 'evidence of other crimes,' including uncharged crimes, unless 'the state demonstrates that the evidence was obtained by means separated from the unlawful interrogation.'" *Ibid*. (quoting *Beltran-Solas,* 277 Or App 669) (suppressing "other crimes" evidence).

State v Savinskiy, 286 Or App 232 (6/14/17) (Clatsop) (Shorr, Armstrong, Tookey)

9.6.3 Waiver

ORS 135.045 provides for appointment and waiver of counsel in criminal cases. No Oregon appellate court has interpreted the current text of that statute. *State v Hunt*, 271 Or App 603, 607 n 1 (2015); *see also State v Phillips*, 235 Or App 646, 651, *modified on recons*, 236 Or App 465 (2010) (same).

Article I, section 11, of the Oregon Constitution allows a criminal defendant to waive the right to counsel "only if a trial court finds that (1) 'the defendant knows of his or her right;' and (2) 'the defendant intentionally relinquishes or abandons that right.'" *State v Clardy*, 286 Or App 745, 754 (2017) (quoting *State v Myrick*, 313 Or 125, 133 (1992)).

"'A defendant whose waiver of counsel is accepted without first being apprised of the risks of self representation cannot be expected to object to acceptance of that waiver on the ground that he or she was not apprised of those risks.' *State v Cole*, 323 Or 30, 36, 912 P2d 907 (1996); *see also State v Morrow*, 192 Or App 441, 444-45, 86 P3d 70, *rev den*, 337 Or 282 (2004) ('When a defendant who appeared pro se at trial contends, for the first time on appeal, that his or her waiver of counsel was invalid, that argument is preserved without the need for an objection at trial.')." *State v Haines*, 283 Or App 444, 449-50 (2017) ("Here, defendant was not apprised of the risks of self-representation and is therefore excused from our preservation requirements.").

A criminal defendant may waive the right to be represented by counsel at critical stages in criminal proceedings; the waiver must be voluntarily and intelligently made. *State v Meyrick*, 313 Or 125, 132 (1992). The "intelligently" element "refers to a defendant's *knowledge and understanding* of the right to counsel." *State v Erb*, 256 Or App 416, 420 (2013) (quoting *Meyrick*, 313 or at 132 n 8). The "knowledge" part of the "intelligently" element means that the defendant "substantially appreciates the material risks of self-representation." *State v Kim*, 271 Or App 196, 205 (2015); *State v Jackson*, 172 Or App 414, 423 (2001).

"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.'" *State v Meyrick*, 313 Or 125, 137 (1992) (quoting *Faretta v California*, 422 US 806, 836 (1975)).

A "colloquy on the record is the preferred method of establishing that the waiver was made knowingly," but courts "will also affirm a trial court's acceptance of a defendant's waiver of the right to counsel where, under the totality of the circumstances, the record reflects that the defendant knew of the right to counsel and understood the risks of self-representation." Evidence to establish an inference of a "knowing" waiver can be the defendant's "prior experience with the criminal justice system," his "first-hand experience of 'some of the basic things that an attorney could do,'" and a "request for retained counsel." *State v Easter*, 241 Or App 574 (2011).

"A defendant may elect to waive his or her right to counsel and proceed pro se" as long as the waiver is "knowing and intentional" per *State v Meyrick*, 313 Or 125, 133 (1992). On a counsel's motion to withdraw, "a trial court may inquire into a defendant's position on defense counsel's motion" but "the defendant has no burden to provide information" on the motion. A defendant may waive the right to counsel by his conduct, "so long as the conduct adequately conveys the defendant's knowing and intentional choice to proceed in court without counsel." *State v Langley*, 351 Or 652 (2012).

A trial court may accept a defendant's proffered waiver of counsel only if it finds that the defendant knows of his or her Article I, section 11, right to counsel and, if indigent, of his or her right to court-appointed counsel, and that the defendant intentionally relinquishes or abandons that right. *State v Meyrick*, 313 Or 125, 133 (1992). Under *Meyrick*, to determine if a defendant has intentionally relinquished or abandoned that right, appellate courts examine the record as a whole and consider the defendant's age, education, experience, and mental capacity, the charge, the possible defenses, and other relevant factors. *State v Phillips*, 235 Or App 646, *modified on reconsideration*, 236 Or App 465 (2010).

Usually, no colloquy = no knowing waiver. For example, a trial court must ensure that a defendant "must understand the risks of self-representation" for the waiver to be "knowingly" made. No "catechism" is required, and the "particular risks" do not need to be understood, but more than an "abstract knowledge that there may be risks and disadvantages of self-representation" must be understood. *State v Todd*, 264 Or App 370, rev den 356 Or 401 (2014) (trial court did not "discuss the risks of self-representation or determine whether defendant understood those risks" and thus defendant's waiver of right to counsel was not knowing). However, particularly when a defendant asserts the "flesh and blood" defense, he will refuse to engage with the trial court and will place "the trial court in the position of having to move forward with trial without getting an answer to its inquiries about appointed counsel." *State v Menefee*, 268 Or App 154, 172 (2014).

9.6.3.A "Implicit" Waiver

In these difficult cases where a defendant seems to "implicitly" waive his right to counsel and represent himself, the trial court must be very careful in warning the defendant of the consequences of his behavior, so as to provide him with facts to make knowing waiver. In *State v Guerrero*, 277 Or App 836 (2016), defendant was on trial for first-degree assault and unlawful use of a weapon. He had 12 prior convictions so he "was familiar with the criminal justice system." After several motions to withdraw, by three successive attorneys, defendant told the court that he "will represent himself" and he needed time to prepare. The court gave defendant the choice of keeping the third attorney and not testifying or representing himself and testifying. The trial court found that defendant had made an implicit waiver of his right to counsel. Defendant represented himself and a jury convicted him. The Court of Appeals reversed. Having a history of criminal convictions "is not necessarily enough to show that a defendant understood the risks of proceeding without counsel." The state did not prove that defendant understood "the risks of self-representation," thus his waiver was not "knowing." "Further, at no relevant point did the trial court warn defendant of the specific disadvantages of representing himself of that self-representation would be unwise or detrimental to his case." *Id*. at 849. For an implied waiver, defendant must have received advance warning that the continuation of his behavior would result in being forced to proceed pro se and he must have been given a reasonable opportunity to explain himself such that the court is able to consider all sides of the dispute. A "defendant who engages in further misconduct *after* being warned of its consequences (being forced to proceed pro se) may be deemed to have 'understood' those consequences." *Id*. at 845.

> ***State v Lacey***, 282 Or App 123 (11/09/16) (Lagesen, Ortega) (Garrett dissenting). After defendant forfeited his right to be present and his right to self-representation, the trial court continued the trial in defendant's absence. This case was tried before *State v Menefee*, 268 Or App 154 (2014). Defendant was convicted.
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> The Court of Appeals reversed and remanded in a split opinion. It held that the trial court violated defendant's constitutional rights by conducting closing arguments in his absence without either taking steps to protect defendant's "right to representation" or securing defendant's "waiver" of that right. The Court of Appeals concluded that the trial court did not secure a waiver of defendant's right to representation, it did not appoint counsel, and it did not take other measures to protect defendant's right to representation after it removed him from the courtroom. As a result, the court held that

defendant was deprived both of closing argument and the ability to participate in the trial on the sentencing enhancement factors.

The Court of Appeals majority also followed *United States v Mack*, 362 F3d 597 (9th Cir 2004), describing a recent federal case at footnote 2:

> "The district court's warnings to the self-represented defendant in *United States v. Bundy*, No 3:16-cr-00051-BR-5 (D Or 2016), and the process that it employed to address the defendant's misconduct, illustrate the type of warnings and process contemplated by *Mack*. In response to misconduct by the defendant in that case, the court repeatedly warned the defendant that, as allowed by *Faretta v. California*, 422 US 806, 834 n 46, 95 S Ct 2525, 45 L Ed 2d 562 (1975), and as contemplated by *Mack*, the court would terminate his right to self-representation and re-appoint his previously appointed counsel to represent him. Minute Order, *United States v. Bundy*, No 3:16-cr-00051-BR-5 (D Or Jul 29, 2016), ECF 955 (citing *Faretta*); Order to Show Cause as to Defendant Ryan Bundy, *United States v. Bundy*, No 3:16-cr-00051-BR-5 (D Or Aug 24, 2016), ECF 1101 (citing *Faretta* and *Mack*). When the court concluded that the defendant's misconduct risked prejudice to the "fair administration of justice," it directed the defendant to show cause why the court should not declare his right to self-representation forfeited, and re-appoint counsel. Order to Show Cause as to Defendant Ryan Bundy, *United States v. Bundy*, No 3:16-cr-00051-BR-5 (D Or Aug 24, 2016), ECF 1101. By alerting the defendant that the consequence of his misbehavior would be the forfeiture of the right to self-representation and the appointment of counsel, the court's warnings informed the defendant that he had retained the right to representation even upon forfeiture of the right to self-representation. Such warnings laid the groundwork for the knowing and intelligent waiver of the right to representation that exists upon the forfeiture of the right to self-representation although, ultimately, the court in the *Bundy* case decided not to declare a forfeiture of the right to self-representation."

The dissent would have affirmed: "This case is not like *State v Menefee*, 268 Or App 154, 341 P3d 229 (2014), on which the majority relies, for the simple reason that, here, defendant was fully warned of the consequences of his misconduct. He was warned that he would be removed, and the trial court repeatedly made it clear not only that defendant would lose the right to represent himself, but that he would be left without any representation while the trial continued. By giving defendant every imaginable warning and, then, by doing exactly what it said it would do, the trial court committed no error."

9.6.3.B Implicit Waiver by Conduct

A defendant's waiver of the right to counsel may be demonstrated by conduct. *State v Langley*, 351 Or 652 (2012). Three criteria must be met to establish waiver by conduct: (1) "engaging in repeated misconduct in the attorney-client relationship" that "defeats the ability of counsel to carry out the representation function"; (2) an "'advance warning [to the defendant] that continuation of [his or her] abusive behavior would result in * **

being forced to proceed pro se'" and; (3) a reasonable opportunity for the defendant to "present his or her position on the facts in a manner that permits, if appropriate, the safeguarding of confidential communications and trial strategy from public disclosure." *Id*. at 669-73 (quoting Wayne R. LaFave 3 Criminal Procedure § 11.4(b), 705-06 nn 29-31 (3d ed 2007)); *State v Clardy*, 286 Or App 745, 761 (2017). *Langley* concluded that the defendant had not waived the right to counsel by conduct. *Id*. at 670-73. *Clardy* concluded that the defendant had waived the right to counsel by conduct. 286 Or App at 763.

State v Clardy, 286 Or App 745 (7/19/17) (Multnomah) (Tookey, DeHoog, Sercombe) Defendant, convicted of pimping, robbing, assaulting, tampering with a witness, and other crimes, alleged that the trial court had erred when it concluded he'd waived his right to counsel *by his conduct* and by denying his request for appointment of new counsel after his final attorney withdrew. Several trials were held on different charges. Numerous attorneys had been appointed in succession. The last two attorneys asserted that no attorney could be prepared for such a complex trial with only a week to prepare. However defendant refused to consent to a continuance. Defendant asserted his right to represent himself. The court allowed that but required one attorney to remain on as an advisor until a new attorney was appointed later that day. Then the new attorney asked for a continuance, which defendant refused to consent to. That new attorney said he could not prepare sufficiently. The court allowed that new attorney to withdraw but required him to remain as an advisor. Defendant refused again to consent to a continuance. Defendant physically yanked his attorney-advisor's tie and threatened him. Defendant repeatedly asked to have that attorney withdraw. The court ordered defendant shackled to his chair. Defendant had threatened to "head butt" his attorney, a witness, or a juror," or to cause a mistrial. *Id*. at 750. More such activity occurred, with more successive attorneys reporting "abuse" by defendant of them. Defendant threatened to rape police officers' wives and kids, tried to spit in court, was shackled in a wheelchair, with a smock because he refused to dress, and his head bagged to contain him from spitting at jurors, see Oregonian article.

In a complicated consolidated appeal, the Court of Appeals affirmed some convictions but reversed based on his demurrer to an inadequate indictment. Regarding waiver of counsel, the court recited *State v Meyrick*, 313 Or 125 (1993), the court concluded that defendant had waived his right to counsel by his own conduct. The court so concluded based on the record and the totality of the circumstances. Defendant *at his sentencing* "testified at length about his extensive criminal history and involvement with the criminal justice system, and the state entered his previous convictions as exhibits for the purposes of his sentencing." *Id*. at 757. He had 11 convictions, with two jury trials, in the past decade, with seven separate experiences where he was represented by counsel. *Ibid*. Further, defendant had observed his attorney in jury trial immediately preceding this trial. *Id*. Further, defendant repeatedly stated that he wanted new counsel because he lacked legal knowledge, but that "suggests that defendant understood the risks of proceeding without counsel." *Id*. at 758. The trial judge also warned defendant that the state had 30 witnesses and 1,000 pages of discovery, but defendant refused to consent to a continuance of his trial, even when his own new attorney asserted that he couldn't be ready for trial in less than one week. Defendant said it's "not his fault" that he and his attorney had "all these conflicts." In sum the waiver was knowing.

The waiver also was intentional. The court recited the three *State v Langley* criteria to determine waiver by conduct. Defendant engaged in repeated misconduct that was abusive and defeated the ability of his last three court-appointed attorneys to act (such as trying to grab his attorney's necktie in an apparent attempt to injure his attorney). Defendant also threatened each of the three. The court also warned defendant about the risks of threatening and abusing one's own lawyers. The court also gave defendant a chance to present himself in confidential hearings outside the presence of the state. "Thus, unlike in Langley [where the Court concluded there had been no waiver by conduct], the trial court in this case considered information that came directly from defendant and did not err when it concluded that defendant intentionally waived his right to counsel by conduct." *Id*. at 764. No error under the state or federal constitutions. The court addressed the Sixth Amendment right to waive counsel under *State v Meeks*, 987 F2d 575 (9th Cir 1993), *cert den*, 510 US 919 (1993) and *Faretta v California*, 422 US 806 (1975).

9.6.3.C Midtrial Waiver & Self-Representation

The rights to representation by counsel and to self-representation "are mutually exclusive." *State v Hightower*, 361 Or 412, 417 (2017). The accused in a trial "has a choice either to be represented by counsel or to represent himself." *Ibid*. By asserting the right to counsel, the accused waives the right to self-representation. By waiving the right to counsel, the accused asserts the right to self-representation. *Ibid*.

The "timing of a defendant's waiver matters." *State v Hightower*, 361 Or 412, 417 (2017). After a trial begins, "interests other than the defendant's" matter. *Ibid*. Those other interests are "the trial court's overriding obligation to ensure the fairness and integrity of the trial and its inherent authority to conduct proceedings in an orderly and expeditious manner" in ORS 1.010(3). Note: the Court characterized "those other interests" only as "an orderly and expeditious proceeding." It did not identify any other rights of any kind.

A defendant may waive his right to counsel, but only if he does so knowingly and intentionally. *State v Langley*, 351 Or 652, 665-66 (2012). If a trial court errs by allowing a defendant to proceed at critical stages without counsel, violating Article I, section 11, that error does not require reversal if it is harmless. Error is harmless if there is little likelihood that it affected the outcome in the case. *State v Cole*, 323 Or 30, 36 (1996); *State v Erb*, 256 Or App 416, 427 (2013).

"To knowingly waive the right to counsel, a defendant must be aware of the right to counsel and also understand the risks inherent in self-representation." *State v Haines*, 283 Or App 444, 451 (2017). "An on-the-record colloquy is the preferred method of establishing that a defendant knowingly waived the right to counsel." *Ibid*. The "failure to even mention any of the risks of self-representation, or put on the record any facts indicating that defendant understood the risks, is akin to the circumstances that we have described as *prima facie* error." *Ibid*. (quoting *State v. Todd*, 264 Or App 370, 380 *rev den*, 356 Or 401 (2014)). "Under the totality of the circumstances, however, if the record reflects that the defendant understood the risks of proceeding without counsel—that is, a defendant 'substantially appreciates the material risks of self-representation in his or her case'— [the court] will affirm a trial court's acceptance of a defendant's waiver." *Ibid*. (quoting *State v Jackson*, 172 Or App 414, 423 (2001)). "The circumstances that can support a

determination that a defendant understood the risks of self representation include a defendant's prior experience with the criminal justice system, *State v Reynolds*, 224 Or App 411, 419, 198 P3d 432 (2008), *rev den*, 346 Or 158 (2009); a defendant's firsthand experience of "some of the basic things that an attorney could do," *id*.; and a defendant's request for retained counsel, *State v Brown*, 141 Or App 156, 163, 917 P2d 527, *rev den*, 323 Or 691 (1996)." *Ibid*. Abstract knowledge that there may be risks or disadvantages of self-representation, without any appreciation of what those risks may be, is insufficient. *Ibid*. (held: waiver not knowing because the "trial court never provided any colloquy about the risks of self-representation.").

> ***State v Hightower***, 361 Or 412 (4/27/17) (Multnomah) (Landau) (Baldwin not participating) Defendant was on trial for sex abuse of teenagers. He was unsatisfied with court-appointed counsel. During the first three days of trial, he made numerous requests for a replacement attorney, objected during trial testimony, and complained. The judge told him twice that he'd be sent out of court if he didn't stop objecting. On the fourth day, he told the judge he wanted to represent himself several times. The judge said, "Here's the thing. …. You don't change horses in the midstream." When defendant corrected the judge by saying that he did have that right, the judge said, "Well, actually not" and denied his motion to represent himself and waive his right to counsel. Again later the judge said that he did not have that right midtrial. Defense counsel renewed the motion. The judge again denied it. The jury convicted defendant of seven counts. Defendant was sentenced to life in prison without the possibility of parole under ORS 137.719. The Court of Appeals affirmed.
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> The Oregon Supreme Court reversed and remanded. Although the trial court is usually reviewed for abuse of discretion, here the judge erred as a matter of law. A defendant does have the right to waive the right to counsel and proceed pro se midtrial. The Court explained as follows.
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> The rights to representation by counsel and to self-representation "are mutually exclusive." *Id.* at 417. The accused in a trial "has a choice either to be represented by counsel or to represent himself." *Ibid*. By asserting the right to counsel, the accused waives the right to self-representation. By waiving the right to counsel, the accused asserts the right to self-representation. *Ibid*.
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> The "timing of a defendant's waiver matters." *Id.* After a trial begins, "interests other than the defendant's" matter. *Ibid*. Those other interests are "the trial court's overriding obligation to ensure the fairness and integrity of the trial and its inherent authority to conduct proceedings in an orderly and expeditious manner" in ORS 1.010(3). *Id*. at 417-18. Note: the Court characterized "those other interests" only as "an orderly and expeditious proceeding." It did not identify other rights of any kind.
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> "[I]f a defendant who has previously asserted the right to counsel waits until well into the conduct of trial to attempt to waive that right and proceed pro se, he or she has not necessarily relinquished permanently the right to self-representation, as the state suggests. But the trial court's decision concerning the defendant's request is subject to appellate review for an abuse of discretion, in light of all other relevant interests that come into play at the commencement of trial. For example, a trial court may exercise its discretion to deny a motion for self-representation that is conditioned on the grant of a

continuance. Or it may reasonably deny the motion if it has reason to conclude that granting the motion would result in disruption of proceedings." *Id*. at 418.

"[T]he record must include some indication of how the trial court actually weighed the relevant competing interests involved for an appellate court to be able to determine whether the trial court abused its discretion in ruling on a request to waive the right to counsel and proceed pro se." *Id*. at 421. "[I]f a court's decision as to whether to grant a request for self-representation turns on the court's legal conclusions as to the scope of the right, that determination is reviewed for errors of law." *Id*.

State v Ortega, 286 Or App 673 (2017) The Court of Appeals held that the trial court erred in denying a defendant's request to represent himself a trial. The trial court precluded defendant from waiving counsel and representing himself. The "trial court never assessed whether defendant's putative waiver of appointed counsel was intelligent and understanding. Nor does the record disclose, much less substantiate, any discretionary determination by the trial court that allowing defendant to represent himself would be disruptive of the orderly conduct of the trial in a way that would be unreasonable under the circumstances, including delaying the progress of the trial." (quotations omitted).

The Oregon Court of Appeals summarized waivers of counsel and self-representation in *State v Williams*, 288 Or App 712 (2017):

"Article I, section 11, guarantees criminal defendants both the right to counsel and the right to self-representation. *State v Hightower*, 361 Or 412, 416, 393 P3d 224 (2017). A defendant is not entitled to exercise both rights concurrently. *See State v. Stevens*, 311 Or 119, 124-25, 806 P2d 92 (1991) (Article I, section 11, does not guarantee the right to "hybrid" representation.). A defendant may, however, seek midtrial to waive his or her previously invoked right to counsel and proceed without representation for the remainder of the trial. *Hightower*, 361 Or at 418. At that stage, the right to self-representation is qualified, and the denial of a defendant's midtrial request to proceed pro se is appropriate if either of two circumstances is present. First, a trial court must deny the request if the defendant's attempt to waive counsel is not knowing and voluntary. *State v. Meyrick*, 313 Or 125, 133, 831 P2d 666 (1992). Second, the court may deny such a request if it determines that the defendant's right to self-representation is outweighed by the court's "overriding obligation to ensure the fairness and integrity of the trial and its inherent authority to conduct proceedings in an orderly and expeditious manner." *Hightower*, 361 Or at 417-18 (citing ORS 1.010(3)). 'For example, a trial court may exercise its discretion to deny a motion for self-representation that is conditioned on the grant of a continuance. Or it may reasonably deny the motion if it has reason to conclude that granting that motion would result in disruption of proceedings.' *Id*. at 418.

"[Appellate courts] review for abuse of discretion a denial of self-representation based on considerations of disruption or delay, *Hightower*, 361 Or at 418, but review any underlying legal conclusions, such as the scope of the right to self-representation, for errors of law, *id*. at 421. On review for abuse of discretion, the record must indicate that 'the trial court actually weighed the relevant competing interests involved,' i.e., the right to self-representation and the need for an orderly and expeditious trial. *Id*. A court's findings and reasoning need not be express, 'so long as the record reveals the reasons for

the trial court's actions." However, it is "not sufficient that an appellate court may be able to speculate about what might have been the trial court's rationale for its decision.' Id. (emphasis in original); see *State v. Guzek*, 358 Or 251, 269, 363 P3d 480 (2015), *cert den*, ___ US ___, 137 S Ct 1070 (2017) (describing a "functional" standard for determining whether a court's findings and reasoning are sufficiently clear in the record to support the exercise of discretion)."

State v Williams, 288 Or App 712 (11/08/17) (Multnomah) (DeHoog, Egan, Aoyagi) Defendant was represented by court-appointed counsel for a full day at his trespass trial. Then he informed the court that he wanted to fire his attorney and proceed pro se. The court stated that defense counsel was providing "excellent representation" and that it would not have been possible for counsel to have accomplished what defendant wished had happened during cross-examination. The court opined that defendant would be "at a severe disadvantage in terms of the outcome of the trial" if he were to dismiss his attorney. The court also stated that defendant's decision, including any request for a legal advisor instead of an attorney, "should have been done long ago." The court denied defendant's request, and a jury convicted defendant the next day. The Court of Appeals reversed and remanded, citing *State v Hightower*, 361 Or 412, 416, 393 P3d 224 (2017) and explaining as follows:

> "[The trial] court's focus on defense counsel's performance, together with its view that defendant could not 'adequately' represent himself or would not be 'able' to do so, suggests [an erroneous] decision on that basis . . . *See State v Miller*, 254 Or App 514, 524, 295 P3d 158 (2013) (error to deny right to self-representation based on the defendant's 'best interest'); *State v. Ormsby*, 237 Or App 26, 29, 238 P3d 421 (2010) (agreeing with the state's concession that 'the trial court's finding that defendant lacked the knowledge and skill to take his case to trial was not sufficient to deny defendant his constitutional right to represent himself')." *Id*. at 718 n 3.
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> "[T]he court's comments to defendant do not reflect an awareness that it was required to balance any such concerns against defendant's right to self-representation. Indeed, the court's statement that, unlike the right to counsel, the question of self-representation 'is a decision that is made by the Judge' suggests that the court may not have understood that the right to self-representation is constitutionally protected. In any event, the record does not demonstrate, expressly or implicitly, that the trial court engaged in the required balancing of defendant's right to self-representation against the need for an orderly and expeditious trial. See *Hightower*, 361 Or at 421 (requiring that balancing). Accordingly, there is no basis on which to conclude that the court's ruling was a proper exercise of its discretion." *Id*. at 718.

9.6.3.C Restraints

In *State v Washington*, 355 Or 612, *cert den*, __ US __, 135 S Ct 685 (2014), the Oregon Supreme Court has affirmed a trial court's ruling requiring a defendant to wear a "REACT Band-it" by the Stinger Company over defendant's objection that wearing it impeded his effort to assist in his own defense. The REACT Band-It is a one-pound stun belt worn under clothes, either on a limb or lower back, classified as a "neuromuscular incapacitation device" with "high levels of voltage with very low amperage" that causes muscle contraction, urination, defecation, falling, and the

making of "loud noises." It was not visible. The trial court made detailed findings after a hearing that involved witnesses describing what the belt does, and why defendant should wear it. Defendant was seated 30 feet from witnesses, he was a gang member, he had intimidated witnesses, he was an escape risk, he was very strong and could overpower people, and had told jail officers that they weren't his boss. The trial court found each day that the trained personnel would operate the device, it was not visible, and would not impede defendant's movements. *State v Washington*, 355 Or 612, *cert den*, ___ US ___, 135 S Ct 685 (2014). *See also* *State v Guzek*, 358 Or 251 (2015) (stun belt worn under clothing during penalty-phase of capital murder case upheld).

9.6.4 Post-Trial

Sentencing is a "critical stage" of a criminal proceeding to which defendants have a right to counsel under Article I, section 11, of the Oregon Constitution. *State v Jones*, 293 Or 312, 315 (1982); *State v Erb*, 256 Or App 416 (2013).

The right to assistance of counsel exists at probation revocation proceedings. *State v Jones*, 293 Or 312, 315 (1982); *State v Hunt*, 271 Or App 603, 608 (2015).

9.7 Right to Self-Representation

9.7.1 Introduction

Under Article I, section 11, and the Sixth Amendment, a criminal defendant has a right to be represented by counsel <u>and</u> 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)).

The right to self-representation "does not allow a party to prosecute an action individually *and* through an attorney. The right to engage in so-called 'hybrid representation' has been rejected by [the Oregon Supreme Court] in the context of criminal proceedings, despite the fact that criminal defendants have a constitutional right to self representation under Article I, section 11." *Johnson v Premo*, 355 Or 866, 872-73 (2014); *State v Stevens*, 311 Or 119, 123-25 (1991).

9.7.2 Forfeiture and Waiver

A. Forfeiture

A "trial court may deny that right 'where dispensing with an attorney's services would disrupt the orderly conduct of trial.'" *State v Kinney*, 264 Or App 612 (2014) (quoting *State v Verna*, 9 Or App 620, 627 (1972) and citing *State v Davis*, 110 Or App 358, 360 (1991)). A trial court may deny self-representation on an anticipated disruption of the judicial process. *State v Miller*, 254 Or App 514, 524 (2013); *State v Kinney*, 264 Or App 612 (2014). In other words, the trial court does not need to wait until a defendant has disrupted a trial to rule on defendant's motion to represent himself. *Ibid*. (no error where trial court observed defendant's behavior the day before trial and on the day of trial, and denied his motion to represent himself before the trial commenced).

B. Waiver

The "right to self-representation is not unlimited. A trial court may not allow a defendant to proceed *pro se* without first determining that the defendant's decision to waive his or her right to counsel is 'intelligent and understanding.'" *State v Hightower*, 275 Or App 287, 292 (2015) (quotation omitted). A "trial court may deny a self-representation request if it is unclear or equivocal or if granting the request will result in the 'disruption of the orderly conduct of the trial.'" *Id*. (understanding the trial court's order denying self-representation, made late in trial to put on irrelevant evidence, to have been based on an implicit finding of disruption) (quoting *State v Blanchard*, 236 Or App 472, 476 (2010).

"When a defendant asks to represent himself, the court must determine, on the record, whether his decision is an intelligent and understanding one." *State v Miller*, 254 Or App 514 (2013) (quoting *State v Davis*, 110 Or App 358, 360 (1991)). "Further, the court must 'determine whether granting the defendant's request would disrupt the judicial process.'" *Miller*, 254 Or App 514 (2013).

"The request for self-representation and waiver of legal representation may be denied under Article I, section 11, * * * if the request is unclear or equivocal or if it would result in the disruption of the orderly conduct of the trial" per *State v Blanchard*, 236 Or App 472 (2010). "[I]t

was within the discretion of the trial court to deny the midtrial request if the court concluded that the timing of the change or other consequences of the self-representation would be disruptive of the orderly conduct of the trial in a way that would be unreasonable under the circumstances." The trial court has "discretion to deny an unequivocal, knowing, and intelligent request for self-representation." *State v Fredinburg*, 257 Or App 473 (2013).

9.8 Rights to be Heard, to Testify, and to be Present

9.8.1 Right to be Heard

Article I, section 11, provides in part: "In all criminal prosecutions, the accused shall have the right * * * to be heard by himself and counsel[.]" That right was included in the original Oregon Constitution and no debate or comment on it is reported. Claudia Burton and Andrew Grade, *A Legislative History of the Oregon Constitution of 1857 – Part I*, 37 WILLAMETTE L. REV. 469, 518-19 (2001); *cf*. *State v Douglas*, 292 OR 516, 527 (1982) (Lent, J, specially concurring).

"Article I, section 11, grants two distinct, not overlapping, rights: the defendant's right to make a statement and to testify, and the defendant's right to be represented by counsel." *State v Stevens*, 311 Or 119, 124 (1991).

A defendant has the Article I, section 11, right to make an unsworn statement to the jury during the penalty phase of a capital proceeding. *State v Rogers*, 330 Or 282, 296-300 (2000). That right is limited to sentencing proceedings. *State v Wilcher*, 262 Or App 758 (2014) (defendant does not have the right to make an unsworn statement to the jury during the guilt phase of his criminal trial).

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

9.8.2 Right to Testify

Under the Fourteenth Amendment's Due Process Clause and the Compulsory Process Clause of the Sixth Amendment, a criminal defendant has a right to take the witness stand and testify on his own defense. *Rock v Arkansas*, 483 US 44, 49 (1987). "The opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony." *Id*. at 52-53. The Ninth Circuit has concluded that a defendant has a constitutional right to be present at his pretrial competency hearing, and to testify at one. *United States v Gillenwater*,717 F3d 1070, 1085 (9th Cir 2013). "[W]hen a defendant chooses to testify in a criminal case, the Fifth Amendment does not allow him to refuse to answer related questions on cross-examination. A defendant 'has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts.' *Fitzpatrick* v. *United States*, 178 U. S. 304, 315 (1900)." *Kansas v Cheever*, 571 US __ (2013) ("We hold that where a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state to commit a crime, the prosecution may offer evidence from a court-ordered psychological examination for the limited purpose of rebutting the defendant's evidence.").

Defendants decide whether to testify based on lots of factors. *State v Moore/Coen*, 349 Or 371 (2010), *cert denied*, 131 S Ct 2461 (2011). Sometimes a defendant makes pretrial admissions that the state introduces against him during trial. A defendant may decide he wants to testify to explain those pretrial admissions. If an appellate court determines that a defendant's constitutional rights were violated by the state's collection of his pretrial statements, it is "assumed" that his trial testimony was tainted by those erroneously admitted pretrial statements. That is because the defendant may have chosen to testify because the state used those statements against him during trial. *Moore/Coen*, 349 Or at 385. On remand and retrial, the state may try to introduce the defendant's first trial testimony in his second trial (even if it cannot introduce the pretrial statements). But the defendant's trial testimony from his first trial must be excluded unless his first trial testimony "did not refute, explain, or qualify the erroneously admitted pretrial statements." *Id*.

The Oregon Court of Appeals has upheld the trial court denial of a defendant's request to present his version of the facts to a jury, unsworn, during his case-in-chief. *State v Wilcher*, 262 Or App 758 (2014). Although under *State v Stevens*, 311 Or 119 (1991), a defendant has a right to address the jury directly during the penalty phase of a death-penalty case, a defendant does not have an Article I, section 11, right to do so during the guilt phase of a criminal trial. All testifying witnesses are subject to procedural requirements, such as taking an oath (OEC 603), answering questions on cross (ORS 136.643), and being subject to impeachment (OEC 607).

9.8.3 Right to be Present

No case has held that Article I, section 11, of the Oregon Constitution secures a defendant's right to be present at trial. *State v Menefee*, 268 Or App 154, 176 n 12 (2014).

The Oregon Court of Appeals has not precisely identified whether the Due Process Clause or the Confrontation Clause of the U.S. Constitution protects a criminal defendant's "right to be present" at trial. *See, e.g.*, *State v Menefee*, 268 Or App 154, 176 (2014) ("Under the federal constitution, a criminal defendant has the right to be present at his or her trial."). The *Menefee* Court recited *Illinois v Allen*, 398 US 915 (1970) to adopt "three constitutionally permissible ways to deal with a disruptive defendant." *Id*. at 176. Those are: "(1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly." *Ibid*. In *Menafee*, the Court of Appeals concluded that the trial court acted within its discretion under the state constitution by removing the intentionally disruptive defendant. *Id*. at 182. However, the court erred "under the federal constitution," by *proceeding* with the trial in defendant's absence. *Id*. "The trial court erred in so doing because defendant did not forfeit his right to representation when he acted out, and the trail court failed to obtain defendant's waiver of that right or to appoint him counsel." *Id*. at 185. The court offered "a number of actions" that the trial court could have taken: "it could have ordered a recess, brought defendant back to the courtroom, told him that it was terminating his right to represent himself, and advised him of his right to representation" in addition to appointing "advisory counsel." *Id*. & n 13.

9.9 Confrontation

9.9.1 Generally

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

Article I, section 11, was adopted in 1857 without amendment or debate. * * * The provision was derived from the identically worded article from Indiana's Constitution adopted in 1851." *State v Copeland*, 353 Or 816 (2013) (citations omitted). No "direct evidence exists of what the people who framed the Oregon Constitution thought about the right to confrontation. * * * The framers more or less grafted the provision onto Oregon's constitution without explaining how they understood its scope or application." *State v Supanchick*, 354 Or 737, 765 (2013).

Article I, section 11, gives an accused the right "to meet the witnesses face to face." Under Article I, section 11, out-of-court statements made by declarant not testifying are admissible only if (1) the declarant is unavailable and (2) the statement has adequate indicia of reliability, per *State v Campbell*, 299 Or 633, 648 (1985) (adopting the test from *Ohio v Roberts*, 448 US 56, 66 (1980)). A statement that falls within a "firmly rooted hearsay exception" or has "particularized guarantees of trustworthiness" is considered "reliable" under *State v Nielsen*, 316 Or 611, 623 (1993). *State v Supanchick*, 245 Or App 651 (2011).

"Under Article I, section 11, a defendant in a criminal prosecution has the right 'to meet the witnesses face to face.' Like the Sixth Amendment, the confrontation clause in Article I, section 11, concerns the opportunity for effective cross-examination at trial and does not require that the defendant to be allowed to use the exact method of cross-examination that he wishes to conduct." *State v Wixom*, 275 Or App 824 (2015), *rev den* 359 Or 166 (2016) (quoting *State v Zinsli*, 156 Or App 245, 251, *rev den*, 328 Or 194 (1998)).

Article I, section 11, does not prohibit the introduction of a witness's otherwise admissible out-of-court statements where the witness testifies at trial and is subject to cross-examination. *State v. Barkley*, 315 Or 420, 431, *cert den*, 510 US 837 (1993); *State v Rascon*, 269 Or App 844, 847 (2015).

A trial court's "preemption of an offer of proof in the context of criminal defense counsel's cross-examination of the complaining witness is especially problematic. *Cf. Chambers v. Mississippi*, 410 US 284, 295 (1973) ('The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the accuracy of the truth-determining process.' (Internal quotation marks omitted.)). *State v Cervantes*, 271 Or App 234, 241 n 11 (2015).

9.9.2 Hearsay

9.9.2.A Criminal Trials

"[T]o admit hearsay evidence under OEC 803 in a criminal case, the state must establish that the declarant is unavailable for purposes of Article I, section 11." Two requirements must be met: "First, the declarant must be unavailable, and second, the declarant's statements must have 'adequate indicia of reliability.'" *State v Cook*, 340 Or 530, 540 (2006) (quoting *Ohio v Roberts*, 448 US 56, 66 (1980))." *State v Simmons*, 241 Or App 439 (2011).

State v Harris, 362 Or 55 (10/19/17) (Deschutes) (Landau) (Flynn and Duncan not participating) Police received a 9-1-1 call from a child. The child told the dispatcher that she was hiding from her mother's boyfriend, defendant, who had struck her with a belt and was fighting with her mother. Police arrived and found the child "hysterical" in the street outside the house. Defendant claimed that he had attempted to discipline the child. The state subpoenaed the child to appear as a witness at defendant's assault trial. (The record does not include the subpoena or the return of service, and it does not show the precise date that the subpoena was issued.) On the morning of trial, the prosecutor learned that the child was not going to appear. In lieu of her testimony, the state offered a recording of the 9-1-1 call, arguing that the recording was admissible under the excited-utterance exception to the rule against hearsay.

The state argued that the child's failure to appear established her unavailability. Defendant argued that a witness is unavailable for Article I, section 11, confrontation purposes only when the state has exhausted all reasonable means of securing the appearance of the witness. Once the state became aware that its witness would not appear, he argued, it could have taken additional actions to secure her appearance, but did not do so.

The trial court offered to continue the trial to allow the state to take such additional steps, but defendant objected. The trial court then concluded that the state had made reasonable efforts to produce the witness and admitted the hearsay. The Court of Appeals reversed, holding that "more could have been done" to produce the witness at trial

The Supreme Court reversed the Court of Appeals' decision and affirmed the trial court's. "By objecting to the state being allowed to take further measures to produce its witness, defendant essentially invited any error that may have resulted. As this court has long held, invited error is no basis for reversal." *Id*. at 67.

The court reasoned: "We conclude that, to establish unavailability for Article I, section 11, purposes, the state must show that it is unable to produce a witness after exhausting reasonable means of doing so. In most cases, the state will not be allowed simply to rely on a subpoena. In this case, however, defendant objected to a continuance that would have enabled the state to pursue other means of securing its witness. Under the circumstances, defendant cannot be heard now to complain that the state did not exhaust those measures. we reject the state's contention that the unavailability requirement of Article I, section 11, is satisfied when a witness fails to comply with a subpoena. The state must exhaust reasonably available measures for producing the witness. In so holding, however, we reiterate that the rule is one of reasonableness under the circumstances of the individual case. In this case, defendant objected to the state being granted the time to pursue other means of producing the victim as a witness. Under those circumstances, defendant is in no position to complain that the trial court erred in concluding that the victim was unavailable for confrontation purposes and in admitting the 9-1-1 recording of her report."

9.9.2.B Parole and Probation

"Neither the rules of evidence nor the state or federal constitutions provide a *per se* bar to the use of hearsay evidence at certain types of proceedings that are collateral to criminal convictions." *State v Monk*, 244 Or App 152, 155 (2011) (citing *Morrissey v Brewer*, 408 US 471 (1972) (parole) and *Gagnon v Scarpelli*, 411 US 778 (1973) (probation). Defendants in such proceedings have a right

under the Due Process Clause "to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation"). *Morrissey*, 408 US at 489.

State v Presock, 281 Or App 277 (2016) held that a probationer does not have a due process right to review his probation file for potential mitigating evidence when the contents of that file are not being used as evidence against him in a proceeding to potentially revoke his probation.

9.9.3 Unavailable Declarant

"To determine whether the admission of out-of-court statements of an absent declarant violates a defendant's state confrontation clause rights, we apply the two-part test announced and applied in *Ohio v Roberts*, 448 US 56, 65-66 (1980)." *State v Starr*, 269 Or App 97, 103, *rev den*, 357 Or 415 (2015). "Although the United States Supreme Court no longer adheres to the *Roberts* test * * * we continue to use it to analyze Confrontation Clause claims under Article I, section 11." *Ibid*. (quoting *State v Cook*, 340 Or 530, 540 (2006).

"The state bears the burden of proof, as the proponent of the evidence, that the witness was unavailable." *State v Starr*, 269 Or App 97, 103, *rev den*, 357 Or 415 (2015) (no error in admitting unavailable victim's 911 call recording and her statements to police). "'Unavailability' under OEC 804 is not necessarily the same as under the confrontation clause of Article I, section 11," although the court has "declined to determine how the inquiries as per each might differ." *Id*. at 104 n 4. "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).

Sixth Amendment analysis under *Davis v Washington* and *Hammon v Indiana*, 547 US 813 (2006) divides Confrontation Clause statements into "testimonial" and "nontestimonial:" "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."

See State v Starr, 269 Or App 97, 103, *rev den*, 357 Or 415 (2015), in which a domestic-violence victim called 911 and made statements to police. Before grand jury and at trial, the state tried to phone her, mail her, subpoena her, offered to pay for her meals, hotel, and mileage. She had no permanent address, did not want to travel, and did not return calls. The trial court admitted the 911 recording and her statements in to evidence over defendant's confrontation clause objections. The Court of Appeals affirmed: Nothing indicated that the state had acted with casual indifference, or had waited until the last minute, or had made a half-hearted effort. Some of her statements admitted into evidence were testimonial under the Sixth Amendment but their admission was harmless error.

State v Harris, 362 Or 55 (10/19/17) (Deschutes) (Landau) (Flynn and Duncan not participating) Police received a 9-1-1 call from a child. The child told the dispatcher that she was hiding from her mother's boyfriend, defendant, who had struck her with a belt and was fighting with her mother. Police arrived and found the child "hysterical" in the street outside the house. Defendant claimed that he had attempted to discipline the child. The state subpoenaed the child to appear as a witness at defendant's assault trial. (The record does not include the subpoena or the return of service, and it does not show the precise date that the subpoena was issued.) On the morning of trial, the prosecutor learned that the child was not going to appear. In lieu of her testimony, the state offered a recording of the 9-1-1 call, arguing that the recording was admissible under the excited-utterance exception to the rule against hearsay.

The state argued that the child's failure to appear established her unavailability. Defendant argued that a witness is unavailable for Article I, section 11, confrontation purposes only when the state has exhausted all reasonable means of securing the appearance of the witness. Once the state became aware that its witness would not appear, he argued, it could have taken additional actions to secure her appearance, but did not do so.

The trial court offered to continue the trial to allow the state to take such additional steps, but defendant objected. The trial court then concluded that the state had made reasonable efforts to produce the witness and admitted the hearsay. The Court of Appeals reversed, holding that "more could have been done" to produce the witness at trial

The Supreme Court reversed the Court of Appeals' decision and affirmed the trial court's. "By objecting to the state being allowed to take further measures to produce its witness, defendant essentially invited any error that may have resulted. As this court has long held, invited error is no basis for reversal." *Id*. at 67.

The court reasoned: "We conclude that, to establish unavailability for Article I, section 11, purposes, the state must show that it is unable to produce a witness after exhausting reasonable means of doing so. In most cases, the state will not be allowed simply to rely on a subpoena. In this case, however, defendant objected to a continuance that would have enabled the state to pursue other means of securing its witness. Under the circumstances, defendant cannot be heard now to complain that the state did not exhaust those measures. we reject the state's contention that the unavailability requirement of Article I, section 11, is satisfied when a witness fails to comply with a subpoena. The state must exhaust reasonably available measures for producing the witness. In so holding, however, we reiterate that the rule is one of reasonableness under the circumstances of the individual case. In this case, defendant objected to the state being granted the time to pursue other means of producing the victim as a witness. Under those circumstances, defendant is in no position to complain that the trial court erred in concluding that the victim was unavailable for confrontation purposes and in admitting the 9-1-1 recording of her report."

9.9.4 Impeaching Witnesses

The "Confrontation Clause of Article I, section 11, requires that the court permit a defendant to cross-examine the complaining witness in front of the jury considering other accusations she has made" in three circumstances. *State v LeClair*, 83 Or App 121, *rev den* 303 Or 74 (1987). Those are:

(1) when the witness has recanted accusations; (2) the defendant demonstrates to the court that those accusations were false; or (3) there is some evidence that the victim has made prior accusations that were false, unless the probative value of the evidence which the defendant seeks to elicit on the cross-examination is substantially outweighed by the risk of prejudice, confusion, embarrassment, or delay." *Id*. at 130.

9.9.5 Forfeiture by Misconduct

"If a defendant forfeits the right to meet a witness face to face, Article I, section 11, does not require that any evidence admitted under the forfeiture doctrine possess independent guarantees of reliability." *State v Supanchick*, 354 Or 737, 765-66 (2014).

"The framers of Oregon's constitution * * * would have understood that, at common law, a defendant who engaged in wrongdoing for the purpose of making a witness unavailable could not complain that the witness's prior statements were admissible without the defendant having the opportunity to meet the witness 'face to face.'" *State v Supanchick*, 354 Or 737, 764 (2014). When "a defendant has intentionally made a witness unavailable to testify, the defendant loses the right to object that that evidence should not be admitted on state constitutional grounds. The defendant's act ensures that the witness's testimony can never be subject to 'testing in the crucible of cross-examination.' [*Crawford v Washington*, 541 US 36, 61 (2004)]. In other words, where a defendant acts wrongfully to make a witness unavailable, that defendant largely controls the very feature of the evidence to which he objects. The principle of forfeiture by wrongdoing * * * ensures that a defendant cannot manipulate proceedings in that way." *Id*. at 766.

9.9.6 Historical Exceptions

A deputy sheriff's certificate of service of a restraining order, which he was administratively required to serve, does not "trigger" an Article I, section 11, confrontation right because the declaration is an official record that did not include "investigative or gratuitous facts or opinions" and does not "contain a witness statement." *State v Copeland*, 353 Or 816 (2013).

9.9.7 Sixth Amendment

"The Sixth Amendment provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him.' Thus, by its terms, the amendment applies to 'criminal prosecutions,' and the United States Supreme Court has held that 'criminal prosecutions' in the Sixth Amendment refers to criminal trials and, concomitantly, that the right to confront witnesses is 'a *trial* right.' *Pennsylvania v Ritchie*, 480 US 39, 52-53, 107 S Ct 989, 94 L Ed 2d 40 (1987) (emphasis in original); *see also California v Green*, 399 US 149, 157, 90 S Ct 1930, 26 L Ed 2d 489 (1970) (stating that it is the right to confront witnesses 'at the time of trial that forms the core of the values furthered by the Confrontation Clause')." *State v Wixom*, 275 Or App 824, 840 (2015), *rev den* 359 Or 166 (2016).

9.9.7.A Cross-Examination

"Specifically as to cross-examination, the Sixth Amendment requires a full opportunity for effective cross-examination, and not necessarily the entire extent or manner of the cross-examination that the defendant wishes to conduct. *Delaware v Fensterer*, 474 US 15, 19-20, 106 S Ct 292, 88 L Ed 2d 15 (1985). Rather, the right to confront witnesses at trial is 'designed to prevent

improper restrictions on the types of questions that defense counsel may ask during cross-examination.' *Ritchie*, 480 US at 20. The 'ability to question adverse witnesses, however, does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony.' *Id*. at 53. The Sixth Amendment Confrontation Clause 'does not compel the pretrial production of information that might be useful in preparing for trial.' *Id*. at 53 n 9. *State v Wixom*, 275 Or App 824, 840 (2015), *rev den* 359 Or 166 (2016).

9.9.7.B "Testimonial Statements"

The Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial" if the statements are offered to establish the truth of the matter asserted, unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. *Crawford v Washington*, 541 US 36, 59-60 n 9 (2004). Under *Davis v Washington and Hammon v Indiana*, 547 US 813 (2006),"Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." See *State v Starr*, 269 Or App 97, 107 (2015) (so noting).

The Confrontation Clause in the Sixth Amendment "applies to 'witnesses' against the accused – in other words, those who 'bear testimony.'" *Crawford v Washington*, 541 US 36, 51 (2004). Testimony "is typically a solemn declaration or affirmation made" to establish or prove some fact. *Id*.

Photographs do not "bear testimony" and their admission into evidence against a defendant does not violate the Confrontation Clause. *United States v Brooks*, 772 F3d 1161 (9th Cir 2014) (citation omitted).

Documents certifying that a breath-testing machine had been tested for accuracy is not "testimonial." *State v Bergin*, 231 Or App 36 (2009), *rev den* 348 Or 280 (2010).

A printout of a defendant's driving record is not testimonial. *State v Davis*, 211 Or App 550 (2007). A "Notice of Suspension" signed by a police officer and given to defendant at the police station, as required by statute, after defendant failed a breath test, is not testimonial. *State v Velykoretskykh*, 268 Or App 706 (2015). The court identified "several precepts" from prior cases. First, if the document's primary purpose was for litigation, it is more likely to be "testimonial" than if its purpose was "to serve the administrative functions of the issuing entity." If the document is prepared to focus on a particular individual, it is more likely to be "testimonial" than if it was for "routine certification." A "document prepared at the specific request of a law enforcement official, as opposed to one that is prepared pursuant to a statute or rule, is likely to be testimonial." Second, "an otherwise nontestimonial routine or ministerial document prepared pursuant to statute is not testimonial even if the preparer knows that the document cold be used, and is used, in a future trial." *Id*. at 712.

In *State v Copeland*, 353 Or 816 (2013), a deputy sheriff certified that he had served a copy of a restraining order on the defendant, who was later charged with criminal contempt for violating

that order. At the contempt proceeding, the deputy's certificate of service was admitted to prove that the order had been served on the defendant. The Oregon Supreme Court upheld the trial court's ruling admitting the certificate of service over the defendant's objection. Because the primary purpose for creating the certificate of service was for administrative reasons and not for use in a later criminal proceeding, the certificate was not "testimonial" evidence that the Confrontation Clause prohibits. *State v Rafeh*, 361 Or 423, 430, 433 (2017) ("the question whether a statement is testimonial turns on whether it was elicited or made for use in a criminal proceeding").

"When defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system. We reiterate what we said in *Crawford*: that 'the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds.' * * * That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation. *Davis v Washington*, 547 US 813, 833 (2006).

Introducing a Notice of Suspension of a driver's license with an officer's signature, without having the officer present at trial, is not "testimonial" under *Crawford v Washington*, 541 US 36 (2004). *State v Velykoretskykh*, 268 Or App 706 (2015) (the Notice of Suspension was directed toward defendant, but it was to serve an administrative function per statute).

State v Rafeh, 361 Or 423 (5/04/17) (Kistler) (Multnomah) This is a federal Confrontation Clause case. Defendant was in a serious car wreck in 2012. Taken to the hospital, she refused a blood test. The DMV suspended defendant's driver's license for three years for refusing to submit voluntarily to a blood alcohol test after that accident. Within three years of that wreck, defendant was stopped while driving without a license, and the state charged her with the crime of driving while suspended (DWS). At her trial for DWS, she raised a federal Confrontation Clause challenge to the admission of the Implied Consent certification that the state offered against her. Defendant testified that: she had no memory of anything that occurred on the night of the accident in 2012; she had not received a copy of the Implied Consent Combined Report; and she had not been aware that her license had been suspended until the officer stopped her in 2015. She further testified: "the hospital said that my blood alcohol limit [after the 2012 accident] was a 3.52 [sic], so [it was] enough to kill a walrus." *Id*. at 428 n 3. The issue at trial was whether defendant had been provided with a copy of the Implied Consent Combined Report when she'd been suspended.

The state did not call anyone to testify that defendant had been provided with a copy of the Implied Consent Combined Report. Rather, the only direct evidence that the state offered on that issue was contained in the report itself. The report stated that defendant "[was] given a copy of this form *** as written notice." Defendant objected to that statement on federal Confrontation Clause grounds. The trial court overruled her objection based on *State v Velykoretskykh*, 268 Or App 706 (2015). The jury found her guilty of DWS. The Court of Appeals affirmed.

This case focuses on "the statement that defendant has challenged—the certification that she received notice of the state's intent to suspend her driver's license." *Id*. at 438. The issue is

"whether the statement in the report— that defendant was given a copy of the report as written notice—was 'testimonial' evidence prohibited by the federal Confrontation Clause. *Id*. at 428-29.

The Oregon Supreme Court wrote that the US Supreme Court's "Confrontation Clause cases confirm our understanding in [State v. Copeland, 353 Or 816 (2013)] that the question whether a statement is testimonial turns on whether it was elicited or made for use in a criminal proceeding." *Id*. at 433. The Court followed *Copeland* and concluded "the certification in the Implied Consent Combined Report was not made for the primary purpose of assisting in [defendant's] prosecution." *Id*. at 435 (quotes omitted). "[T]he primary purpose of the certification is administrative. It confirmed that defendant had received sufficient notice for DMV to proceed with an administrative license suspension hearing. And the decision whether to suspend defendant's license was undertaken to ensure the safety of the other drivers on the state's roads." *Id*. at 435-36.

9.9.7.C Security and Secrecy

A Ninth Circuit panel upheld a district court's ruling that it was "not even a close question" that a confidential informant would testify against the Sinaloa Cartel wearing a fake wig and fake moustache. On direct, the informant stated that he was wearing a wig and moustache. Defendant contended that the disguise violated his Confrontation Clause rights and Due Process rights. *United States v Jesus-Casteneda*, 705 F3d 1117 (9th Cir 2013). Determining whether the reliability of the testimony is otherwise assured turns upon the extent to which the proceedings respect the four elements of confrontation: physical presence, oath, cross-examination, and observation of demeanor by the trier of fact." *Id*.

9.10 Self-Incrimination

See Chapter 5 herein

"The courts are in agreement that the privilege against self-incrimination is waived where the witness has entered a plea of guilty and been sentenced and the examination is directed to eliciting facts concerning the crime of which he was convicted." *State v Nelson*, 246 Or 321, 323, *cert den*, 389 US 964 (1967).

A "defendant who elects to testify on his own behalf waives the constitutional protection against self-incrimination within the scope of his testimony." ORS 136.643; *State v Strickland*, 265 Or App 460 (2014). A "defendant's submission of an affidavit at a motions hearing" is a "waiver of the right against self-incrimination." *Id*.

9.11 Public Trial

See Erin J. Snyder, *Open Courts and Public Trial*, OREGON CONSTITUTIONAL LAW MANUAL (2013), www.osbar.org/secured/barbooks/viewchapter.asp?bid=85&cid=2349.

"The exclusion of the public from hearings under OEC 412(4) to determine the admissibility of evidence of a sex crime victim's past sexual behavior under OEC 412(2) does not violate Article I, section 10 or 11, of the Oregon Constitution or the First or Sixth Amendment to the United States Constitution." *State v MacBale*, 353 Or 789 (2013).

See "Open Courts" in **Section 10.5** for discussion of Article I, section 10).

9.12 Laboratory Reports

Admission of a laboratory report "without requiring the state to produce at trial the criminalist who prepared the report or to demonstrate that the criminalist was unavailable to testify" violates a defendant's right to confront witnesses against him under Article I, section 11, of the Oregon Constitution. *State v Birchfield*, 342 Or 624 (2007). The state cannot require a defendant to "secure the attendance of the criminalist who prepared the laboratory report." *State v Kinslow*, 257 Or App 295 (2013).

Under Article I, section 11, the trial court may admit a crime lab report showing that meth was a substance seized. A defendant had received a certified copy of that lab report, but did not file a written objection to that report within 15 days before trial, as required under ORS 475.235(4)-(5). The state did not have the lab report's author testify based on defendant's failure to file any objection. The statutes "do not impermissibly shift the burden to a defendant to procure a criminalist but, rather, set forth a constitutionally permissible process for determining whether the defendant intends to object to the written report." *State v Kinslow*, 257 Or App 295 (2013).

9.13 Liberty Interests

9.13.1 Involuntary Administration of Psychotropic Medicine

"Among the most weighty decisions our society can make is to subject someone to a powerful medication against his or her will. The government must meet the demanding standard set by the Supreme Court in *Sell v United States*, 539 US 166 (2003), before involuntary medication may be administered in an effort to restore a defendant's competency to stand trial." *United States v Brooks*, 772 F3d 1161 (9th Cir 2014) (9th Cir 2014).

Note: The right is a "liberty interest" in the Due Process Clause of the United States Constitution, not in the state constitution to date. This could be an interesting aspect of penumbral rights under Article I, section 33, of the Oregon Constitution.

On *Sell* orders, see *United States v Gillenwater*, 2014 WL 1394960 (9th Cir 2014) (district court did not err in authorizing defendant's involuntary medication).

> *See State v Lopes*, 355 Or 72 (2014) and ORS 161.360 to 161.370 (incapacity and incompetence to stand trial) and ORS 426.385(3) (permitting hospitals to administer certain treatment without the consent of a person with a mental illness) and OAR 309-114-0010(1)(b)(D), allowing hospitals to administer medication without a patient's consent pursuant to a valid court order. *Lopes* concluded that trial courts have implicit authority to issue *Sell* orders to hospitals under ORS 161.370.

9.14 Right to Be Present at Trial

A. Oregon. A criminal defendant has a statutory right to be present at trial. ORS 136.040; *State v Shutoff*, 263 Or App 615 (2014); *State v Harris*, 47 Or App 529, 531-32 (1980), *rev'd on other grounds*, 291 Or 179 (1981); *In re Jordan*, 290 Or 669, 672-73 (1981). A "criminal trial may proceed in the defendant's absence only if there is a sufficient factual basis for concluding that the defendant voluntarily is absent from a trial that the defendant knows is occurring." *Shutoff*, 263 Or App at 617.

B. United States. "A person charged with a felony has a fundamental right to be present at every stage of the trial [including] the voir dire and empaneling of the jury." *Campbell v Wood*, 18 F3d 662, 671 (9th Cir 1994) (en banc) (citing *Illinois v Allen*, 397 US 337, 338 (1970) and *Diaz v United States*, 223 US 442, 455 (1912)).

The right to be present derives from the Confrontation Clause of the Sixth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments. *United States v Gagnon*, 470 US 522, 526 (1985) (per curiam); *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987) (Under the Due Process Clause, "a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure."). "Importantly, the scope of [Federal Rule of Criminal Procedure] 43 is broader than the scope of the constitutional right to be present. * * * The statute sweeps more broadly than the corresponding constitutional right because Rule 43 incorporated the more expansive common law understanding of the right as well as the constitutional standard. *See United States v. Rolle*,

204 F3d 133, 137 (4th Cir 2000) (citing Fed R Crim P 43, 1944 Advisory Committee Note, Para. 1)." *United States v Reyes*, __ F3d __ (9th Cir 2014) (No. 12–50386) ("We hold that Reyes's exclusion from the side bar exchanges during jury selection did not violate his constitutional right to be present because the conferences were not instances where the defendant's 'absence might frustrate the fairness of the proceedings.').

9.15 Victims' Rights

9.15.1 Article I, section 42

Article I, sections 42 through 45 are not set forth in their entirety here but are online here.

Article I, section 42, in part:

"(1) To preserve and protect the right of crime victims to justice, to ensure crime victims a meaningful role in the criminal and juvenile justice systems, to accord crime victims due dignity and respect and to ensure that criminal and juvenile court delinquency proceedings are conducted to seek the truth as to the defendant's innocence or guilt, and also to ensure that a fair balance is struck between the rights of crime victims and the rights of criminal defendants in the course and conduct of criminal and juvenile court delinquency proceedings, the following rights are hereby granted to victims in all prosecutions for crimes and in juvenile court delinquency proceedings:

(a) The right to be present at and, upon specific request, to be informed in advance of any critical stage of the proceedings held in open court when the defendant will be present, and to be heard at the pretrial release hearing and the sentencing or juvenile court delinquency disposition;

(b) The right, upon request, to obtain information about the conviction, sentence, imprisonment, criminal history and future release from physical custody of the criminal defendant or convicted criminal and equivalent information regarding the alleged youth offender or youth offender;

(c) The right to refuse an interview, deposition or other discovery request by the criminal defendant or other person acting on behalf of the criminal defendant provided, however, that nothing in this paragraph shall restrict any other constitutional right of the defendant to discovery against the state;

(d) The right to receive prompt restitution from the convicted criminal who caused the victim's loss or injury;

(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

"**(2) This section applies to all criminal and juvenile court delinquency proceedings * * *. Nothing in this section reduces a c criminal defendant's rights under the Constitution of the United States. Except as otherwise specifically provided, this section supersedes any conflicting section of this Constitution**." * * * * *

"**(3)(a) Every victim described in paragraph (c) of subsection (6) of this section shall have remedy by due course of law for violation of a right established in this section**." *** * * * *** -- Article I, section 42(2) and (3), Or Const (in part)

In 1999, voters enacted Article I, section 42, as a ballot measure. HJR 87, 89, 90, 94 (1999); *Cf. State v Algeo*, 354 Or 236 (2013) (no citation). "In 2008, the voters amended Article I, section 42, to provide victims with a 'remedy by due course of law' for violation of their existing constitutional rights. Or Const, Art I, § 42(3)(a)." *State v Algeo*, 354 Or 236 (2013) (no citation).

"In 1999, Oregon voters enacted a crime victim's bill of rights, codified at Article I, section 42, of the Oregon Constitution. *See generally State v. Barrett*, 350 Or 390, 255 P3d 472 (2011) (discussing enactment)." *State v Ramos*, 358 Or 581, 589 n 5 (2016).

Because Article I, section 42, was enacted by voters, it is interpreted based on the voters' intent. The first focus is text and context, "but also [the courts] may consider the measure's history, should it appear useful to our analysis." *State v Algeo*, 354 Or 236 (2013) (citing *Ecumenical Ministries v Oregon State Lottery Comm'n*, 318 Or 551, 559 (1994) and *State v Gaines*, 346 Or 160, 171-72 (2009)).

"The legislature enacted ORS 147.500 to 147.550 to effectuate [the] constitutional rights" in Article I, sections 42 and 43. *State v Algeo*, 354 Or 236 (2013).

Article I, section 42(1)(c) does not impose a duty on a private investigator, hired by a defense attorney, to inform a crime victim of his/her right to refuse an interview when conducting an interview. Similarly, a police officer has no duty to inform a person of his/her right to be free from unreasonable searches and seizures when an officer requests consent to search. In contrast, a police officer does have the duty to inform a person of his/her right against self-incrimination under Article I, section 12. *Johnson v Dep't of Public Safety Stds and Training*, 253 Or App 307 (2012).

In State v Bray, the defendant tried to obtain his rape survivor's Google search history from Google, unsuccessfully, 352 Or 24 (2012). Defendant then subpoenaed the survivor, attempting to order her to bring her laptop or a clone to the criminal trial. She refused and the trial court refused to order her to produce it. The trial court issued a proposed order requiring the survivor to produce a clone. She filed a claim that production of a clone, even under seal, would violate her rights under Article I, sections 42 and 43, of the Oregon Constitution, which severely restrict "discovery" of crime victims. "Regardless of what the exact boundaries of 'discovery' may be under Article I, section 42, defendant's request that a clone of the hard drive be preserved under seal for purposes of appellate review, and the trial court's order allowing that request, do not

qualify [as discovery].” *State v Bray*, 352 Or 809 (2012). The Court mused about what "discovery" could mean in Article I, section 42, which voters adopted in 1999. The Constitution does not define "discovery." The first reference the Court turned to was the word's "well-defined legal meaning" in Black's Law Dictionary. The Court didn't mention anything Oregon-related. Next the Court wrote that the constitutional phrase "other discovery request" is wedged between "interview" and "deposition" "— both of which would occur pretrial --" so therefore "the voters may have intended to refer only to discovery that occurs pretrial." But would "the voters" know where and when "discovery" occurs in a lawsuit? The Court cited nothing except its own knowledge of where and when discovery occurs in civil litigation. And the Court did not decide what "discovery' means.

A statute (ORS 147.515(1)) required a victim to inform the court, within a specific number of days, that he is a victim under the Oregon Constitution asserting victims' rights. The right of a crime victim to receive prompt restitution is created by Article I, section 42(3)(a)-(c) of the Oregon Constitution. Timely filing is <u>not</u> jurisdictional, as it is with filing a notice of appeal. The statutory time restriction on filing a victims' rights claim is <u>not</u> jurisdictional. The statutes provide a "procedural path for a crime victim to pursue a remedy for the violation of the victim's constitutional rights." *State v Thompson*, 257 Or App 336 (2013).

Article I, section 42, and ORS 137.106, grant courts authority to award prompt restitution from a convicted criminal more than 90 days after entry of defendant's judgment.   "As in *State v Thompson*, 257 Or App 336 (2013), ORS 137.600 did not prevent the court from imposing restitution in order to provide the victim a remedy by due course of law, after it was discovered that her constitutional right to restitution was violated." *State v Wagoner*, 257 Or App 607 (2013).

Under Article I, section 42, a crime victim is entitled to "receive prompt restitution." Under ORS 137.106(1)(a) people who commit crimes resulting in economic damages must pay the "full amount" of damages, regardless of who is at fault. A crime victim argued that because the statute requires a victim's restitution to be in "the full amount of the victim's economic damages," Article I, section 42, should be interpreted to have that same requirement. The Court held: "Article I, section 42(1)(d) does not grant petitioner a right to 'restitution' in the 'full amount' of her economic damages as that term is defined in ORS 137.106." *State v Algeo*, 354 Or 236 (2013).

See *State v Bray*, 281 Or App 584 (2016), where the Court of Appeals held that the trial court did not err in denying a defendant's motion to compel the state to obtain and share his rape victim's Google information.

See Martin v Oregon Dep't of Corrections, 6:15-CV-226-PK (D. Or. 2017):

"Article I, Section 41 of the Oregon Constitution provides in relevant part:

> 'Section 41. Work and training for corrections institution inmates; work programs; limitations; duties of corrections director. . . (2) All inmates of state corrections institutions shall be actively engaged full-time in work or on-the-job training, The work or on-the-job training programs shall be established and overseen by the corrections director . . . . (3) . . . . However, no inmate has a legally enforceable right to a job or to otherwise participate in work, on-the-job training or educational programs . . . .'

“The plain language of Section 41(3) precludes [inmate-plaintiff’s] claim that the [] defendants violated the Oregon constitution by failing to allow [plaintiff] access to the educational program, in that it clearly establishes that he had no ‘legally enforceable right’ under the Oregon constitution to participate in the program.”

9.15.2 Victim Defined

"(3) As used in this section, 'victim' means any person determined by the prosecuting attorney to have suffered direct financial, psychological or physical harm as a result of a crime and, in the case of a victim who is a minor, the legal guardian of the minor. In the event no person has been determined to be a victim of the crime, the people of Oregon, represented by the prosecuting attorney, are considered to be the victim. In no event is it intended that the criminal defendant be considered the victim." -- Art. I, section 44, Or Const (in part)

Article I, section 44(3), states that "the people of Oregon" are the victim if no other victim has been identified. The "public is a single collective 'victim' of a violation [of the felon in possession law] for purposes of merger." *State v Torres*, 249 Or App 571, *rev den*, 352 Or 378 (2012) (deciding the matter under statute only, not Article I, section 44(3).

9.16 Inadequate Assistance of Counsel

"Criminal defendants have a constitutional right to counsel under both Article I, section 11, of the Oregon Constitution and the Sixth Amendment to the United States Constitution. *Montez v. Czerniak*, 355 Or 1, 6-7, 322 P3d 487, 493, *adh'd to as modified on recons*, 355 Or 598, 330 P3d 595 (2014). To prevail on a claim of inadequate assistance of counsel under Article I, section 11, a petitioner must establish both "that [counsel] failed to exercise reasonable professional skill and judgment," and "that counsel's failure had a tendency to affect the result of [the] trial." *Lichau v. Baldwin*, 333 Or 350, 359, 39 P3d 851 (2002). When a court evaluates trial counsel's conduct to determine whether it failed to meet state constitutional standards, the court must "make every effort to" do so "from the lawyer's perspective at the time, without the distorting effects of hindsight" and must "not second-guess a lawyer's tactical decisions in the name of the constitution unless those decisions reflect an absence or suspension of professional skill and judgment." *Montez*, 355 Or at 7 (internal quotation marks and citations omitted). Similar principles apply when evaluating whether trial counsel's performance failed to meet federal constitutional standards. * * * * * The Oregon Supreme Court has 'recognized that the standards for determining the adequacy of legal counsel under the state constitution are functionally equivalent to those for determining the effectiveness of counsel under the federal constitution. *Id*. at 6-7. 'Under both constitutions, the defendant's right is not just to a lawyer in name only, but to a lawyer who provides adequate assistance.' *Id*. at 6." *Farmer v Premo*, 283 Or App 731, 739-40 (2017) (quotation mark missing in original).

"A petitioner who seeks post-conviction relief on the ground that his trial counsel was inadequate must prove, by a preponderance of the evidence, facts demonstrating that his counsel failed to exercise reasonable professional skill and judgment and that the petitioner suffered prejudice as a result. *Trujillo v. Maass*, 312 Or 431, 435, 822 P2d 703 (1991); *Strickland v. Washington*, 466 US 668, 687, 104 S Ct 2052, 80 L Ed 2d 674 (1984) (the federal constitution requires 'effective' assistance of counsel). * * * * * To prove prejudice under the Oregon constitution, a petitioner must show that his counsel's deficient performance had 'a tendency to affect the result of the prosecution.' *Stevens v. State of Oregon*, 322 Or 101, 110, 902 P2d 1137 (1995); *see also Green v. Franke*, 357 Or 301, 322-23, 350 P3d 188 (2015) (explaining that 'the tendency to affect the outcome standard demands more than mere possibility, but less than probability,' and that 'the issue is whether trial counsel's acts or omissions could have tended to affect the outcome of the case')." *Brenner v Nooth*, 283 Or App 868, 876 (2017).

Chapter 10: Civil Trials

10.1 Juries

"'Jury' means a body of persons temporarily selected from persons who live in a particular county or district, and invested with power to present or indict in respect to a crime or to try a question of fact." ORS 10.010. There are three types of juries: grand, trial, inquest. ORS 10.020.

"The tyranny of the legislatures is the most formidable dread at present, and will be for long years." Thomas Jefferson, letter to James Madison, March 15, 1789.

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

"**In civil cases three-fourths of the jury may render a verdict**." -- Article VII (Amended), section 5(7), Or Const

"In actions at law, where the value in controversy shall exceed $750, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict." -- Article VII (Amended), section 3, Or Const

"In 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

"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

10.1.1 Principles

"The jury is, above all, a political institution, and it must be regarded in this light in order to be duly appreciated." Alexis de Tocqueville, DEMOCRACY IN AMERICA (1835) reprinted in Alan H. Scheiner, *Note, Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, COLUMBIA L. REV. 142 (1991).

"In many ways, the most influential of the Colonial documents protecting individual rights were the Pennsylvania Frame of Government of 1682 and Charter of Privileges of 1701. Those two

basic documents were intimately connected with the personality of William Penn and the persecutions he and his fellow Quakers had suffered in Stuart England." Bernard Schwartz, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY (1971), p. 130, 169. "The most important guarantees of the Penn document (at least in their influence on later Bills of Rights) have to do with judicial procedure. They reflect the burdens under which the Quakers themselves had suffered so often in English courts, including Penn himself in his famous prosecution in 1670 for preaching a prohibited sermon in a Quaker meeting." *Id*. at 131. That prosecution resulted in *Bushell's Case* – "one of the landmarks of Anglo-American liberty, since it settled the jury's right to decide according to their own conscience, regardless of any contrary direction of the court. His own experience led Penn to provide for a broad right of trial by jury in all trials with the jury to 'have the final judgment'" and "for public trials." *Ibid*.

"What I disapproved from the first moment also was the want of a bill of rights to guard liberty *against the legislative* as well as executive branches of the government, that is to say to secure freedom in religion, freedom of the press, freedom from monopolies, freedom from unlawful imprisonment, freedom from a permanent military, and a trial by jury in all cases determinable by the laws of the land." Thomas Jefferson, letter to Francis Hopkinson, March 13, 1789, online here and printed in BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY, VOLUME 1 (1971) p. 619 (emphasis added).

"The tyranny of the legislatures is the most formidable dread at present, and will be for long years." Thomas Jefferson, letter to James Madison, March 15, 1789, online here and printed in BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY, VOLUME 1 (1971) p. 620.

"As we contemplate the brutalities of despotic power arbitrarily exercised in other lands, we can well say with Blackstone, that the right to jury trial is the glory of our law, as the great Commentator felt it to be the glory of the English law." *Pacific Indemnity Co. v McDonald*, 25 F Supp 522, 529 (D Or 1938) (commenting on both the Oregon and federal constitutions).

"The guarantee of trial by jury was ensured in the Magna Carta in 1215, although the historical origins of the jury system predate the Magna Carta by hundreds of years. Thomas H. Tongue, *In Defense of Juries as Exclusive Judges of the Facts*, 35 Or L R 143, 145 (1956) (citing 3 Blackstone Commentaries 349-50) * * *. See also James L. Coke, *On Jury Trial*, 1 Or L R 177 (1922) (tracing history of jury trial to ancient Athens). From the first British expeditions to America, the common law of England, including jury trial procedures, was made a part of the law of colonial communities); *State v Hansen*, 304 Or 169, 172, 743 P2d 157 (1987) ('The "common law of England" was adopted prior to statehood or official territorial status by Oregon's provisional government. * * * The common law, in the sense of an evolving body of law, continues in force insofar as it is not in conflict with legislation or constitutional provisions.')." *Lakin v Senco Products, Inc*., 329 Or 62 (1999). **Note:** In 2016, the Oregon Supreme Court overturned *Lakin* in *Horton v OHSU*, 359 Or 168 (2016). *Horton* concluded that the legislature may require judges to reduce a jury's verdict on noneconomic damages in civil cases and doing so does not violate Oregon's constitutional jury trial guarantees.

"The language of the constitution indicates that the right of trial by jury shall continue to all suitors in courts in all cases in which it was secured to them by the laws and practice of the courts at the time of the adoption of the constitution. * * * . So that, in order to ascertain whether such

right exists in this case, we must look into the history of our laws and jurisprudence, at and before the adoption of the state constitution." *Tribou v Strowbridge*, 7 Or 156, 158-59 (1879).

Article I, section 17, "of the constitution creates no new right to trial by jury. It simply secures to suitors the right to trial by jury in all cases where that right existed at the time the constitution was adopted." *Dean v Willamette Bridge Ry Co*, 22 Or 167, 169 (1892); *see also Jensen v Whitlow*, 334 Or 412, 422 (2002) (Article I, section 17, "is not a source of law that creates or retains a substantive claim or a theory of recovery in favor of any party.").

The words "In all civil cases the right of Trial by Jury shall remain inviolate" mean "in all civil cases the right of Trial by Jury shall remain inviolate." *Lakin v Senco Products, Inc*., 329 Or 62 (1999), *overruled by Horton v OHSU*, 359 Or 168 (2016). Under *Horton*, the "right" is not what *Lakin* said it was just 16 years earlier. Under Article VII (Amended), section 3, judges may not reexamine (reduce) a jury's factual decision on noneconomic damages, the legislature may do so. The legislature may pre-ordain a reduction in a jury's factual decision on noneconomic damages without violating Oregon's constitutional jury trial guarantees.

10.1.2 Origins

Article I, section 17, of the Oregon Constitution was copied from Indiana's Constitution of 1851. Charles Henry Carey, THE OREGON CONSTITUTION (1926) p. 28 ("the Indiana constitution was used . . . as the chief model for substance and phraseology"). Indiana's Constitution of 1851 was based in part on the Indiana Constitution of 1816. That 1816 Constitution provided, in its Article I, section 5:

> "That in all civil cases, when the value in controversy shall exceed the sum of twenty dollars, and in all criminal cases, except in petit misdemeanors which shall be punished by fine only, not exceeding three dollars, in such manner as the Legislature may prescribe by law; the right of trial by Jury shall remain inviolate."

Then in the Indiana's Constitution of 1851, that jury-trial right was retained in more compact form at Article I, section 20:

> "In all civil cases, the right of trial by jury shall remain inviolate."

The same wording is in the Oregon Constitution, at Article I, section 17:

> "In all civil cases the right of Trial by Jury shall remain inviolate."

Note: That wording was originally proposed, and ultimately adopted at the Constitutional Convention. Charles Henry Carey, THE OREGON CONSTITUTION (1926) p. 120. An amendment to that was (temporarily) adopted; that the section would have read: "The right of trial by jury in civil cases shall remain inviolate when jury trial is demanded by either party." *Id*. at 314-15.

10.1.3 Oregon 1857 and 1910 – Remittitur

Article I, section 17, of the Oregon Constitution was copied from Indiana's Constitution in 1857. Courts had power to reduce a jury's verdict if, under those particular facts, the judge thought the verdict was excessive. The Oregon Supreme Court has noted that judicial power to lower jury

> verdicts was not absolute: "Oregon trial courts never have had the power to reduce a jury's verdict or to enter judgment for a lesser amount of damages over the objection of the prevailing party, who always could reject a judicial remittitur and demand a new jury trial. See *Adcock v Oregon Railroad Co*., 45 Or 173, 181, 77 P 78 (1904) (in an action for personal injuries, the court may order a remission of part of the damages awarded by the jury, but only as a condition of overruling a motion for a new trial)." *Lakin v Senco Products, Inc*., 329 Or 62 (1999), *overruled by Horton v OHSU*, 359 Or 168 (2016).

In 1910, Oregon voters amended the Oregon Constitution to eliminate that power from judges. "[S]ince the adoption of Art. VII, § 3, of the Constitution it has been uniformly held that the circuit courts of this state have been stripped of the power which they had theretofore exercised of setting aside a verdict for excessive damages. See *Hust v Moore-McCormack Lines, Inc*., 180 Or 409, 417 (1946)." *Van Lom v Schneiderman*, 187 Or 89, 92 (1949); *Carey v Lincoln Loan Co*., 342 Or 530, 537 (2007). The purpose of Article VII (Amended), section 3, is "to eliminate, as an incident of jury trial in this state, the common law power of a trial court to re-examine the evidence and set aside a verdict because it was excessive or in any other respect opposed to the weight of the evidence." *Van Lom*.

In 2001, the Oregon Supreme Court has summarized that significant shift in power away from the state and to the people (both jurors and litigants):

> "Before the people adopted Article VII (Amended), section 3, in 1910, an Oregon trial court had the power to set aside a jury's verdict when it considered the verdict to be excessive. See, e.g., *Lindsay v Grande Ronde Lumber Co*., 48 Or 430, 438-39, (1906) (duty of trial court to set aside excessive jury verdict); *Nelson v Oregon Railway Etc.* Co., 13 Or 141, 142-43 (1886) (same). * * * In *Van Lom*, the court emphasized the importance of a litigant's state constitutional guarantee to a jury trial and concluded that the purpose of Article VII (Amended), section 3, was "to eliminate, as an incident of jury trial in this state, the common law power of a trial court to re-examine the evidence and set aside a verdict because it was excessive or in any other respect opposed to the weight of the evidence." *Id*. at 99. Consequently, the court held that, under the Oregon Constitution, a reviewing court may examine the record only "to determine whether it can affirmatively say there is no evidence to support the verdict." *Id*. at 95; *see also State v Brown*, 306 Or 599, 604, (1988) (fact decided by jury may not be reexamined unless reviewing court can say affirmatively that there is no evidence to support jury's decision); ORCP 64 B(5) (trial court may grant new trial if evidence is insufficient to justify verdict or is against the law); *Hill v Garner*, 277 Or 641, 643 (1977) (court may not grant judgment notwithstanding verdict if there is any evidence to support verdict)." *Parrott v Carr Chevrolet, Inc*., 331 Or 537, 552 (2001).
>
> Note: The legislature patched over that 1910 amendment, not by repealing the aspect of Article VII (Amended), section 3 (which removed remittitur power from judges), but instead by capping juries' factual decisions (damages) by statute. *See* ORS 18.650 (1987) *renumbered as* ORS 31.710 (legislatively capping noneconomic damages at $500,000 regardless of the severity of the injury, the facts, or the verdict of any case). Moreover, the legislature not only took power from the jury but attempts to keep them ignorant of the legislature's cap: "The jury shall not be advised of the limitation" on damages. ORS 31.710(4)). *See also* ORS 30.260 to 30.300 for limitations to tort claims against the state and public bodies.

In 2017, an Oregon federal district court explained remittitur in *VanValkenberg v Oregon Dep't of Corrections*. There, a deaf plaintiff-prisoner successfully sued the Oregon prison system. A jury awarded him $400,000 in noneconomic damages. Defendant sought remittitur. The district court denied the motion, explaining remittitur:

> "Under federal law, a court may conditionally grant a defendant's motion for a new trial unless the plaintiff agrees to a reduced damages award, also known as a remittitur. *See Hetzel v. Prince William Cty., Va.*, 523 US 208, 211 (1998); *see also Morgan v. Woessner*, 997 F.2d 1244, 1258 (9th Cir. 1993) (explaining that a court cannot order reduced damages without providing plaintiff with the option for a new trial on the issue of damages). In general, a 'motion for remittitur of a jury verdict is subject to the same standard as a motion for new trial under FRCP 59' *Morris*, 2016 WL 1704320, at *3; *see also Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 278 (1989) (explaining that Rule 59 applies to motions for a new trial and remittitur). In federal question cases, federal courts 'allow substantial deference to a jury's finding of the appropriate amount of damages . . . unless the amount is grossly excessive or monstrous, clearly not supported by the evidence, or based only on speculation or guesswork.' *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1435 (9th Cir. 1996). In federal cases based on diversity jurisdiction, however, state substantive law determines whether a jury verdict is excessive or inadequate. *Browning-Ferris Indus.*, 492 U.S. at 278-79; *see also Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 430-31 (1996). To the extent that Oregon law differs from federal law in determining whether the jury's damages award was appropriate, I must follow Oregon law in this case.
>
> "Article VII, Section 3 of the Oregon Constitution limits a court's discretion to award a remittitur. It states: "[n]o 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." Or. Const. art. VII, § 3; *see also Van Lom v. Schneiderman*, 210 P.2d 461, 465 (Or. 1949) (explaining that Oregon courts do not have the common-law power to re-examine the evidence and set aside a verdict because it was excessive) *overruled on other grounds by DeMendoza v. Huffman*, 51 P.3d 1232 (Or 2002). Thus, in determining whether to grant a motion for remittitur in this case, I must ask whether there is *no evidence* to support the damages award. That appears to be a higher bar than determining whether the damages award is "grossly excessive or monstrous, clearly not supported by the evidence, or based only on speculation or guesswork." *Del Monte Dunes*, 95 F.3d at 1435." *VanValkenburg v Oregon Dep't of Corrections*, No. 3:14-ev-00916-MO (02/08/17) (*held*: "I cannot substitute my own opinion for the jury and find that there was no evidence to support the jury's damages award. Accordingly, ODOC's Motion for Remittitur is DENIED.")

10.2 Specific Claims

See Alycia Sykora, *Right to Jury Trial*, OREGON CONSTITUTIONAL LAW MANUAL (2013), www.osbar.org/secured/barbooks/viewchapter.asp?bid=85&cid=2334.

The right to a jury trial is guaranteed under the Oregon Constitution in those classes of cases in which the right was customary at the time the Constitution was adopted and does not extend to cases that would have been tried in equity. *McDowell Welding & Pipefitting v US Gypsum Co.*, 345 Or 272, 279 (2008). However, under *M.K.F. v Miramontes*, 352 Or 401 (2012), 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**."** *Id.* (claims for money damages, even as part of a stalking protective order, have a jury) (emphasis added).

"Article I, section 17, guarantees a right to a jury trial for all civil claims or requests for relief, absent a showing that the nature of the particular claim or request at issue is such that it would have been tried to a court without a jury at common law. *M.K.F. v Miramontes*, 352 Or 401, 425 (2012)." *State v N.R.L.*, 354 Or 222 (2013).

Article I, section 17, does not require a jury trial for restitution determinations in adult criminal prosecutions under ORS 137.106. *State v Hart*, 299 Or 128 (1985).

Article I, section 17, does not require a jury trial for restitution determinations in juvenile delinquency cases under ORS 419C.450. Restitution under that statute does serve a compensatory purpose. Restitution also is a blend of civil and criminal law, but the purpose of restitution under ORS 419C.450 is primarily "a tool to achieve penal and rehabilitative ends." That statute is not civil in nature, therefore Article I, section 17, did not grant a right to a jury trial in this case. *State v N.R.L.*, 354 Or 222 (2013).

10.3 Caps on Noneconomic Damages

> "What I disapproved from the first moment also was the want of a bill of rights to guard liberty *against the legislative* as well as executive branches of the government, that is to say to secure freedom in religion, freedom of the press, freedom from monopolies, freedom from unlawful imprisonment, freedom from a permanent military, *and a trial by jury* in all cases determinable by the laws of the land." Thomas Jefferson, Letter to Francis Hopkinson (Mar. 13, 1789) regarding the ratification of the U.S. Constitution without a Bill of Rights, reprinted in Bernard Schwartz, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY, Vol. 1, p. 619 (1971) (emphasis added).

* * * *

> "Until the perceived insurance crisis of recent times, no one has seriously suggested that assessment of the amount of a plaintiff's damages in a common law action is anything but a question for the jury or that plaintiffs should be required to forego full compensation for their injuries for a public policy reason." Paul B. Weiss, *Reforming Tort Reform: Is There Substance to the Seventh Amendment?*, 38 CATH.U.L.REV. 737, 742 (1989).

Oregon enacted a noneconomic damages cap, ORS 31.710. The "legislature's purpose in enacting the cap on noneconomic damages was 'to stabilize insurance premiums and to decrease costs associated with tort litigation.' *Tenold v Weyerhaeuser Co.*, 127 Or App 511, 519, 873 P2d 413 (1994) (citing Minutes, House Judiciary Subcommittee, Apr 29, 1987, at 11, 15). The Supreme Court has quoted as apt the following summary of the legislative history of the noneconomic damages cap in ORS 31.710(1): 'In enacting the cap, the Oregon Legislature sought to control the escalating costs of the tort compensation system. The legislature determined that the cap would put a lid on litigation costs, which in turn would help control rising insurance premium costs for Oregonians. The legislature listened to hours of testimony on the insurance and tort crisis, and how reform was needed in order to salvage the system.' *Greist v Phillips*, 322 Or 281, 299 n 10, 906 P2d 789

(1995) (quoting Kathy T. Graham, 1987 *Oregon Tort Reform Legislation: True Reform or Mere Restatement*?, 24 WILLAMETTE L REV 283, 292 (1988) (footnote omitted in *Greist*))." *Vasquez v Double Press Mfg., Inc*., 288 Or App 503, 516 (2017).

10.3.1 *Horton* and its Void

See **Remedy Guarantee**, Chapter 12, *post*.

In ***Horton v OHSU***, 359 Or 168 (2016) two doctors admitted that they negligently cut blood vessels to an infant's liver, resulting in the infant's severe lifelong injuries. A jury returned a verdict for plaintiff for $6,071,190 as economic damages plus $6,000,000 in noneconomic damages. The trial court ruled that the Tort Claims Limit capping damages at three million dollars, applied to one doctor (as opposed to the hospital), violated the remedy clause in Article I, section 10, and Article I, section 17 and Article VII (Amended), section 3, which protected civil jury verdicts, per *Lakin v Senco Products, Inc*., 329 Or 62 (1999). The trial court entered a limited judgment for the jury's verdict against one doctor. The doctor filed a direct appeal to the Oregon Supreme Court under ORS 30.274(3).

The Oregon Supreme Court held: "the right to a remedy protected by Article I, section 10, and the right to a jury trial protected by Article I, section 17, address related but separate issues. Article I, section 10, limits the legislature's substantive authority to alter or adjust a person's remedy for injuries to person, property, and reputation. Article I, section 17, guarantees a jury trial in those classes of cases in which the right to a jury trial was customary at the time the Oregon Constitution was adopted and in cases of like nature. However, Article I, section 17, places no additional substantive limit on the legislature's authority to alter or adjust remedies beyond that found in Article I, section 10." *Id*. at 173.

The *Horton* Court called *Smothers v Gresham Transfer, Inc*., 332 Or 83 (2001) "a procrustean template" and overturned it. *Id*. at 197. The *Horton* court "reaffirm[ed]" its remedy clause decisions that preceded *Smothers*, including the cases that *Smothers* disavowed. *Id*. at 188 & n 9 & 218 ("we overrule *Smothers*" and "our remedy clause cases that preceded *Smothers*, which we reaffirm today"). *Smothers* had concluded that Article I, section 10, requires courts to ask "whether the plaintiff has alleged an injury to one of the absolute rights that Article I, section 10 protects." *Id*. at 175. If yes, "then the remedy clause mandates that a constitutionally adequate remedy for that injury be available." *Id*. at 176. "If the legislature has abolished a common-law cause of action for protected injuries, has the legislature 'provided a constitutionally adequate substitute remedy for the common-law cause of action for that injury?'" *Id*.

The Court wrote that *Smothers* was incorrect in viewing early remedy clause cases as preventing the legislature from modifying Oregon common law as it existed in 1857. *Id*. at 197. The Court cited, among other things, Article XVIII, section 7, of the Oregon Constitution, which provides: "All laws in force in the Territory of Oregon when this Constitution takes effect, and consistent therewith, shall continue in force until altered, or repealed." *Id*. at 181, 185, 187, 196, 220. The Court also mused that: "Certainly, nothing in the text of the remedy clause says that its protections are limited to the common law as it existed at a particular time. The clause lacks words used elsewhere in the constitution that connect a constitutional guarantee to a single point

in time." *Id*. at 180 (citing three provisions but not citing Article I, section 17, which states that the right of trial by jury "shall remain inviolate.").

The *Horton* Court decided it wanted to write about Magna Carta from 1215 in rendering its decision about what the framers in Oregon thought in 1857. *Id*. at 198-206. From there, it brought itself up to early American state cases that it says "recognized that the legislature may substitute one remedy for another, even though the new remedy effectively limited common-law rights" as long as the legislature did "not deny a remedy completely." *Id*. at 213. The Court admitted: "Perhaps our early cases interpreted Oregon's remedy clause more robustly than other courts did." *Id*.

The *Horton* Court concluded: "we cannot say that the $3,000,000 tort claims limit on damages against state employees is insubstantial in light of the overall statutory scheme, which extends an assurance of benefits to some while limiting benefits to others." *Id*. at 224. "We recognize that the damages available under the Tort Claims Act are not sufficient in this case to compensate plaintiff for the full extent of the injuries that her son suffered. However, our remedy clause cases do not deny the legislature authority to adjust, within constitutional limits, the duties and remedies that one person owes another." *Id*.

Horton concluded that the legislative cap on noneconomic damages does not violate Article I, section 17. *Horton* basically eliminates Article I, section 17, and Article VII (Amended), section 3, as protection from legislative remittitur against injured parties. (The Court did not use the phrase "legislative remittutur").

There are many remarkable, disturbing aspects of *Horton*. Take the word "inviolate," as Article I, section 17, states: "The right of trial by jury shall remain inviolate." Buried in a footnote, the Court "question[s] how much weight can be put on that term." *Id*. at 235 n 35. The *Horton* Court decided to value a Fifth Circuit case interpreting the Mississippi Constitution's jury-trial right, rather than *Lakin*'s decision that agreed with the Washington Supreme Court's interpretation of its jury-trial right. *Lakin* was clear: "shall remain inviolate" means that the right shall remain what it was in 1857, and that included the right to have the jury's verdict entered without advance legislative remittitur. Whatever a Fifth Circuit panel thinks about the Mississippi Constitution, why would the Oregon Supreme Court weight it more heavily than the unanimous seven-justice Oregon Supreme Court itself had concluded 16 years earlier in *Lakin*?

Elected politicians enacted the "cap" on noneconomic damages. Notably, the legislature enacted a "cap" rather than a "floor" for severely injured people. (In other words, the legislature did not enact a law requiring a *minimum* amount of damages when a defendant causes injury. A cap rather than a floor requires asking who the legislators are protecting.).

Lakin had held that "The legislature may not interfere with the full effect of a jury's assessment of noneconomic damages, at least as to civil cases in which the right to jury trial was customary in 1857, or in cases of like nature."

The *Horton* court overruled the unanimous holding in *Lakin*, which held that Oregonians have a fundamental constitutional civil right to entry of judgment based on a jury's assessment of noneconomic damages based on each individual case. The *Horton* court wrote: "it is difficult to describe *Lakin* as either 'settled or 'well-established' precedent." *Id*. at 234. The *Horton* court

actually wrote that given *Lakin* and its four subsequent cases, Article I, section 17, cases are in "disarray." *Id*.

Note: It is not difficult to describe *Lakin* as settled precedent, unless one wants to describe it that way. The *Horton* court criticized the justices who wrote *Smothers* by stating that *Smothers* was a "procrustean template." Isn't that what *Horton* is, too?

Through *Horton*, the court shifted power away from the people as jurors and filled that void with itself and the legislature.

The *Horton* court lumbered after one law review article by Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn L Rev 639 (1973), here. The *Horton* court wrote that "[h]istorians no longer accept the Magna Charta pedigree for jury trial," citing nothing for that idea except a footnote in the Wolfram article. *Horton*, 359 Or at 236 n 36.

That may be accurate -- but it makes no difference to damages caps in Oregon in 1857. William Forsyth, in HISTORY OF TRIAL BY JURY (1878) spends almost 400 pages writing for the proposition that "the English jury is of indigenous growth, and was not borrowed from any of the tribunals that existed on the continent." *Id*. at p. 11. Forsyth wrote: "We can trace the undoubted existence of juries . . . as far back as one thousand years; before that period the history of Northern Europe is wrapped in Cimmerian darkness, and we can not expect to find authentic records respecting juries, where all other records fail." *Id*. at 14. Juries on the European continent may trace to the early ninth century. Theodore F.T. Plucknett, A CONCISE HISTORY OF THE COMMON LAW (1956), p. 109. The point is that it doesn't matter what the "pedigree" was in the year 900 or 1215 to determine what "the right to trial by jury shall remain inviolate" means in Oregon.

Because the *Horton* court wanted to follow the old Wolfram law review article, what Wolfram wrote should be read more completely than the tiny excerpt that the *Horton* majority used. Wolfram wrote:

"Specifically, it is clear that the [seventh] amendment was meant by its proponents to do *more* than protect an occasional civil litigant against an oppressive and corrupt federal judge – although it certainly was to perform this function as well. There was substantial sentiment to preserve a supposed functioning of the jury that would result in ad hoc 'legislative' changes through the medium of the jury's verdict. Juries were sought to be thrust into cases to effect a result different from that likely to be obtained by an honest judge sitting without a jury. The effort was quite clearly to require juries to sit in civil cases as a check on what the popular mind might regard as *legislative* as well as judicial excesses." Wolfram, 57 MINN L REV at 653 (emphasis added).

Wolfram further wrote:

"The framers all seem to have agreed that trial by jury could be traced back in an unbroken line to the provision in Magna Charta in which King John guaranteed trial by one's peers. The only argument was whether Magna Charta preserved the right of trial by jury against interference *both by the King and by Parliament*." *Id*. at n 44. The

antifederalists so argued. The federalists argued that Magna Charta did not limit Parliament, but only the King." *Ibid*. (emphasis added).

In short, the framers of the U.S. Constitution did debate whether the right to trial by jury limited *Parliament* in addition to the Crown. The Oregon Supreme Court in *Horton* appears to believe that the right of trial by jury is not

Next, the *Horton* court cited Blackstone heavily. But Blackstone was not the singular authority on trial by jury and legislative caps. Forsyth noted that Blackstone, "one of the greatest of our legal authorities," had been "misled" by thinking that Magna Charta first provided for trial by jury. *Id*. at 91. Plucknett compared Blackstone to Lord Mansfield "who tried to treat some of the ancient portions of the common law in the same liberal spirit as the newer commercial law." Plucknett wrote: "Sir William Blackstone . . . at times a critic of the law as it then existed, was not a reformer by temperament, and his *Commentaries* (1776) then, as now, leave the impression of almost indiscriminate praise for the great bulk of the old law which the courts had been accustomed to administer." *Id*. at 69-70. Jeremy Bentham read Blackstone's *Commentaries*, which "stirred him to fierce criticism expressed in his *Fragment on Government* (1776)." *Id*. at 73.

In sum, Blackstone, an authority on then-existing English law in the late 1700s, need not be the authority on Oregon's Article I, section 17.

The *Horton* court then selectively quoted from Alexander Hamilton's FEDERALIST No. 83, in which Hamilton argued for ratifying the Constitution without an express civil jury trial provision. The *Horton* majority rested its case on a short reference to "taxation" in No. 83. In that publication, Hamilton addressed another person's "observation" that "trial by jury is a safeguard against an oppressive exercise of the power of taxation. This observation deserves to be canvassed." THE FEDERALIST, No. 83, p. 509 (Bantam Dell ed. (1982)). Then Hamilton broke down that "observation" on taxation. A jury does not set the amount of taxes, the "legislature" does, he wrote. *Id*. at 510.

Alexander Hamilton was <u>not</u> discussing caps on personal injuries or whether state legislatures may cap damages. Being *taxed* at an amount set by a legislature is different from being *compensated* for injury at a maximum amount set by a legislature. A jury's factual decision is not akin to a "tax" on a person. A legislature's "tax" on its population is not akin to a fact of "pain and suffering" for injury.

In short, legislative taxation powers before the U.S. Constitution was ratified have nothing to do with Article I, section 17, of the Oregon Constitution.

In THE FEDERALIST No. 83, Hamilton spent considerable effort on the complexity of incorporating the differences in the states' various civil jury trial provisions into one federal constitution. Variation among states in 1787 is one critical point that the *Horton* court skipped in overturning *Lakin*. Oregon modeled Article I, section 17, from Indiana's constitution "without discussion." *Horton*, 359 Or at 243 (citing *Lakin*, 329 Or at 71). Remarkably, the *Horton* court just cited one case (!) to conclude that "the right of trial by jury that the Seventh Amendment preserved was the right defined *by the English common law*. *See United States v Wonson*, 28 F Cas 745, 750 CCD Mass 1812). *Horton*, 359 Or at 243. (Emphasis added). Moreover, the following sentences—completely

without any footnote or basis to link the ideas -- demonstrate the profound gaps in the *Horton* writers' logic:

"Oregon modeled its guarantee in Article I, section 17, on the guarantee in Indiana's constitution and adopted that guarantee without discussion. It follows that the relevant history of Article I, section 17, comes primarily from the English practice reflected in Blackstone's Commentaries and the history leading up to and surrounding the adoption of the seventh Amendment. That history reveals what the text of that provision implies and what this court consistently had recognized until Lakin: Article I, section 17, guarantees a procedural right; that is, it guarantees the right to a trial by jury (as opposed to a trial by a judge) in civil actions for which the common law provided a jury trial when the Oregon Constitution was adopted in 187=57 and in cases of like nature." *Id*. at 243.

Just as the *Horton* court footnoted that the framers were mistaken in their belief that Magna Carta formed the basis for the right of civil trial by jury, the judge writing *Wonson* may have been mistaken in his belief that the Seventh Amendment was defined by the English common law, or may have not meant its decision to be the determinative, conclusive data in the twenty-first century on jury trial rights. Moreover, the *Horton* court acknowledged Hamilton's concern that a Seventh Amendment could be an amalgamation of all or some states' civil jury trial rights. Oregon's Article I, section 17, should be traced and assessed with more independence than simply stretching dots to lead to a conclusion that Blackstone's *Commentaries*, complacently recording the English common law, define Article I, section 17. As the *Horton* court criticized its own fellow justices who wrote *Smothers* as creating a "procrustean template," *Horton* itself is a procrustean opinion. For the *Horton* court to "conclude that *Lakin* should be overruled" based on Article I, section 17's "text" and its "history," when placing no effort on examining its "history," is not a legitimate basis to overrule *Lakin*.

Even accepting that Blackstone's "*Commentaries* had a tremendous sale" in America, Plucknett at page 287, the *Horton* court's citations to THE FEDERALIST NO. 83 (in which Hamilton compared in detail each state's jury provisions) show that colonies' and states' variations should be considered *by each state*.

There appears to have been no noneconomic damages caps in 1787. Thus it is logical and rational to understand that the Oregon Constitution writers and their predecessors did not intend to include any encroachment by legislatures on juries' factual determinations noneconomic damages. There is zero evidence that the Founders of the United States intended the Seventh Amendment to permit *state* legislatures to enact noneconomic damages caps. Professor Akhil Amar has written: "State-law causes of action were at the core of the Seventh Amendment. For the Founders, two types of Seventh Amendment cases were paradigmatic: first, state-law trespass suits against federal officers, and second, state-law contract cases pitting creditor-state plaintiffs against debtor-state defendants. The Seventh Amendment was crafted around these two types of cases and had less bite for causes of action based on federal statutes; a Congress intent of evading civil juries could draft statutes sounding in equity, not law." Akhil Reed Amar, THE LAW OF THE LAND (2015) p. 257-58.

The *Horton* court did breeze across a few other jurisdictions in the present date. The *Horton* court created what it called a "ledger" of the "22 other jurisdictions" to consider damages caps under each state's constitution as of 2016. *Horton*, 359 Or at 248. The *Horton* court declined to engage in

any effort to compare those states' constitutions' histories or even their texts, preferring an accounting "ledger" of what the currently prevailing political views are. Notably, the five of the 22 "other jurisdictions" that protect citizens' rights to have a jury decide facts including noneconomic damages are Washington, Alabama, Georgia, South Dakota, and Missouri. *Id.* at 249 n 50. (This is the *Horton* court's accounting). Those states now provide greater protection of this fundamental civil right than Oregon.

Finally, in its self-serving "ledger" of other states' decisions, the *Horton* court failed to even note that each state has different standards, different bases, for overturning statutes as unconstitutional. For example, in Mississippi, it is a plaintiff's burden to prove beyond a reasonable doubt that a statute is unconstitutional: "'The general principle followed [by Mississippi courts] when considering a possible conflict between the [Mississippi] constitution and a [state] statute is that the constitutional provision prevails.' *Bd. of Trs. of State Insts. of Higher Learning v. Ray*, 809 So.2d 627, 636 (Miss.2002) (en banc). However, '[s]tatutes are clothed with a heavy presumption of constitutional validity, and the burden is on the party challenging the constitutionality of the statute to carry his case beyond a reasonable doubt.' *James v. State*, 731 So.2d 1135, 1136 (Miss.1999). 'All doubts must be resolved in favor of validity of a statute.' *PHE, Inc. v. State*, 877 So.2d 1244, 1247 (Miss.2004) (citation omitted). 'Any legitimate interpretation that creates a reasonable doubt of unconstitutionality may prevent the court from striking the statute.' *Attorney Gen. v. Interest of B.C.M.*, 744 So.2d 299, 301 (Miss.1999) (en banc) (citation omitted). A statute will be struck down 'only where the legislation under review be found in palpable conflict with some plain provision of the ... constitution.' *Hood v. State*, 17 So.3d 548, 551 (Miss.2009)." *Learmouth v Sears, Roebuck Co.*, 710 F3d 249, 258 (5th Cir 2013).

Oregon courts may not be as deferential to the legislature by requiring such a high burden on parties challenging a law as unconstitutional. Oregon courts may apply a "narrowing construction" of a law to avoid declaring it to be unconstitutional. For example, in a First Amendment case, the Oregon Court of Appeals wrote: "It is true that a court, when faced with an ambiguous statute, may employ a maxim of statutory construction that would cause the court to choose a constitutional construction of the statute over an unconstitutional one. *See State v Kitzman*, 323 Or 589, 602, 920 P2d 134 (1996) ('when one plausible construction of a statute is constitutional and another plausible construction of a statute is unconstitutional, courts will assume that the legislature intended the constitutional meaning'). That maxim has no application here, though, because ORS 248.010 is unambiguous—it prohibits 'the use of the whole party name or any part of it,'" with no limitations or qualifications." *Freedom Socialist Party v Bradbury*, 182 Or.App. 217 (2002) (*Kitzman* is an Article I, section 11 case). More significantly, in 2015, the Oregon Supreme Court characterized *Kitzman* as applying a "canon of statutory interpretation that counsels avoidance of unconstitutionally" but that canon "applies only when a disputed provision remains unclear." *State v Lane*, 357 Or 619, 637 (2015). In *Lane*, the Court wrote:

> "The canon of interpretation that counsels avoidance of unconstitutionality applies only when a disputed provision remains unclear after examination of its text in context and in light of its enactment history. See *State v Kitzman*, 323 Or 589, 602, 920 P.2d 134 (1996) (if legislative intent remains unclear after considering text, context, and legislative history, court may apply maxim that, 'when one plausible construction of a statute is constitutional and another plausible construction of a statute is unconstitutional, courts will assume that the legislature intended the constitutional meaning'). In light of our analysis of the text of Article I, section 44(1)(b), in its context, and in light of its enactment

history, it is not clear to us—and defendant does not explain—the nature of the persistent ambiguity that application of the avoidance canon ordinarily requires." *Id*.

In short, when compiling and relying a ledger of states with unconstitutional noneconomic damages caps, the Oregon Supreme Court did not address the different standards that state courts have in declaring statutes unconstitutional.

Issues with *Horton* in a nutshell:

•*Horton* majority and concurrence use the word "procedural" 23 times (the dissent uses it three times). *Lakin* used that word one time in a footnote on "procedural due process." Why did the Oregon Supreme Court become so fixated on the word "procedural" in *Horton*?

•*Horton* majority and concurrence use the word "parliament" (or "parliamentary") 60 times. Why did the Oregon Supreme Court become so fixated on parliament in *Horton*?

•Why did the *Horton* majority decline to mention stare decisis? It stated that it decided to reconsider *Lakin* due to its self-generated "disarray." Is that a reason?

•The words "by jury" "suggests" that all Article I, section 17, "preserves is a right to a procedure." Really?

•*Horton* reasoned: "Oregon modeled its guarantee in Article I, section 17, on the guarantee in Indiana's constitution and adopted that guarantee without discussion. *It follows that* the relevant history of Article I, section 17, comes primarily from the English practice reflected in Blackstone's *Commentaries* and the history leading up to and surrounding the adoption of the Seventh Amendment. That history reveals what the text of that provision *implies* and what this court consistently *had recognized until Lakin*: Article I, section 17, guarantees a procedural right; that is, it guarantees the right to a trial by a jury (as opposed to a trial by a judge) in civil actions for which the common law provided a jury trial when the Oregon Constitution was adopted in 1857 and in cases of like nature. However, the history does not suggest that Article I, section 17, limits the legislature's authority to define, as a matter of law, the substantive elements of a cause of action or the extent to which damages will be available in that action." *Id*. at 243 (emphasis added). Again: because Oregon used the words from Indiana's Constitution, "it follows that" Oregon's fundamental right to a civil jury verdict "comes primarily from" Blackstone? Really?

•*Horton* reasoned: "Blackstone focused solely on the procedures associated with jury trials." *Id*. at 236. Blackstone wrote that when the civil jury examines a fact and "once the fact is ascertained, the law must of course redress it," but that "did not reflect an understanding that the jury's fact-finding ability imposed a substantive limitation on parliament or common-law courts' authority to announce legal principles that guide and limit the jury's fact-finding function." *Id*. at 238. The writers and voters on the Oregon Constitution agreed with that because they adopted Indiana's fundamental right to a jury verdict verbatim?

•The *Horton* majority relied heavily on two old law review articles: Charles W. Wolfram (1973) and Edith Guild Henderson (1966), but neither mentions legislative caps. Henderson "did not identify any substantive limitation among the original states that the right to civil jury placed on a state legislature's ability to define civil causes of action or damages." *Id*. at 239. But Henderson's article is *not about* caps; it is about the diversity of jury rules in colonies and states before the Seventh Amendment was written and ratified. As for Wolfram, he actually wrote that the Seventh Amendment right of a civil trial by jury was sought in part to guard against obnoxious legislation passed by a potentially oppressive legislature that could not be trusted to preserve a right of trial by jury:

> An "argument against a civil jury trial guarantee [in the U.S. Constitution] was that it was wiser to leave the matter to Congress for flexible regulation and future adjustment, rather than to create the straight-jacket of a constitutional guarantee. [Representatives] made this argument [in the Constitutional Convention and in state] ratification debates. Politically, the argument seems to have foundered because it gratuitously ignored one of the reasons why a constitutional guarantee of civil jury trial was insisted upon: to guard against unwanted legislation passed by a misguided national legislature. *Certainly the same potentially oppressive legislature that might pass obnoxious legislation could not be trusted to preserve a right of jury trial in cases arising under that legislation*. The only federalist response to this was a rather lame plea to assume that decent men would be elected to Congress or that, if Congress legislated to take away the right to jury trial in civil cases, the public in some unspecified way would 'instantly resist.'" **Charles W. Wolfram**, *The Constitutional History of the Seventh Amendment*, 57 MINN L.REV. 639, 665 (1973) (footnotes omitted) (emphasis added).

•The *Horton* majority manipulates THE FEDERALIST NO. 83 (Hamilton). The Federalist papers were written to advocate to New Yorkers for ratification of the Constitution despite its lack of a civil jury-trial right. The *Horton* court misappropriated Hamilton by writing that Federalist and Anti-Federalist arguments on civil jury trial "all addressed the jury's value as a procedural corrective" on judges, not as "a substantive limit on Congress's lawmaking power."

The worst *Horton*-court abuse of Hamilton in The Federalist No. 83 is *Horton*'s reliance on Hamilton's statement on taxes, as if it had any relation to caps on pain-and-suffering damages in tort: "In addressing [the civil jury as a safeguard against taxation], Hamilton explained that the right to a civil jury placed no limit on the legislature's power to define the substantive law." *Id*. at 241. "Hamilton explained that the right to a civil jury trial would not limit Congress's ability to enact statutes defining the subjects and extent of taxation. Instead it could serve as a check on the manner in which the executive carried out the law in an individual case." *Id*. What Hamilton wrote had nothing to do with legislative caps on private parties:

> Trial by jury is not a safeguard against an oppressive power of taxation. "It is evident that it can have no influence upon the legislature, in regard to the amount of the taxes to be laid, to the objects upon which they are to be imposed, or to the rule by which they are to be apportioned. If it can have any influence therefore, it must be upon the mode of collection, and the conduct of the officers entrusted with the execution of the revenue laws." **Alexander Hamilton**, The Federalist No. 83 (1788)

•*Horton* used simplistic reliance on *United States v Wonson*, 28 F Cas 745 (1812), in which Justice Story stated that the Seventh Amendment right was defined by the English common law. Consider this:

> "There is no recorded legislative history suggesting that the phrase 'common law' referred to the common law of England" as *Wonson* had concluded. Kenneth S. Klein, *The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial*, 53 OHIO STATE L.J. 1005, 1022 (1992) (criticizing Wolfram for writing that *Wonson* stated the "obvious").

> "State-law causes of action were at the core of the Seventh Amendment. For the Founders, two types of Seventh Amendment cases were paradigmatic: first, state-law trespass suits against federal officers, and second, state-law contract cases pitting creditor-state plaintiffs against debtor-state defendants." Akhil Reed Amar, THE LAW OF THE LAND: A GRAND TOUR OF OUR CONSTITUTIONAL REPUBLIC p. 257-58 (2015). Linking the Fourth and Seventh Amendments, reasonableness "in tort law often emerges as an issue of fact, or a mixed issue of law and fact, in which the jury looms large. Beyond its role in helping to determine liability, a civil jury would also often decide whether to sock defendants with punitive damages, and, if so, where to set the award within a broad range marked out by judges." *Id*. at 256.

•The Horton majority's unsophisticated use of a "ledger" of the 22 other jurisdictions "that have considered this issue" does nothing to advance analysis of Oregon constitutional law, stare decisis, or the effect of the change on civil rights. All it does is retract and attempt to guide readers to believe that it is not alone in so doing. Seventeen states held that the cap does not violate their state right to jury trial. Five held that caps are unconstitutional, citing WA, AL, GA, SD, MO. *Id*. at 248-49. As noted, each state has different texts, history, and arguments, thus reliance on a simplistic ledger is of no value.

• The *Horton* concurrence misstates *Lakin*'s civil rights protection as "what purported to be a rigid originalist interpretive approach." *Id*. at 254. *Lakin* never "purported to be" either "rigid" or "originalist." Instead, *Lakin* held that the civil right to a jury trial means and protects today what it meant and protected in 1857. Constitutional civil rights protect against the tyranny of the legislature against the people by eroding their rights through legislation especially that specifically designed and implemented to protect insurance companies from ordinary (non-political) jurors fact-finding in favor of catastrophically injured ordinary people. "Rigid originalism" is what conservative interpreters may lean toward in not expanding civil rights. *Lakin* secured the civil right to a jury verdict. *Horton* eviscerates it. By attempting to convince people that *Lakin* "purported to be a rigid originalist" opinion, those words in *Horton* are a failed attempt to cover *Horton*'s devastating retraction of civil rights.

• *Horton* dissenters: Justices Martha Walters and Richard Baldwin wrote that

• "Damages caps did not exist at common law; they are a modern innovation."

• The majority "bargains away and belittles two constitutional provisions designed to guarantee justice for all. I dissent."

• “The idea that the Oregon Constitution permits the legislature to bargain away a plaintiff’s constitutional right to remedy in these circumstances is so repugnant that I wonder whether the majority means to endorse it.”

• “Until today, a bedrock of our constitutional jurisprudence has been that ‘a state legislative interest, no matter how important, cannot trump a state constitutional command.”

• “The [noneconomic damages cap] does not change the elements of a common-law claim or determine the types of recoverable damages; it requires that a court enter judgement for an amount of damages different than the amount awarded by the jury. ORS 30.269(3). It is one thing to say, correctly, that the court and the legislature can *change* the common law; it is quite another to say that the legislature can preclude a plaintiff from obtaining the benefit of a jury’s award under *existing* common law.”

10.3.2 Medical Malpractice

See the preceding **Section 10.3.1** on Personal Injury.

Note: *Klutchkowski*, discussed *post*, must be read in the shadow of ***Horton v OHSU***, 359 Or 168 (2016), which overturned *Lakin v Senco Products, Inc*., 329 Or 62 (1999), thereby allowing the legislature to impose its predetermined noneconomic damages cap.

In 2013, the Oregon Supreme Court decided that Article I, section 17, prohibits the legislature from limiting the jury’s determination of noneconomic damages in medical malpractice cases for injuries, including those that occur to a person *during his birth*. Such medical malpractice cases are not “prenatal” torts, they are medical malpractice torts. Applying Oregon’s statutory cap on noneconomic damages violates Article I, section 17, in medical malpractice cases. A “cause of action for medical malpractice preexisted the adoption of the Oregon Constitution. *See, e.g.*, *Mead v Legacy Health System*, 352 Or 267, 276 n 7 (2012); *see also* William Blackstone, 3 *Commentaries on the Laws of England* 122 (1768).” *Klutschkowski v PeaceHealth*, 354 Or 150 (2013).

Note: In *Klutchkowski*, the Oregon Supreme Court cited Blackstone to uphold its precedent declaring legislative caps unconstitutional. In *Horton*, the Oregon Supreme Court cited Blackstone to support its case to overturn its precedent and declare legislative caps not unconstitutional under Artricle I, section 17.

10.3.3 Prenatal Injuries

The Oregon Supreme Court has stated: “[W]e assume * * * that, in 1857, a child would not have had a cause of action for physical injuries to the mother during the course of her pregnancy that resulted from a breach of the general standard of due care and that had only a consequential effect on what was, at the time of the injury, a fetus.” *Klutschkowski v PeaceHealth*, 354 Or 150, 176 (2013). Note that injuries occurring during birth are not “prenatal” torts. But *Klutchkowski* now must be read under ***Horton v OHSU***, 359 Or 168 (2016), which overturned *Lakin v Senco Products, Inc*., 329 Or 62 (1999).

10.3.4 Loss of Consortium in Products Liability

Loss of consortium related to a spouse's injury was recognized in 1857. *Rains v Stayton Builders Mart, Inc*., 264 Or App 636, 666 (2014), *rev'd in part, aff'd in part, vacated in part, and remanded,* 359 Or 610 (2016). Note: ***Horton v OHSU***, 359 Or 168 (2016) overturned *Lakin v Senco Products, Inc*., 329 Or 62 (1999).

Rains v Stayton Builders Mart, Inc., 359 Or 610 (2016) A defendant hired Kevin Rains to build a barn. That defendant bought certain wood boards from another defendant. Yet another defendant had made the board. At least one board had a knot, which made it defective. Kevin Rains stood on a wood board, which broke, and he fell 16 feet to the ground, becoming a T12 paraplegic. Kevin and his wife brought several claims against several defendants, who third-partied in the board-maker and other board-manufacturing companies.

The case was tried on plaintiffs' strict products liability and loss of consortium claims. The jury returned a verdict against two defendants. The jury awarded the injured man $5,237,700 in economic damages and $3,125,000 in noneconomic damages, and the man's wife $1,012,500 in noneconomic damages. The trial court applied the comparative fault statute (ORS 31.600(2)), then designated one defendant 30 percent at fault, the other defendant 45 percent at fault, and the injured man 25 percent at fault. After reducing the judgment to account for the injured man's comparative fault, the trial court entered a limited judgment for plaintiffs in the total sum of $7,031,400. All of the wife's $759,375 damages award was for noneconomic injuries. Of the $6,272,025 awarded to Kevin, about $2,343,750 was for noneconomic damages. *Id*. at 638.

The trial court denied the board-maker-defendant's motion to reduce both plaintiffs' noneconomic damages under ORS 31.710(1). ORS 31.710(1) caps noneconomic damages at $500,000 in most civil actions "arising out of bodily injury[.]" The trial court denied the defendant's motion to apply the statutory cap, agreeing with plaintiffs that application of the cap to strict products liability and loss of consortium would violate Article I, section 17, of the Oregon Constitution, under *Lakin v Senco Products, Inc*., 329 Or 62, *clarified*, 329 Or 369 (1999), because those claims existed when the Oregon Constitution was adopted. The trial court did not consider plaintiff's Article I, section 10, and Article VII (Amended), section 3, arguments.

The Court of Appeals held that the trial court erred by refusing to apply the statutory cap on noneconomic damages to Kevin's strict products liability claim. The court held that the Kevin's wife's loss of consortium claim could not be capped, per Article I, section 17, of the Oregon Constitution, because that type of claim existed when the Oregon Constitution was adopted (although then only for men).

Both sides sought review in the Supreme Court. The board-maker argued that Article I, section 17, does not protect a loss of consortium claim. Plaintiffs sought review arguing that Article I, section 17, protects strict products liability claims.

While the petitions for review were pending, the Oregon Supreme Court decided ***Horton v OHSU***, 359 Or 168 (2016), which "overturned *Lakin* based on [the] court's conclusion that Article I, section 17, does not independently restrict the legislature's ability to impose a statutory damage cap on specific claims." *Id*. at 639. The Supreme Court also held in *Horton* that "Article I, section 10, of the Oregon Constitution, substantively ensures a remedy for persons injured in their person, property, or reputation." *Id*. at 639 n 10 (citation to *Horton* omitted).

The Oregon Supreme court vacated the Court of Appeals' decision on Article I, section 17, for the Court of Appeals to consider this case under *Horton*.

10.3.5 Wrongful Death

See also **Section 12.3** on caps under the Remedy Clause.

10.3.5.A Common Law

Professor Wex S. Malone "discovered no observation in colonial statues or decisions lending any support to a belief that a death claim would have been denied by our colonial ancestors." Wex S. Malone, *The Genesis of Wrongful Death*, 17 STAN L REV 1043, 1066 (1965). New York, Connecticut, and a federal district court in Maine had clearly recognized the right to sue for the killing of a wife or child" before 1848. *Id*. A Massachusetts case in 1848 was "the first case in this country denying a cause of action for death." *Ibid.* That case was "unprecedented in America." *Id*. at 1067.

The "once popular common-law remedy" for wrongful death became obsolete "in the shadow" of legislation in the mid-nineteenth century. Malone, 17 STAN L REV at 1071 & n 141, 1076. Widows and children, at common law, may not have had legal rights to bring a wrongful-death action for their husbands and fathers. Statutes went further, conferring on the widow and children the rights that their husbands and fathers had had. "The statute, therefore, represented a new and comprehensive scheme for disposing of controversies arising out of wrongful deaths, which by that time had become a problem of considerable importance due to the appearance of the railroad and the factory. It is probable that the courts felt thereafter that any judicial innovation in the common law in this field independent of the provisions of [statutes] would impair the consistency of the statutory scheme and would result in confusion." *Id*. at 1059.

Except for Massachusetts, which expressly acknowledges common-law wrongful death actions, there may be no decision on the common-law right to wrongful death action since 1932. Malone, 17 STAN L REV at 1071 & n 141, 1076; see *Gaudette v Webb*, 362 Mass 60, 71 (1972) ("the law in this Commonwealth has also evolved to the point where it may not be held that the right to recovery for wrongful death is of common law origin, and we so hold. To the extent that *Carey v Berkshire R.R.*, 1 Cush 475, and other prior decision of this court conflict with our present holding, those decisions are no longer to be followed.").

Early American cases allowed husbands and fathers to receive compensation at common law for wrongful death of wives and children. Malone, 17 STAN L REV at 1062-65; John Fabian Witt, *From Loss of Services to Loss of Support: The Wrongful Death Statutes, the Origins of Modern Tort Law, and*

the Making of the Nineteenth-Century Family, LAW AND SOCIAL INQUIRY (2000) p. 731 (citation omitted).

Georgia, Connecticut and the federal court in Maine also allowed common law actions for wrongful death before 1857. Malone, 17 STAN L REV at 1066; Witt at 732-33 (citations omitted). In 1853, two years before Missouri enacted its first wrongful death act, Missouri also recognized a parent's right to sue for the death of a child. *James v Christy*, 18 Mo 162 (1853); see also Daniel J. Sheffner, *Wrongful Death's Common Law Antecedents in Missouri*, JOURNAL OF THE MISSOURI BAR (July-August 2014) p. 194-98.

For a brief history of wrongful death claims in Oregon, see *Goheen v General Motors Corporation*, 263 Or 145 (1972). Oregon appellate courts still have not recognized the common-law right to a wrongful death action. *See, e.g.* *Lunsford v NCH Corp*., 271 Or App 564, 569 (2015) *decision vac'd*, 360 Or 235 (2016) ("In the past decade, the Supreme Court has considered the historical accuracy of the premise that wrongful death actions have no basis in common law – and no protection under the remedy clause – but has not disavowed its prior opinions." *Lunsford v NCH Corp*, 285 Or App 122 (2017) on remand.

To date, there appear to be no reported Oregon cases acknowledging or creating a right to a civil action for wrongful death before Oregon statehood in 1859. That is a critical aspect in Oregon constitutional law regarding legislative caps on jury-awarded damages for injury and death.

The Oregon Supreme Court has recognized that before the Oregon Constitution was adopted in 1857, *personal injury* cases existed in Oregon and therefore jury verdicts on damages for personal injury are protected from legislative caps, in most cases. In contrast, since 1891, the Oregon Supreme Court has adopted the "questionable premise" that "there was no common-law action for wrongful death." *Storm v McClung*, 334 Or 210 224 n 6 (2002) (citing *Putman v Southern Pacific Co.*, 21 Or 230, 231-32 (1891)); *Union Bank of California v Copeland Lumber Yards, Inc*., 213 Or App 308, 313-14 (2007) ("the Oregon Supreme Court itself has noted, there is reason to doubt the widely held view that there was no common-law action for wrongful death").

10.3.5.B Statute

The story of the statutory death action "is a novel of the nineteenth century, a story of the new swarming into crowded cities, the travail of the factory and, above all, of the first hurtling of men and goods across the continent on steel rails. Up until this time unnatural death meant largely death by violence in the popular sense of the word. It was the work of the robber, the burglar, or the hot-blooded man. Usually the culprit was executed or confined behind bars. Even if he were left free in society he was usually without any means to compensate the bereaved family of the victim. In this setting, wrongful death was a matter of little concern to the civil law, and lawmen developed no tools for the handling of it. Then, suddenly at mid-century society faced up in panic to a virtually new phenomenon—accidental death through corporate exercise. Tragedy as a result of indifference and neglect was suddenly upon us in the factory, on the city streets, and on the rails. Nor was the principal villain of the piece any longer the impecunious felon. In his place stood the prospering corporation with abundant assets to meet the needs of widows and orphans.

* * * Many have taken the position that common-law judges were staggered at this point, that they could not adapt their archaic conceptions to the new need, and that the resulting void was finally filled when the legislatures came to the rescue. Perhaps this explanation is too easy. * * *" Wex S. Malone, *The Genesis of Wrongful Death*, 17 STAN L REV 1043, 1043-44 (1965). Professor Malone asserted that "the once popular common-law remedy" for wrongful death became obsolete after 1848 because "virtually all" cases were decided "under the shadow of impending legislation" or "under the shadow of preceding legislation." *Id*. at 1071 & n 141, 1076.

In 1840, Massachusetts enacted the first wrongful death statute, which was a quasi-criminal, public statute. John Fabian Witt, *From Loss of Services to Loss of Support: The Wrongful Death Statutes, the Origins of Modern Tort Law, and the Making of the Nineteenth-Century Family*, LAW AND SOCIAL INQUIRY (2000) p. 733 & 735.

In *Baker v Bolton,* 170 Eng. Rep. 1033 (K.B. 1808), "Lord Ellenborough, whose forte never was common sense, held without citing an authority that a husband had no action for loss of his wife's services through her death, and declared in broad terms that 'in a civil court the death of a human being could not be complained of as an injury.'" Prosser on Torts 901, section 127 (4th ed. 1971), cited in *Goheen v General Motors Corp*., 263 Or 145, 150 & n3 (1972).

In other words: "Lord Ellenborough ruled that no action could be maintained at common law for wrongful death. * * * [T]he opinion was probably bad law, but * * * that did not prevent the importation of the opinion's holding into the United States, where it spread like the dutch elm disease." Frederick Davis, *Wrongful Death*, 1973 Wash. U. L. Q. 327, 328 (1973) (available at http://openscholarship.wustl.edu/law_lawreview/vol1973/iss2/2).

The Oregon Supreme Court has quoted Stuart M. Speiser in RECOVERY FOR WRONGFUL DEATH (1966): "Thus, it is clear that the rule in *Baker v Bolton* was not based on precedent or logic. But the fault is not Lord Ellenborough's alone. The fault lies with those judges who followed the rule without questioning or closely examining it." *Goheen v General Motors Corp*., 263 Or 145, 150 & n3 (1972).

In 1846, England, Parliament reacted to *Baker v Bolton* with a wrongful death statute known as Lord Campbell's Act. Witt at 734; Davis at 328.

In 1847, New York enacted its wrongful-death statute, redirecting legislation toward a private tort action like Lord Campbell's Act and allowing for all injuries resulting in death. Witt at 734-35.

In 1857, these states had wrongful death statutes that applied to deaths from any source: Alabama, California, Illinois, Kansas, Michigan, Mississippi, Montana, New Jersey, North Carolina, Ohio, Vermont, and Wisconsin. Will at 736 n 53.

In 1862, Oregon enacted its first statute providing for a wrongful-death action. *See* General Laws of Oregon, ch 4, § 367 (Deady 1845-1864); *Ladu v Oregon Clinic*, 165 Or App 687 (2000). Oregon's statute was "similar" to Lord Campbell's Act, but Oregon "did not specifically limit awards of damages to any named dependents," nor did it "specifically limit damages to pecuniary loss,

although total recovery was limited to $5,000." *Goheen v General Motors Corp*., 263 Or 145, 153 & n 16 (1972)

Oregon's 1862 statute on wrongful death provided:

> "When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action at law therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury caused by the same act or omission. Such action shall be commenced within two years after the death, and the damages therein shall not exceed five thousand dollars, and the amount recovered, if any, shall be administered as other personal property of the deceased person."

Today the wrongful death statute is at ORS 30.020. The legislature caps damages for wrongful death at $500,000. That cap has been upheld under the reasoning that the legislature created that right and remedy, so it can basically overrule a jury's verdict by capping cases. In *Greist v Phillips*, 322 Or 281 (1995), the Oregon Supreme Court determined that the legislature's $500,000 statutory cap on noneconomic damages in wrongful death actions does not violate the right to trial by jury under the Oregon Constitution. It upheld that decision in 2008: "*Greist* was a wrongful death case, the parameters of which are subject to legislative adjustment from time to time." *Hughes v PeaceHealth*, 344 Or 142 (2008).

In 2007, the Oregon Court of Appeals footnoted: "A number of nineteenth-century American courts declared that no right of action for wrongful death existed at common law. * * * Usually, the American courts cited for that proposition an English decision, *Baker v Bolton* * * *. The problem is that a number of scholars have come to believe that Baker was wrong in that regard. * * * In the meantime, however, *Baker* was cited by a number of state courts in this country. * * * That creates an interesting question as to precisely what was the state of the 'common law' in the mid-nineteenth century, given the fact that so many American courts perpetuated *Baker*'s overstatement of the law. We do not, however, need to resolve that matter in this case." *Union Bank of California v Copeland Lumber Yards, Inc*., 213 Or App 308, 313 n 1 (2007).

The following paragraphs are from *Greist*:

"In Oregon, * * * the right of action for wrongful death is statutory. '[A]t common law no remedy by way of a civil action for wrongful death existed.' *Richard v. Slate*, 239 Or 164, 167, 396 P.2d 900 (1964). In *Goheen v. General Motors Corp.*, 263 Or 145, 153-54, 502 P.2d 223 (1972), this court traced the history and development of wrongful death actions in Oregon and stated: 'The original Oregon Wrongful Death Act was included in the original Deady Code in 1862. * * * [It] did not specifically limit awards of damages to any named dependents. Neither did it specifically limit damages to pecuniary loss, although total recovery was limited to $5,000. This limitation on the amount of recovery was increased from time to time, and was finally removed [by Oregon Laws 1967, chapter 554, section 1].' (Footnotes omitted.) There was no wrongful death statute in Oregon before the 1862 Deady Code. *Ibid.* Therefore, at the time Article I, section 17, was adopted, no right existed for a trial by jury for a wrongful death action. Because

wrongful death actions are 'purely statutory,' they 'exist only in the form and with the limitations chosen by the legislature.' *Hughes v. White*, 289 Or 13, 18, 609 P2d 365(1980)."

"Even [if] a wrongful death action is 'of like nature' to a personal injury action, [the statutory cap is not unconstitutional under Article I, section 17]. When Article I, section 17, and the constitution were adopted, a jury's determination of the amount of damages to be awarded in tort actions was not protected from judicial alteration."

"Before the adoption of Article VII (Amended), section 3, in 1910, Oregon trial courts were empowered to exercise their discretion and set aside jury verdicts and grant a new trial for excessive damages found by a jury, or to order a remittitur of the excess as a condition to denying a motion for a new trial. *See, e.g.,* General Laws of Oregon, ch. 2, § 232(5), p. 197 (Deady 1845-1864) (court could set aside jury's verdict because of '[e]xcessive damages * * * given under the influence of passion or prejudice'); *Adcock v Oregon Railroad Co.,* 45 Or 173, 181, 77 P 78 (1904) ('Where the damages assessed are excessive, in the opinion of the trial court, or not justified by the evidence, the error may in many cases be obviated by remitting the excess.'); *Sorenson v Oregon Power Co.,* 47 Or 24, 33, 82 P 10 (1905) (approving trial court's exercise of remittitur). *See also* Hall S. Lusk, *Forty-Five Years of Article VII, Section 3, Constitution of Oregon,* 35 Or L Rev 1, 4 (1955) (stating that, before adoption of Article VII (Amended), section 3, trial courts were empowered to set aside verdicts that they believed to be excessive)."

"Article VII (Amended), section 3, and subsequent decisions by this court, did away with that practice. In order to inhibit such practice and to uphold verdicts, the Constitution was amended so as to preclude a court from re-examining any fact that had been tried by a jury, when the verdict returned was based on any legal evidence. *Buchanan v. Lewis A. Hicks Co.,* 66 Or 503, 510, 133 P780, 134 P 1191 (1913)."

"*Until* the adoption of Article VII (Amended), section 3, in 1910, trial courts were empowered to reduce jury awards of damages when the courts believed that those awards were excessive. That fact, in itself, disposes of plaintiff's argument that there existed at common law, at the time Article I, section 17, was adopted in 1857, a right to have a judge enter judgment on a jury's award of damages without judicial alteration in a personal injury action." (Emphasis in *Greist*).

"The right of action for wrongful death was created by the legislature in 1862, and it was created with a limitation on the amount recoverable. When the voters adopted Article VII (Amended), section 3, in 1910, the maximum amount recoverable in a statutory wrongful death action was $7,500. Lord's Oregon Laws, ch. VI, § 380, p. 326 (1910). Although voters told the courts not to 're-examine' facts "tried by a jury," Art. VII (Amended), § 3, there is no indication in wording, case law, or history that the voters meant to undo the extant dollar limit on wrongful death actions. The removal, in 1967, of any limitation on the amount recoverable in a wrongful death action did not place the issue of dollar limits beyond the legislature's power to act, nor clothe the legislature's creation with constitutional guarantees not present at its inception.

"In summary, after examining the wording of Article VII (Amended), section 3, the case law surrounding it, and the historical circumstances that led to its creation, we have found no suggestion that Article VII (Amended), section 3, restricts the legislature's authority to set a maximum recovery in statutory wrongful death actions. Its authority in that regard is not

diminished by the fact that the maximum recovery is set in a general statute that applies to wrongful death actions, rather than in the wrongful death statute itself."

Lunsford v NCH Corp., 285 Or App 122 (4/26/17) (Multnomah) (Flynn, Duncan, Lagesen) This plaintiff filed a "wrongful death product liability action" after dying from leukemia. Defendant raised a statute of repose defense: The statute requires claims to be brought within 8 years after the product is purchased or consumed. When the Court of Appeals first heard this case in 2015, it held that the statute of repose for product liability claims did not violate Article I, section 17, or Article I, section 10. After *Horton v OHSU*, 359 Or 168, the Oregon Supreme Court remanded the case to the Court of Appeals.

On remand, the Court of Appeals concluded that it cannot "distinguish or disregard" *Sealey v Hicks*, 309 Or 387 (1990), in which the Oregon Supreme Court declined an Article I, section 10, challenge to the statute of ultimate repose under a Remedy Guarantee analysis that *Horton v OHSU*, 359 Or 168 (2016) disinterred. *Sealey* had held that the statute of repose eliminated a plaintiff's remedy before he suffered an injury, but the statute of repose was constitutional. *Id*. at 129 (quoting *Sealey*). "Nothing in *Horton* calls into question *Sealey*'s analysis of the function of Article I, section 17." *Id*. at 129. "*Horton* reiterates the court's construction of Article I, section 17, as guaranteeing a procedural right to a jury trial in civil actions without imposing a substantive limit on the legislature's authority." *Ibid*.

10.4 Jury Selection & Internet Scouring

For a federal judge's commentary and limits on attorneys researching jurors in a civil case, see *Oracle America, Inc. v Google, Inc.*, 2016 U.S. Dist. Lexis 39675 (ND Cal 2016):

> "Trial judges have such respect for juries — reverential respect would not be too strong to say — that it must pain them to contemplate that, in addition to the sacrifice jurors make for our country, they must suffer trial lawyers and jury consultants scouring over their Facebook and other profiles to dissect their politics, religion, relationships, preferences, friends, photographs, and other personal information." *Id*. at slip op. 1.

10.5 Verdicts

10.5.1 "Three-Fourths of the Jury"

A. Constitution

"**In civil cases three-fourths of the jury may render a verdict.**" -- Article VII (Amended), section 5(7), Or Const

Article VII (Amended), section 5(7) was added to the Oregon Constitution by initiative petition in 1910. Or Laws 1911, p 8, sec 5. *Ex Parte Jack Wessens*, 89 Or 587, 589 (1918); *Kennedy v Wheeler*, 356 Or 518, 532 n 8 (2015).

It is "probable that the voters intended only to increase the efficiency of the court system by permitting jurors to render non-unanimous verdicts, not to impose complex concurrence requirements." *Kennedy*, 356 Or at 539. A jury's verdict does not violate ORCP 59 G(2) or Article VII (Amended), section 5(7) if the same nine jurors do not agree on the amounts of economic and noneconomic damages awarded, as long as three-fourths of the jury agreed on the economic damages and three-fourths agreed on the noneconomic damages. *Kennedy v Wheeler*, 356 Or 518 (2015).

Now the Oregon Supreme Court interprets Article VII (Amended), section 5(7) "under the rubric of" *Priest v Pearce*, 314 Or 411, 415-16 (1992). *Kennedy v Wheeler*, 356 Or 518, 538 (2014). Note: Ordinarily, *Priest v Pearce* is used to interpret parts of the original constitution, not parts adopted by initiative petition. Without explanation, the *Kennedy* Court recited *Priest v Pearce* to interpret the "specific wording" of the provision, then "case law surrounding it," and then the "historical circumstances" of its adoption. *Ibid*.

B. Statute

ORCP 59 G(2) contains the identical text as the constitutional provision. ORCP 59 G(2), promulgated in 1978, adopted the identical text from a 1953 Oregon statute. *Kennedy v Wheeler*, 356 Or 518, 532 (2014).

When a jury enters a special verdict (that is, one with written findings), ORCP 59 G(2) requires that three-fourths of the jury agree on each of its written findings and that those findings be logically consistent. *Kennedy*, 356 Or at 541. "[L]ogic does not require a connection between the amount of economic damages and the amount of noneconomic damages awarded." *Id*. at 541-42. Thus, a jury's verdict does not violate ORCP 59 G(2) or Article VII (Amended), section 5(7) if the same nine jurors do not agree on the amounts of economic and noneconomic damages awarded, as long as three-fourths of the jury agreed on the economic damages and three-fourths agreed on the noneconomic damages. *Kennedy*.

A trial court must individually poll jurors upon a party's request. The results of that poll need to be the record (a collective "show of hands" from the jury box will not enable review of claims of error). ORCP 59 G(3) "requires an individual poll of each juror in a manner that demonstrates

whether each juror agreed with the entire verdict." That procedural rule is "an absolute privilege" to each party. The purpose of a jury poll "is to determine if three-fourths of the jurors 'agree on all issues determined by the verdict,' * * * whether it be general or special." "Once the verdict is read, the poll, on request, can be conducted in two ways: (1) the jurors can be polled individually on each issue decided, or (2) the jurors can be asked to respond affirmatively or negatively to the question, 'Is the verdict just read your individual verdict?', with an instruction that those who say 'yes' must agree with the entire verdict." *Congdon v Berg and Farmers Insurance*, 256 Or App 73 (2013).

Failure to object to a group poll, however, may eliminate a party's ability to obtain reversal on appeal. *State v Mannix*, 263 Or App 162 (2014) (after jury's guilty verdict, defendant wanted to poll the jury, but rather than individually poll, the court asked the presiding juror if the vote was unanimous, and the jury was dismissed, without any objection by defendant, which resulted in an unpreserved claim of error).

In *Kennedy v Wheeler*, 356 Or 518 (2014), a negligence case, the 12-person jury was asked to return a special verdict, as permitted under ORCP 61 B. That is, the jury was asked to make factual findings as to economic and noneconomic damages. The jury was not asked to make a pronouncement in favor of the plaintiff. At least nine jurors voted for about a $65,000 economic-damages verdict for plaintiff. At least nine jurors voted for a $300,000 noneconomic-damages verdict for plaintiff. All twelve had agreed on causation. The jury was polled. Nine of the 12 agreed with the economic award. A different nine of the 12 agreed with the noneconomic award. The trial court entered judgment in the full sum for plaintiff, based on the jury's findings.

The Oregon Supreme Court affirmed the trial court's judgment based on Article VII (Amended), section 5(7) and ORCP 59 G(2). A jury's verdict does not violate ORCP 59 G(2) or Article VII (Amended), section 5(7) if the same nine jurors do not agree on the amounts of economic and noneconomic damages awarded, as long as three-fourths of the jury agreed on the economic damages and three-fourths agreed on the noneconomic damages.

10.6 Open Courts

> **"No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation."** -- Article I, section 10, Or Const

See Erin J. Snyder, *Open Courts and Public Trial*, OREGON CONSTITUTIONAL LAW MANUAL (2013), www.osbar.org/secured/barbooks/viewchapter.asp?bid=85&cid=2349.

10.6.1 Origins

Oregon's "open courts clause" is based on – but not identical to - Indiana's open courts clause in its constitution of 1851. *State v MacBale*, 353 Or 789 (2013). The Oregon Supreme Court has decided that the Oregon framers wanted courts to administer justice "in a manner that permits

public scrutiny of the court's work in determining legal controversies," based on a dictionary definition of the words "secret" and "openly" in Article I, section 10, and citing David Schuman, *Oregon's Remedy Guarantee: Article I, section 10 of the Oregon Constitution*, 65 OR L REV 35, 38 (1986). *Doe v Corp of the Presiding Bishop*, 352 Or 77 (2012).

10.6.2 Interpretation

The Oregon Supreme Court interprets Article I, section 10, "by examining the text of the provision, the historical circumstances leading to the creation and adoption of the provision, and the applicable case law concerning the provision." *Doe v Church of Latter Day Saints*, 352 Or 77, 87 (2012) (quoting a case that cited *Priest v Pearce*, 314 Or 411, 415-16 (1992)).

"Article I, section 10, does not compel the trial court to release the public trial exhibits that are subject to a protective order or entitle the public to have access to trial exhibits at the close of trial." *Doe v Corp of the Presiding Bishop*, 352 Or 77 (2012). The "command for openness in Article I, section 10, is subject to qualification for some aspects of court proceedings, that, by well-established tradition, were and are conducted out of public view." *Id.*

Nothing in Article I, section 10, prohibits a trial court from releasing files to the public. Under ORCP 36 C, issuing and vacating a protective order are within the trial court's discretion. *Doe v Corp of the Presiding Bishop*, 352 Or 77 (2012).

"The principle of open justice entitles the public to attend and to view the other aspects of the administration of justice in a court – such as a proceeding to suppress inadmissible evidence – to ensure that the court and the parties comply with the law, and appear to do so, in an accountable manner." A "court does not comply with Article I, section 10, by confining the public's attendance in court to only the presentation of admissible evidence." *Doe v Corp of the Presiding Bishop*, 352 Or 77 (2012).

Article I, section 10, "does not entitle the public to inspect every trial exhibit at the end of a trial." Article I, section10, does not create "a right in every observer, at the end of a court proceeding, to obtain the release of the evidence admitted or not admitted during the proceeding." "Article I, section 10, creates no absolute public right of access to trial exhibits at the close of trial." *Doe v Corp of the Presiding Bishop*, 352 Or 77 (2012).

Article I, section 10, is limited to *adjudications* and does not include all pretrial hearings. An OEC 412 hearing is not an adjudication. Although *Oregonian Publishing Co v O'Leary*, 303 Or 297 (1987) appears to require the OEC 412 hearing to be open to the public, the Oregon Supreme Court has shrugged off that case, reasoning: "*O'Leary* was decided before this court adopted its current paradigm for interpreting original constitutional provisions. Thus, the court did not scrutinize the words of Article I, section 10, or specifically consider what the framers intended by the phrase 'no court shall be secret.'" *State v MacBale*, 353 Or 789, 802 (2013). Further distancing itself from its precedent in *O'Leary*, the Court added that grand jury proceedings have been secret. And the Court quoted constitutional framer/judge Matthew Deady's observation in an 1887 case: "[A]lthough the constitution requires justice to be 'administered openly and without purchase,' no one doubts that, * * * in a certain class of cases, the general public, in the interest of public morals and decency, may be excluded from the courtroom." *Id*. at 804. In sum: "a hearing to determine the admissibility of evidence under OEC 412 does not constitute an administration of

justice for purposes of Article I, section 10, and that the legislature may provide that such a hearing be closed to the public." *Id*. at 809. Therefore, "the exclusion of the public from hearings under OEC 412(4) to determine the admissibility of evidence of a sex crime victim's past sexual behavior under OEC 412(2) does not violate Article I, section 10 or 11, of the Oregon Constitution or the First or Sixth Amendment to the United States Constitution."

10.6.4 Fifth and Sixth Amendments

A defendant's Sixth Amendment right to a public trial may be violated when the trial court excludes the public from the voir dire of prospective jurors. *Presley v Georgia*, 558 US 209, 213 (2010) (per curiam).

A defendant charged with a felony has a fundamental right to be present during voir dire." *United States v Sherwood*, 98 F3d 402, 407 (9th Cir 1996). The right to a public trial can also be waived. *See Levine v. United States*, 362 U.S. 610, 619 (1960) ("The continuing exclusion of the public in this case is not to [be] deemed contrary to the requirements of the Due Process Clause without a request having been made to the trial judge to open the courtroom at the final stage of the proceeding".).

10.6.3 First Amendment

The First Amendment guarantees of freedom of speech and freedom of the press provide a right to access criminal trials. *Richmond Newspapers, Inc. v Virginia*, 448 US 555, 576-77 (1980). The First Amendment protects the right of public access, even though it is not explicitly enumerated, because part of the First Amendment's purpose is to enable citizens to contribute to our republican system of self-governance. *Globe Newspaper Co. v Superior Court*, 457 US 596, 604 (1982); *Courthouse News Service v Planet*, __ F3d __ (9th Cir 2014) ("The news media's right of access to judicial proceedings is essential not only to its own free expression, but also to the public's.").

The public has a First Amendment right of access to voir dire of jurors in criminal trials, *Press–Enterprise Co v Superior Court*, 464 US 501, 511 (1984), and to certain preliminary criminal hearings, *El Vocero de P.R. v Puerto Rico*, 508 US 147, 149–50 (1993) (per curiam) (preliminary criminal hearings), *Press–Enterprise Co. v Superior Court*, 478 US 1, 10 (1986) (preliminary criminal hearings).

Every federal court of appeals that has considered whether there is a right of public access to civil trials has concluded that there is such a right, see *Delaware Coalition for Open Gov't, Inc. v Strine*, 733 F3d 510 (3d Cir 2013), *cert denied* __ US __ (2014) (compiling cases; concluding that the public has a right of access under the First Amendment to Delaware's state-sponsored arbitration program). A proceeding qualifies for the First Amendment right of public access when "there has been a tradition of accessibility" to that kind of proceeding, and when "access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise Co*, 478 US at 10.

> ***United States v Index Newspapers LLC et al***, 2014 WL 436296 (9th Cir 2014)
> Newspapers reported a violent protest. Defendant Duran and another protester were

subpoenaed to appear before the grand jury. They refused to testify. They were held in contempt. The contempt hearing was closed to the public. Portions of their grand jury testimony, where they had refused to answer questions, were recited into the record. They were found guilty of contempt and jailed until they consented to testify, for up to 18 months or until the grand jury "expired." Two weeks later, the court held a status conference on the confinement. The first part of that status conference was closed to the public. The second part was open to the public, in which Duran's attorney stated that Duran had been held in solitary confinement for the duration of his jail time. He refused to testify at the grand jury proceeding, so the court continued to hold him in contempt. The government asked for a status hearing in six months, but Duran's attorney stated that Duran would refuse to testify. The court told Duran's attorney he could contact the court for a hearing. Five months later, Duran's attorney did so, requesting that Duran and his protester colleague be released. The court released them. During their confinement, *The Stranger*, a newspaper, had filed motions to unseal the non-grand jury portions of the transcripts of the court's proceedings. The trial court wrote that "the record *The Stranger* sought was "a mix of secret grand jury material, grand jury material that may have lost its secrecy, legal argument, banal information, and more." It ruled that the court had no obligation "to sift through these grand jury proceedings to determine what is secret and what is not." The trial court ruled: "The public has a right to the transcripts of the open portions of the hearings, but no more."

The Stranger filed a mandamus petition in the Ninth Circuit to unseal the portions of Duran's and K.O.'s contempt files that do not contain matters shielded by Federal Rule of Criminal Procedure 6(e).

The Ninth Circuit panel affirmed in part and reversed in part, stating:

"America has a long history of distrust for secret proceedings. *See In re Oliver*, 333 US 257, 268–69 (1948) ("[D]istrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the *lettre de cachet*." (footnotes omitted)). Pursuant to the First Amendment, there is a presumed public right of access to court proceedings. *See Oregonian Publ'g Co. v U.S. Dist. Court*, 920 F2d 1462, 1465 (9th Cir 1990). Secret proceedings are the exception rather than the rule in our courts. *See id.* Nevertheless, one very well established exception is grand jury proceedings. *Press-Enterprise Co. v Superior Court*, 478 US 1, 8–9 (1986) (*Press-Enterprise II*)."

"The Supreme Court has instructed that the following two questions should be asked to determine whether the First Amendment right of access applies to a particular proceeding: (1) "whether the place and process have historically been open to the press and general public," and (2) "whether public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise II*, 478 US at 8.

This test is commonly referred to as the "experience and logic test." *See, e.g.*, *id.* at 9. The same test applies to the disclosure of "*documents* generated as part of a judicial proceeding." *Times Mirror*, 873 F.2d at 1213 n.4. If we conclude that there is a First Amendment right of access to any of the documents encompassed by *The Stranger*'s

request, we must "then determine whether any such right is overcome by a compelling governmental interest." *In re Copley Press, Inc.*, 518 F3d 1022, 1026 (9th Cir 2008). We also "consider whether the common law gives the public a right of access separate from the First Amendment." *Id.* The public's common law right of access is not absolute and it does not extend to records that have "traditionally been kept secret for important policy reasons." *Times Mirror*, 873 F.2d at 1219. In particular, our court has held that the common law right to public records and documents does not extend to grand jury transcripts or to sealed search warrant materials during a pre-indictment investigation. *United States v. Bus. of Custer Battlefield Museum & Store*, 658 F3d 1188, 1192 (9th Cir 2011).

"Applying the experience and logic test to each category of documents sought by *The Stranger*, we conclude there is no First Amendment public right of access to: (1) filings and transcripts relating to motions to quash grand jury subpoenas; (2) the closed portions of contempt proceedings containing discussion of matters occurring before the grand jury; or (3) motions to hold a grand jury witness in contempt. We do not consider whether there is a separate common law right of access to these documents because any such presumption in favor of access is outweighed by the compelling government interest in maintaining grand jury secrecy. In contrast, the public does have presumptive First Amendment rights of access to: (1) orders holding contemnors in contempt and requiring their confinement; (2) transcripts and filings concerning contemnors' continued confinement; (3) filings related to motions to unseal contempt files; and (4) filings in appeals from orders relating to the sealing or unsealing of judicial records. These rights of access are categorical and do not depend on the circumstances of any particular case." *United States v Index Newspapers LLC and Duran*, 2014 WL 436296 (9th Cir 2014) ("Our holding is specifically limited to the public's right of access while the grand jury investigation is ongoing.").

10.7 Waiver of Jury Trial

Oregon case law is limited on waiver of the state constitutional right to a jury trial in civil cases.

"The right of trial by jury in cases at law, whether in a civil or criminal case, is a high and sacred constitutional right in Anglo-Saxon jurisprudence, and is expressly guarantied [sic] by the United States Constitution. A stipulation for the waiver of such right should therefore be strictly construed in favor of the preservation of the right." *State v Barajas*, 262 Or App 364, 367 n 1 (2014) (dicta in a criminal case citing *Burnham v North Chicago St. Ry. Co.*, 88 F 627, 629 (7th Cir 1898)).

In federal cases, the Seventh Amendment right to a civil jury trial may be waived "knowingly and voluntarily based on the facts of the case." *Palmer v Valdez*, 560 F3d 968-69 (9th Cir 2009). Having a bench trial without objection may suffice as a jury waiver in a civil case. *White v McGinnis*, 903 699, 703 (9th Cir 1990) (en banc).

10.8 Venue

"Modern venue rules are predominantly statutory, but they derive from early common-law principles." *Kohring v Ballard*, 355 Or 297 (2014). Oregon's first venue statute followed that tradition. *Id*. at 307 (citing General Laws of Oregon p 147-48 (Deady 1845-1864)).

ORS 14.080 provides that venue is proper wherever a defendant engages in "regular, sustained business activity." *Kohring v Ballard*, 355 Or 297 (2014). Defendants have a "right" to insist on proper statutory venue. *Id*. (citing *Rose v Etling*, 255 Or 395, 399 (1970) (mandamus if the proper vehicle to challenge an erroneous trial court denial of a motion to change venue).

Personal jurisdiction requirements are different than statutory venue requirements. *Id*. at 313. The current federal definition of corporate residence for venue purposes does equate venue and personal jurisdiction. *Id*. Oregon does not. "Jurisdiction refers to the authority of the court to hale a defendant into court, while venue concerns the particular location where it is appropriate for the court to exercise that authority." *Id*. (citation omitted).

10.9 Punitive Damages

• Oregon's $500K noneconomic damages cap does not apply to punitive damages. ORS 31.710(3).

• 70% of punitive damages awarded go to the State of Oregon (not to plaintiff). ORS 31.735.

• A jury may award punitive damages against a party if it is proven by clear and convincing evidence that the party against whom punitive damages are sought has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety, and welfare of others. ORS 31.730(1).

• "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, *adh'd to as modified on recons*, 349 Or 521 (2010).

10.9.1 Compensatory vs Punitive ("Exemplary") Damages

Are Punitive Damages Factual Determinations?

• Compensatory damages "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 US 408, 416 (2003).

• "Punitive damages serve a broader function; they are aimed at deterrence and retribution." "Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *Ibid*.

• "As the types of compensatory damages available to plaintiffs have broadened . . . the theory behind punitive damages has shifted towards a more purely punitive (and therefore less factual) understanding." *Cooper Industries v. Leatherman Tool Group*, 532 US 424 n 11 (2001).

•"'Unlike the measure of actual damages suffered, which presents a question of historical or predictive fact, . . . the level of punitive damages is not really a 'fact' 'tried' by the jury.' *Gasperini v Center for Humanities, Inc.,* 518 US 415, 459 (1996) (Scalia, J., dissenting). Because the jury's award of punitive damages does not constitute a finding of 'fact,' appellate review of the District Court's determination that an award is consistent with due process does not implicate the Seventh Amendment." *Leatherman*.

• Contrast with the Oregon Supreme Court in *Horton*: "This court has long recognized that, for the purposes of the state constitutional right to a jury trial, 'no valid distinction * * * can be drawn between compensatory and exemplary damages.' *Van Lom v. Schneiderman*, 187 Or 89, 110, 210 P2d 461 (1949). As a matter of state constitutional law, both are factual

issues for the jury. *Oberg v Honda Motor Co*., 316 Or. 263, 275 n. 7, 851 P.2d 1084 (1993), *rev'd and remanded on other grounds, Honda Motor Co v Oberg*, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994)." ***Horton v OHSU***, 359 Or 168, 229-30 (2016).

10.9.2 Due Process Requires Punitive Damages Awards to be Reviewable

• "In the federal courts and in every State, except Oregon, judges review the size of damage awards." *Honda Motor Co. v Oberg*, 512 US 415 (1994).

• "[I]f the defendant's only basis for relief is the *amount* of punitive damages the jury awarded, Oregon provides no procedure for reducing or setting aside that award. This has been the law in Oregon at least since 1949 when the State Supreme Court announced its opinion in *Van Lom* v *Schneiderman*, 187 Ore. 89, 210 P2d 461(1949), definitively construing the 1910 Amendment to the Oregon Constitution." *Oberg*.

•In *Honda Motor Co. v Oberg*, 512 US 415 (1994), "we held that the Oregon Constitution, which prohibits the reexamination of any 'fact tried by a jury,' Ore. Const., Art. VII, §3, violated due process because it did not allow for any review of the constitutionality of punitive damages awards." *Cooper Industries v. Leatherman Tool Group*, 532 US 424, n 10 (2001).

•"[C]ourts reviewing punitive damages [must] consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *State Farm v Campbell*, 538 US 408, 418 (2003) (citing *BMW of North America, Inc. v Gore*, 517 US 559 (1996) (held: award of $145 million in punitive damages, where full compensatory damages are $1 million, is excessive and in violation of the Due Process Clause of the Fourteenth Amendment).

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." *Goddard v Farmers Ins Co*., 344 Of 232, 251 (2008).

10.9.3 Oregon's Application of Due Process Review

Under ORS 31.730(1), punitive damages are recoverable in civil cases only where clear and convincing evidence proves that the party acted with malice or showed a reckless and outrageous indifference to a highly unreasonable risk of harm and acted with a conscious indifference to the health, safety, and welfare of others. *See also Estate of Michelle Schwarz v Philip Morris USA, Inc.*, 272 Or App 268, 279 (2015) (fraud case).

Oregon courts may examine punitive-damages review under "substantive" due process. *Schwarz v Philip Morris, Inc*., 348 Or 442, 458-59, *adh'd to as modified on recons*, 349 Or 521 (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 Mutual 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.

Note: See Akhil Reed Amar, AMERICAN'S UNWRITTEN CONSTITUTION, p. 118-19, discussing the phrase "substantive due process" as one that "borders on oxymoron. Substance and process are typically understood as opposite."

Oregon courts' review of punitive damages awards involves three stages. First, is there a factual basis for the punitive damages award. Second, does the award comport with due process when the facts are evaluated under the three *Gore* guideposts ((1) degree of reprehensibility; (2) disparity between the actual or potential harm plaintiff suffered and the punitive damages award; and (3) difference between the punitive damages award and civil penalties authorized or imposed in comparable cases). Third, if the punitive damages exceed that permitted under the Due Process Clause, then what is the "highest lawful amount" that a rational jury could award consistently with the Due Process Clause. *Goddard v Farmers Ins Co.*, 344 Or 232, 261-62 (2008).

As to the second *Gore* guidepost (the ratio between the punitive and compensatory damages awards), the Oregon Supreme Court has stated that "courts generally hold that, in instances in which compensatory awards are $12,000 or less, awards in excess of single-digit ratios are not 'grossly excessive.'" "When the compensatory damages award is small and does not already serve an admonitory function, the second guidepost – the ratio between punitive and compensatory damages – is of limited assistance in determining whether the amount of a jury's punitive damages award meets or exceeds state goals of deterrence and retribution." *Hamlin v Hampton Lumber Mills, Inc*., 349 Or 526 (2011) (Court reinstated the jury's award for a thumb injury with a ratio of 22:1 (punitives to compensatories)).

86:1 ratio: *Parrott v Carr Chevrolet, Inc*. 331 Or 537 (2001) The Oregon Supreme Court affirmed a one million dollar punitive damages award with an $11,496 compensatory damages award.

148:1 ratio: In *Estate of Michelle Schwarz v Philip Morris USA, Inc*., 272 Or App 268 (2015), the Court of Appeals affirmed judgment with a 148:1 ratio of punitives:compensatories. A jury awarded plaintiff $168,514 in compensatory damages ($50,000 of that was noneconomic, the rest was economic damages), and after a retrial on punitive damages for fraud, a jury awarded plaintiff $25 million in punitives. The Court of Appeals affirmed. It views the evidence and inferences in the light most favorable to the plaintiff, because the plaintiff won, per *Parrott v Carr Chevrolet, Inc*., 331 Or 537, 542 (2001). In 1964, Philip Morris developed a low-tar "health cigarette" marketed at "young women" who would be susceptible to "a psychological crutch and a self-rationale to continue smoking" after smoking became linked to disease. In 1976, it promoted lower-tar, lower-nicotine Merit cigarettes, knowing that nicotine addicts compensate by inhaling more deeply, covering holes in the filters, holding smoke longer in their lungs, or taking more puffs. Thus they take in the same amount of nicotine that they did before they smoked Merits. Michelle Schwarz switched to Merits in 1976 and died in 1999. The trial court instructed the punitive-damages jury that the first jury had found seven factors by clear and convincing evidence, that the jury must not question the first jury's findings, and that its only role was to determine punitives. The jury concluded that $25 million in punitives was proper, and the trial court entered judgment for that amount over defendant's objection that the award should be $1.00 (one dollar) and that $25 million was grossly excessive. The Court of Appeals noted that

the US Supreme Court has "a presumption against an award that has a 145-to-1 ratio" in *State Farm Mutual Automobile Ins. Co. v Campbell*, 538 US 408 (2003), the Court has "consistently rejected the notion that a particular fixed ration defines the constitutional limit on punitive damages." Here, under the third Gore guidepost, compensatories do not compensate for death, and this case involved "extreme" and "egregious" and "extraordinarily reprehensible conduct" that continued for years while it knew the consequences. And the jury heard about the billions of dollars this defendant had as its financial resources. Also, in *Williams v RJ Reynolds Tobacco Company*, 351 Or 368 (2011), the Court approved a $79.5 million punitive damages award for similar conduct.

200:1 ratio: In *Lithia Medford LM, Inc. v Yovan*, 254 Or App 307 (2012), the jury awarded $0 in economic damages, $100K in punitives, and $500 in noneconomic damages. That is a 200:1 ratio of compensatory to punitive damages. The *Lithia* court noted: "It is bedrock law that, in Oregon, calculating punitive damages is the function of the jury." The facts must be viewed in a way that favors the jury's award of $100K in punitives, under *Parrott v Carr Chevrolet, Inc*. 331 Or 537 (2001) (in *Parrott*, the Oregon Supreme Court affirmed a one million dollar punitive damages award with an $11,496 compensatory damages award, which is an 86:1 ratio). The 200:1 ratio in *Lithia* was deemed not "grossly excessive" based on similar claims. That 200:1 ratio "alone does not make the punitive damages award 'grossly excessive," because the US Supreme Court affirmed a 526:1 ratio in 1993, in *TXO Production Corp v Alliance Resources Corp*, 509 US 443 (1993). *Lithia Medford LM, Inc. v Yovan*, 254 Or App 307 (2012) (reversed and remanded for reinstatement of jury award).

600,000:1 ratio: In *Evergreen West Business Center, LLC v Emmert*, 254 Or App 361 (2012), *rev'd*, 354 Or 790 (2014), the jury returned a verdict for plaintiff of one dollar in compensatory damages and $600K in punitives. (That is a 600,000:1 ratio). The trial court reduced the award to four dollars, under *Goddard v Farmers Ins Co*, 344 Or 232 (2008) which suggests a 4:1 ratio is proper. The "familiar guideposts" of due process are: (1) reprehensibility; (2) disparity between harm to plaintiff and the punitives awarded; and (3) the difference between punitive damages and the civil penalties in comparable cases, as stated in *State Farm Mutual Ins Co v Campbell*, 538 US 408, 418 (2003). Defendant had a net worth of about 160 million dollars. He saw potentially large profits in breaching his fiduciary duties and made a calculated decision to do so. In addition, the jury heard about defendant's behavior in other business dealings. The jury's decision did not go beyond the state's interests. *See Arizona v Asarco, LLC*, 733 F3d 882 (9th Cir 2013) (reducing punitive damages from a 300,000:1 to a 125,000:1 ratio where compensatories were just one dollar). *Evergreen West Business Center, LLC v Emmert*, 254 Or App 361 (2012), *rev'd* 354 Or 790 (2014).

Chapter 11: Punishment

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

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

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

11.1 Oregon Criminal Law

"For the most part, [the Oregon Supreme Court] has analyzed the requirement that 'penalties shall be proportioned to the offense' separately from the related prohibition on cruel and unusual punishments." *State v Althouse*, 359 Or 668 683 (2016).

11.1.1 Proportionality

History

"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." *Id*.

Test

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).

"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).

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. But 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).

Case Examples

On probation revocation and vertical proportionality, see *State v Barajas*, 254 Or App 106 (2012).

In *State v Davidson*, 271 Or App 719 (2015), defendant was convicted of public indecency, a felony because defendant has prior convictions for a sex crime. Defendant was 34 years old at sentencing for his fifth public indecency charge. The trial court sentenced him to two consecutive terms of life in prison without the possibility of parole. In defendant's as-applied challenge to his sentence, the Court of Appeals reversed and remanded under *State v Rodriguez/Buck*, 347 Or 46 (2009). This case involves public indecency – not sex abuse, rape, or sodomy. Repeat offenders and first-time offenders may be judged differently. The court recited of each of defendant's public indecency crimes and then applied the three *Rodriguez/Buck* factors, concluding that "a true life sentence is unconstitutionally disproportionate as applied to defendant."

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). In *State v Sanderlin*, 276 Or App 574 (2016), the trial court erred in imposing a 300-month prison term on a brain-damaged defendant for first-degree sodomy and first-degree sexual abuse. The trial court stated that it could not take into account any "mental problems" the defendant had. The trial court should consider "a defendant's diminished capacity."

State v Padilla, 277 Or 440 (2016) Defendant's 75-month sentence not disproportionate for first-degree sex abuse of an 11-year old, despite defendant's lack of prior criminal history. Direct bare-skin contact occurred in addition to contact through clothing.

State v Smith, 277 Or App 709f (2016) Defendant's life sentence was not disproportionate for conviction of felony public indecency with a 16-year old victim, despite no physical contact, given defendant's prior convictions for sex crimes involving force on young girls, and his letters

from prison, which include statements such as "I'm honest about my past and all the things I did, both raping women and having sex with little girls."

State v Althouse, 359 Or 668 (2016) Defendant was convicted of one count of felony public indecency in this case. The trial court sentenced him to life in prison under ORS 137.719(1) after his 30 years of convictions of public indecency and child abuse and sodomy of his own young children and other people's children. Defendant raised an as-applied challenge to that life sentence. The Supreme Court affirmed, stating that one count of public indecency would be different than this case. "Additional considerations come into play when a court assesses the constitutionality of a statute that imposes an enhanced sentence on repeat offenders." *Id*. at 684. Here, "defendant's most recent conviction for public indecency reflects a deeply ingrained pattern of predatory behavior that has persisted since 1982". *Id*. at 687.

State v Davidson, 360 Or 370 (2016) Defendant is an "incorrigible masturbator." The Oregon Supreme Court concluded that defendant's sentence of life in prison without possibility of parole was disproportionate as applied to him for his convictions of two counts of public indecency that did not involve physical contact. He had two prior felony convictions for public indecency, but no priors involving physical contact. "The primary danger identified here is that defendant's repeated behavior will continue to cause upset and possible harm to people who observe him exposing himself and masturbating." *Id*. at 285. That is different from a person who preys on children or who engages in physical contact with victims. Instead, "he generally showed sexual interest in whomever happened to observe him." That is different from "being specifically and personally subjected to unwanted physical sexual contact or sexual violence."

State v Ryan, 361 Or 602 (6/22/17) (Brewer) (Balmer, Kistler, Landau concurring) (Flynn not participating) "Defendant is an intellectually disabled offender who has an IQ score between 50 and 60, a full 10 to 20 points below the cutoff IQ score for the intellectual function prong of the intellectual disability definition." "Defendant has significantly impaired adaptive functioning, such that he functions—as it pertains to standards of maturation, learning, personal independence, and social responsibility—at an approximate mental age of 10, two years below the minimum age for establishing criminal responsibility of a child under Oregon law."

Defendant has a long history of striking out at people, with increasing severity. He has been evaluated by numerous doctors, who note his anger, aggression, reactive hostility, high impulsivity, "rape attitudes," and intellectual disability. While on probation for masturbating into clothing at a department store, during a sleepover birthday party, he "flirted" with a fourteen year old girl by convincing her to go into a bathroom where he slapped her, grabbed her buttocks, tried to expose her breasts, "ground his penis against her," and kissed her on the mouth. Later, the next morning, that girl's nine year old sister was briefly alone with him. He shoved her to the floor, got on top of her, grabbed her genitals, ran his hand down her leg, then chased her as she ran away, stopping only when the child kicked him. Charged with three counts of third-degree sex abuse, and one count of first-degree sex abuse, he pleaded guilty, but objected to the 75-month mandatory sentence for the first-degree sex abuse conviction. He contended that his sentence was disproportionate as applied to him because of his intellectual disability. The trial court (Judge Vance Day) did not provide reasoning as to whether it considered his intellectual disability, but concluded the sentence was not disproportionate, and sentenced him to 75 months for the first-degree sex abuse conviction, under Measure 11. The Court of Appeals AWOP'd.

The Oregon Supreme Court vacated the sentence and remanded to the trial court, concluding that "the trial court failed to sufficiently consider defendant's intellectual disability in addressing his proportionality challenge."

A diagnosis of intellectual disability is to be considered in determining whether a defendant may be subject to the death penalty. *Atkins v Virginia*, 536 US 304 (2002). To date, the concurrence noted, "*no* court has extended the *Atkins* rationale to conclude that imprisonment for a term of years (mandatory or not) is unconstitutionally cruel or disproportionate, *see, e.g.*, *Harris v. McAdory*, 334 F3d 665, 668 n 1 (7th Cir 2003), *cert den*, 541 US 992 (2004). *Id*. at 627 (Balmer, J. concurring).

The Court followed US Supreme Court case law under the Eight Amendment in making this state constitutional decision. "Because there exists a broad spectrum of intellectual disabilities that may reduce, but not erase, a person's responsibility for her crimes, *see Atkins*, 536 US at 318 (a defendant's mental "deficiencies do not warrant an exemption from criminal sanctions"), a one size-fits-all approach is not appropriate. For that reason, a sentencing court's findings, among other factual considerations, as to an intellectually disabled offender's level of understanding of the nature and consequences of his or her conduct and ability to conform his or her behavior to the law, will be relevant to the ultimate legal conclusion as to the proportionality—as applied to the offender—of a mandatory prison sentence." *Id*. at 621.

Defendant's argument focused on the first *Rodriguez/Buck* factor from *State v Rodriguez/Buck*, 347 Or 46, (2009). The Court noted that the "difficulties [in the analysis] are inherent in a proportionality test that asks whether a particular sentence for a particular offender would shock the moral sense of reasonable people." *Id*. at 622.

The Court wrote: "we must remand to the trial court for resentencing. In so concluding, we do not suggest that defendant's intellectual disability is the sole determinant of whether the Measure 11 sentence would shock the moral sense of all reasonable people. As discussed, other case-specific factors, including the nature of defendant's conduct, its effect on the victim, and the length of the prescribed sentence, also are relevant considerations in making the proportionality comparison under *Rodriguez/Buck*. 347 Or at 62. In short, this opinion should not be taken to imply that the proper consideration of defendant's intellectual disability necessarily would lead to a different sentence." *Id*. at 625.

11.1.2 Death Sentencing

"[A]lthough Oregon's Constitution, like the federal constitution, prohibits cruel and unusual punishment, Or Const Art I, § 16, this court has not previously announced a categorical prohibition on the execution of persons with intellectual disabilities." *State v Agee*, 358 Or 325, 341 n 10 (2015) (declining to address the state constitutional issue; death sentence vacated and remanded).

11.1.3 Excessive Fines

In a case that did not turn on the Excessive Fines Clause of the Oregon Constitution, a dissenting judge addressed that clause, and reasoned in part: "The 'excessive fines' language in Article I, section 16, is identical to the language in the Eighth Amendment to the United States Constitution, and there is no reason to believe that the drafters of the Oregon Constitution had any different understanding when they prohibited excessive fines in section 16 than the understanding of the drafters of the Eighth Amendment. See Carey, THE OREGON CONSTITUTION 28 (1926)." *State v Branstetter*, 181 Or App 57 (2002) (Edmonds, J., dissenting). The dissent further noted: "Oregon's Article I, section 16, was adopted from and is identical to the Indiana excessive fines provision. The Indiana Supreme Court, in recognition of the similarities between Article I, section 16, of the Indiana Constitution, and the Eighth Amendment, has concluded that Indiana's section 16 requires no more and no less than the Eighth Amendment. *Norris v State*, 271 Ind. 568, 394 N.E.2d 144 (1979)." *Id*. at n 16.

11.2 Eighth Amendment

"**Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted**." -- Eighth Amendment, US Const

11.2.1 Application to the States

Punishment: The cruel and unusual punishment prohibition in the Eighth Amendment applies to the States through the due process clause of the Fourteenth Amendment. *Robinson v California*, 370 US 660 (1962); *McDonald v City of Chicago*, 130 S Ct 1316, 3034 n 12 (2010).

Bail: The prohibition against excessive bail in the Eighth Amendment applies to the States. *Schilb v Kuebel*, 404 US 357 (1971); *McDonald v City of Chicago*, 130 S Ct 1316, 3034 n 12 (2010).

Fines: The US Supreme Court has not decided whether the Eighth Amendment's prohibition on excessive fines applies to the States through the Fourteenth Amendment. *McDonald*, 130 S Ct at 3035 n 13 (citing *Browning-Ferris Indust. v Kelco Disposal, Inc*., 492 US 257, 276 n 22 (1989)).

11.2.2 Proportionality

"The Cruel and Unusual Punishments Clause prohibits the imposition of inherently barbaric punishments under all circumstances. See, *e.g.*, *Hope v Pelzer*, 536 US 730 (2002). '[P]unishments of torture,' for example, 'are forbidden.' *Wilkerson v Utah*, 99 US 130, 136 (1879). These cases underscore the essential principle that, under the Eighth Amendment, the State must respect the human attributes even of those who have committed serious crimes. For the most part, however, the Court's precedents consider punishments challenged not as inherently barbaric but as disproportionate to the crime. The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the]

offense.' *Weems v United States*, 217 US 349, 367 (1910)." *Graham v Florida*, 130 S Ct 2011, 2021 (2010).

"[T]he Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller v Alabama* and *Jackson v Hobbs*, 132 S Ct 2455 (2012). See also Sarah French Russell, *Jury Sentencing and Juveniles: Eighth Amendment Limits and Sixth Amendment Rights*, 56 B.C.L. Rev. 553 (2015) ("Who is the sentencer?"). *Miller* is retroactively applicable, *Montgomery v Louisiana*, 136 S Ct 718 (2016).

Life without parole violates the Eighth Amendment when imposed on juvenile nonhomicide offenders. *Graham v Florida*, 130 S Ct 2011 (2010).

11.2.3 Death Sentencing

The Eighth Amendment bars capital punishment for all juveniles under age 18. *Roper v Simmons*, 543 US 551 (2005). Earlier the Court had concluded that capital punishment of offenders under age 16 violates the Eighth Amendment. *Thompson v Oklahoma*, 487 US 815 (1988) (plurality).

The Eighth Amendment prohibits imposing the death penalty for nonhomicide crimes. *Kennedy v Louisiana*, 554 US 407 (2008).

The Eighth Amendment prohibits imposing the death penalty on intellectually disabled defendants. *Atkins v Virginia*, 536 US 304 (2002). In *Hall v Florida*, 134 S Ct 1986 (2014), the Court stated that in death penalty cases where a defendant's intellectual functioning is a close question, the defendant "must be able to present additional evidence of intellectual disability." *Id*. at 2001. In such situations, the trial court must not "view a single factor as dispositive" given the complexity of intellectual-disability assessments. *Id*. Thus a court must consider all indications of a defendant's intellectual disability and may not discard relevant evidence. "The death penalty is the gravest sentence our society may impose" and imposing that "harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being. *Id*. at 1992, 2001.

In *State v Agee*, 358 Or 325 (2015), the Oregon Supreme Court noted that in *Atkins*, the U.S. Supreme Court "declined to set a standard for determining whether an offender is intellectually disabled or to specify a particular procedure for making that determination. Rather, the Court left it to the states to develop 'appropriate ways to enforce the constitutional restriction' on executing intellectually disabled persons." *Id*. at 339-40. Further, "in the years since the Supreme Court decided *Atkins*, the Oregon legislature has not adopted any procedure for determining whether a person accused of aggravated murder has an intellectual disability and, therefore, ineligible for the death penalty. Nor has the issue been addressed by the Oregon appellate courts before today." *Id*. The *Agee* court concluded that "the consensus of the psychological community, as reflected in the DSM-5, now recognizes that intellectual functioning should be interpreted in conjunction with adaptive functioning in diagnosing intellectual disability. DSM-5 at 37 ('The diagnosis of intellectual disability is based on both clinical assessment and standardized testing of intellectual and adaptive functioning.')." *Id*. at 353 (affirming murder conviction but reversing and remanding the death sentence).

11.2.4 Excessive Fines

A. *Criminal in personam*

See State v Goodenow, 251 Or App 139 (2012).

B. *Civil in rem*

In *United States v Cyr*, 764 F3d 1055 (9th Cir 2014), the Ninth Circuit applied the Eighth Amendment analysis and concluded that a $132,245 civil forfeiture did not violate the Excessive Fines Clause:

> "If the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional." *United States v Bajakajian*, 524 US 321, 337 (1998). The defendant carries "the burden of establishing that the forfeiture is grossly disproportional by a preponderance of the evidence." 18 U.S.C. § 983(g)(3). While we are not restricted to "any rigid set of factors," *United States v Mackby*, 339 F3d 1013, 1016 (9th Cir 2003), we have typically "considered four factors in weighing the gravity of the defendant's offense: (1) the nature and extent of the crime, (2) whether the violation was related to other illegal activities, (3) the other penalties that may be imposed for the violation, and (4) the extent of the harm caused." *United States v $100,348.00 in U.S. Currency*, 354 F3d 1110, 1122 (9th Cir 2004).
>
> *See United States v Ferro*, 681 F3d 1105 (9th Cir 2012).

11.3 Unnecessary Rigor

"Article I, section 13, guarantees that '[n]o person arrested, or confined in jail, shall be treated with unnecessary rigor.' To establish that a particular practice offends Article I, section 13, an inmate must show that the practice 'would be recognized as an abuse to the extent that it cannot be justified by necessity.'14T *Sterling v Cupp,* 290 Or 61114T, 620, 14T(1981)14T. Practices such as nonemergency bodily searches conducted by opposite-sex guards, *id.* at 632, and 'ongoing and periodical assaults,'14T *Schafer v Maass,* 122 Or App 51814T, 52214T (1993)14T, have been held to be unconstitutional under that standard." *Smith v Department of Corrections*, 219 Or App 192 (2008) *rev den,* 345 Or 690, *cert den,* 557 US 923 (2009) (ban on porn in jail is not unnecessarily rigorous treatment of an inmate).

Article I, section 13, of the Oregon Constitution is concerned with conditions within a prison. *Sterling v Cupp*, 290 Or 611, 619-22 (1981). "In *Sterling*, the Supreme Court held that a corrections officer's nonemergency, over-the-clothes patdown of an inmate of the opposite sex that involves 'touching of sexually intimate body areas' constitutes 'unnecessary rigor.' 290 Or at 632." *Voth v Officer Solice*, 263 Or App 184 n 1 (2014) (court did not address Article I, section 13, claim because it was unpreserved). A sentence of death is not a condition of "unnecessary rigor." *State v Guzek*, 310 Or 299 (1990). Similarly, Article I, section 13, is not violated by pretrial detention anxiety suffered by an aggravated murder defendant. *State v Moen*, 309 Or 45, 97 (1990).

"Damages for deprivations of Oregon constitutional rights can be sustained only if a plaintiff can make a claim under an extant common-law, equitable, or statutory theory that provides nominal damages as a remedy and cannot be based solely on a provision under the Oregon constitution." *Millard v Oregon Dep't of Corrections*, __ F Supp 2d __ (D Or June 3, 2014) (quoting *Barcik v Kubiaczyk*, 321 Or 174, 190-91 (1995)). The "appropriate remedy for constitutional violations by public bodies, officers, employees and agents is the Oregon Tort Claims Act, [ORS] 30.260 – 30.300." *Ibid.* (quoting *Juran v Independence Or Cent School District*, 898 F supp 728, 730 (D Or 1995)). When a plaintiff fails to plead his claim that prison officials violated his Article I, section 13, rights under the Oregon Tort Claims Act, he "thus may not bring such a claim in federal court unless the State of Oregon waives sovereign immunity under the Eleventh Amendment of the U.S. Constitution." *Ibid.*

Cf. Thomas A. Balmer and Katherine Thomas, *In the Balance: Thoughts on Balancing and Alternative Approaches in State Constitutional Interpretation*, 76 ALBANY L REV 2027, 2042 (2013) (addressing the Court's analysis of Article I, section 13, in *Sterling v Cupp*).

In *Taylor v Peters*, 274 Or App 477 (2015), the Court of Appeals reversed a judgment that had dismissed with prejudice a petition for writ of habeas corpus. An inmate alleged that other prisoners are continually throwing urine and feces into his cell and jailors are doing nothing about it. He alleged deprivations of his Article I, sections 13 and 10 rights under the Oregon Constitution, and the Eighth and Fifth Amendments of the US Constitution. The court footnoted that ORS 34.362 permits a petition for deprivations of constitutional rights, and does not mention statutory rights.

11.4 Consecutive Sentences; Judicial Factfinding

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

See State v Lane, 357 Or 619 (2015). An administrative rule (OAR 213-012-0040(2)(a)) requires incarceration terms to be concurrent, not consecutive, if a defendant with multiple terms of probation commits a single probation violation. In this case, defendant drank alcohol, violating his probation for multiple convictions for child sex abuse against multiple victims. The state sought to revoke probation and impose consecutive terms of incarceration. He sought concurrent terms based on the rule.

In *Lane*, the Court held that Article I, section 44(1)(b) applies to sanctions for probation violations because such sanctions are sentences. The constitutional text invalidates the rule because the rule conflicts with the constitutional provision. The Court arrived at that conclusion by interpreting the constitutional text in its "historical context, along with relevant cases interpreting it," as set out in *Couey v Atkins*, 357 Or 460, 490 (2015), *Stranahan v Fred Meyer, Inc*., 331 Or 38, 54-55 (2000) (ascertaining framers' meaning of original 1857 provisions), *Ecumenical Ministries v Oregon State Lottery Comm*., 318 Or 551, 559 (1994), *State v Sagdal*, 356 Or 639, 642 (2015), and *State v Gaines*, 346 Or 160 (2009). Without "freez[ing] the meaning" to the date it was adopted, the Court sought to identify "relevant underlying principles that may inform" its "application of the constitutional

text to modern circumstances," citing *State v Davis*, 350 Or 440, 446 (2011). The text at issue in Article I, section 44(1)(b) is "to sentence * * * for crimes." The "historical context, which includes related statutes and regulations" that existed when Article I, section 44(1)(b) was adopted, show a broad inclusion of probation violation sanctions as "sentences." The "relevant history" of the constitutional provision is "scant." It is a measure that "was adopted by the voters upon referral from the legislature." The history of such measures includes contemporary sources, such as "the ballot title and associated information in the voters' pamphlet."

The *Lane* Court also considered an audio recording of a legislator testifying before the Senate Judiciary Committee. When considering measures referred to the people, "the legislature's deliberations seem no less worthy of consideration than the deliberations of a legislative committee in referring a bill to the floor of the house or the Senate. Certainly, they are at least as germane to the intended meaning of a measure as a newspaper editorial that we have no way of knowing anyone actually read."

11.5 Right to Allocution

At the country's founding, "no criminal defendant could testify at his own trial, but today, every defendant has a clear constitutional right to do so. No constitutional clause has expressly dictated this about-face." Akhil Reed Amar, AMERICA'S UNWRITTEN CONSTITUTION, p. 106.

Article I, section 11, provides in part: "in all criminal prosecutions, the accused shall have the right * * * to be heard by himself and counsel." "An accused defendant's right to be heard under that provision encompasses the common-law right to allocution – that is, 'a convicted defendant's opportunity to speak before sentencing.'" *State v Turnidge*, 359 Or 507, 518 (2016) (quoting *DeAngelo v Schiedler*, 306 Or 91, 93-94 n 1 (1988)). "In exercising that right, a defendant generally is permitted to 'make any statements relevant to existing sentencing and parole practices'; 'state any reason why he or she feels sentence should not be pronounced[;] and, in addition to presenting mitigating evidence, be given an opportunity to make any relevant personal comments[.]'" *Id*. at 518-19 (quoting *DeAngelo*, 306 Or at 96).

A defendant has the right to allocution (right to be heard personally) during a hearing to modify a judgment. *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).

A "defendant also is entitled to allocate to a jury during the penalty phase in a capital proceeding" under *State v Rogers*, 330 Or 282 (2000).

The question of whether a defendant could never be subject to cross-examination during sentencing is "far from beyond dispute." *State v Turnidge*, 359 Or 507, 521 n 4 (2016).

> ***State v Turnidge***, 359 Or 507 (2016) Trial court entered judgment to a father/son killing team, sentencing both to death. The Oregon Supreme Court affirmed the convictions and death sentences. This case involves the father.

During defendant's penalty-phase, after the evidence had been received, the trial judge cleared everyone out of the courtroom except defendant and defense counsel. The trial court explained that defendant has "a right to address the jury that has the decision for making the sentence" in the case. "It's called the right to allocate, right to speak aloud to them, to tell them what you think the sentence ought to be, and it's been indicated to me by counsel that you have chosen not to come to the stand and talk to the jury about what you think the sentence ought to be. Is that your decision?" Defendant said, "Yes." The court asked if defendant had any questions, defendant started talking about the jury making up its mind. The trial judge said, "you have a right, and I need to deal with that. And, of course, you would also be subject probably to cross-examination were you to do that, too." *Id*. at 517-18. No one objected to the trial court's statement about cross-examination. The prosecutor couldn't, because she was out of the courtroom. On appeal, defendant sought plain error review for the trial court's statement that defendant probably would have been subject to cross if he'd chosen to speak to the jury. The Supreme Court concluded that "the trial court's remark had no apparent effect on either defendant's course of action or the course of the trial or sentencing proceeding." *Id*. at 521. Defendant argued that a defendant could never be subject to cross-examination during sentencing. But the Court footnoted that that issue is "far from beyond dispute." *Id*. at n 4.

11.6 *Ex Post Facto*

The record of the Oregon Constitutional Convention on the *ex post facto* clause "does not indicate the convention's intent in adopting the provision." *State v Cookman*, 324 Or 19, 28 (1996). The *Cookman* court wrote: "However, it appears that Article I, section 21, was derived from the Indiana Constitution of 1851, specifically, Article I, section 24, of that Constitution. W. C. Palmer, *The Sources of the Oregon Constitution*, 5 OR L REV 200, 202 (1926). Article I, section 24, of the 1851 Indiana Constitution is itself substantially similar to Article I, section 18, of the 1816 Indiana Constitution." *Ibid*. *Cookman* then concluded that it was entitled to rely on an 1822 Indiana case because the decision "was available to the framers of the Oregon Constitution when they decided to adopt the Indiana *ex post facto* provision in our state constitution." *Id*. at 31 (also citing Blackstone's *Commentaries* and THE FEDERALIST). That method has been called reliance on "The Whopper" and a "fallacy of elitism." See Jack L. Landau, *A Judge's Perspective on the Use and Misuse of History in State Constitutional Interpretation*, 38 VAL U L REV 451, 479-81 (2004) ("Sometimes the courts employ the fiction that sources from other jurisdictions were, at least in a temporal sense, 'available' to the framers.")

The "framers of the Oregon Constitution intended for Article I, section 21, to proscribe four categories of penal laws: those that punish acts that were legal before enactment; those that aggravate a crime to a level greater than it was before enactment; those that impose greater or additional punishment than that annexed to the crime before enactment; and those that deprive a defendant of a defense that was available before enactment." *State v MacNab*, 334 Or 469, 475 (2002).

11.6.1 DUII

In 2009, the Oregon legislature changed the "look back" period for DUII diversion eligibility, to 15 years (it had been 10 years). The "purpose of the Oregon Vehicle Code is primarily remedial, not punitive." The "primary purpose" of the diversion lookback period is "not punitive." The "practical effect" also is not punitive, because "*ex post facto* protections are implicated only when the change in the law inflicts punishment 'not annexed to the crime at the time of commission," per *McNab*. Diversion is a procedure to avoid prosecution and punishment. Eligibility for diversion is not punishment. Changes in the criteria for diversion eligibility do not "increase punishment" for DUII under Article I, section 21, of the Oregon Constitution. *State v Carroll*, 253 Or App 265 (2012), *rev den* 353 Or 428 (2013).

11.6.2 Prisoners

"[A] person raising *an ex post facto* challenge to a change in parole procedure must demonstrate in a non-speculative way that the change has resulted in a significant risk that the person's punishment will be increased." *Morrison v Board of Parole*, 277 Or App 861, 866 n 3, *rev den*, 360 Or 465 (2016) (citing *Smith v. Board of Parole*, 343 Or 410, 419-20 (2007)); *see also Butler v Board of Parole*, 194 Or App 164, 171-73, 94 P3d 149, *rev den*, 337 Or 555 (2004)); *Mendacino v Board of Parole*, 287 Or App 822 (2017). "When the change in law 'does not by its own terms show a significant risk, the [petitioner] must demonstrate, by evidence drawn from the rule's practical implementation * * *[,] that as applied to [the petitioner's] own sentence the law created a significant risk of increasing his punishment.' *Garner v. Jones*, 529 US 244, 255, 120 S Ct 1362, 146 L Ed 2d 236 (2000)." *Mendacino*, 287 Or App at 829.

11.7 Forfeitures

Oregon's Constitution contains a lengthy section called the "Oregon Property Protection Act of 2000." That section is in Article XV, section 10: http://bluebook.state.or.us/state/constitution/constitution15.htm.

It was enacted as part of an initiative petition in 2000. Its purpose is listed in section 2:

> "Statement of principles: The People, in the exercise of the power reserved to them under the Constitution of the State of Oregon, declare that:
>
> "(a) A basic tenet of a democratic society is that a person is presumed innocent and should not be punished until proven guilty;
>
> "(b) The property of a person generally should not be forfeited in a forfeiture proceeding by government unless and until that person is convicted of a crime involving the property;
>
> "(c) The value of the property forfeited should be proportional to the specific conduct for which the owner of the property has been convicted; and
>
> "(d) Proceeds from forfeited property should be used for treatment of drug abuse unless otherwise specified by law for another purpose."

11.8 Due Process and Resentencing

In *State v Febuary*, 361 Or 544 (2017), the Court addressed "the possibility that trial courts may employ their sentencing authority to punish defendants for having the temerity to appeal earlier convictions and sentences." *Id.* at 553 (quoting *State v Partain*, 349 Or 10, 17 (2010)). It explained that "trial courts may assemble sentences on individual counts to form a 'package' sentence," "in which the length of the component counts are set in order to reach a desired total sentence." *Id*. at 562; *see also State v Sierra*, 361 Or 723, 731 (2017) (so quoting).

Sierra and *Febuary* addressed a "rule against vindictiveness" or a "presumption of vindictiveness" in resentencing on remand. The Court footnoted in *Sierra* that "even when the presumption of vindictiveness does not apply, a defendant always may demonstrate a due process violation by affirmatively proving actual vindictiveness." *Id*. at 744 n 10 (quoting *Febuary*, 361 Or at 558 which quoted *Wasman v United States*, 468 US 559, 569 (1984)) (quotation marks omitted).

In *State v Reinke*, 289 Or App 10, 15-16 (2017), the Court of Appeals explained *Sierra* as follows: "The Oregon Supreme Court recently explained in *State v Sierra*, 361 Or 723, 734-44, 399 P3d 987 (2017), the twostep inquiry to be used by an appellate court to determine whether a judge who was not the original sentencing judge has imposed a sentence on remand that triggers a presumption of vindictiveness, which, if triggered, makes the sentence unlawful. The first step requires the appellate court to determine whether the resentencing court has imposed a sentence that is more severe than was originally imposed, which turns on whether the total length of the second sentence exceeds that of the first. *Id*. at 744 (quoting *Febuary v. State of Oregon*, 361 Or 544, 563, 396 P3d 894 (2017)). The second step requires the court to determine whether the resentencing court has articulated a wholly logical, nonvindictive reason for the more severe sentence. *Id*. If the resentencing court has done that, then the second sentence is not presumed to be vindictive, and, thus, the defendant's due process rights have not been violated by the imposition of a more severe sentence on remand." (quotations and footnote omitted) (held: the sentence imposed by the resentencing court does not violate defendant's due process rights").

Chapter 12: Remedy Guarantee

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

12.1 Origins

See ***Horton v OHSU***, 359 Or 168 (2016) on the Oregon Supreme Court's perception of the origins of the Remedy Clause in Article I, section 10, of the Oregon Constitution. (*Horton* overturned a prior case, *Smothers v Gresham Transfer, Inc*., 332 Or 83 (2001), but disinterred cases preceding *Smothers*, and said that cases "after *Smothers* * * * must be taken with a grain of salt"). *Id*. at 220.

In 2017, the Court of Appeals summarized *Horton*'s effects on the Remedies Clause: *Horton* "overruled *Smothers v Gresham Transfer, Inc*., 332 Or 83, 23 P3d 333 (2001); reinvigorated pre-*Smothers* cases applying Article I, section 10; and called into question the viability of post-Smothers Article I, section 10, cases that rely on the Smothers construct. *See Horton*, 359 Or at 218, 220-21." *Vasquez v Double Press Mfg., Inc*., 288 Or App 503, 516 (2017).

"The Oregon framers did not debate Article I, section 10, and, except for a minor change, adopted it wholesale from the 1851 Indiana Constitution." *Horton,* 359 Or at 216.

See David Schuman, *Oregon's Remedy Guarantee: Article I, section 10 of the Oregon Constitution*, 65 OR L REV 35 (1986). See Jonathan M. Hoffman and Maureen Leonard, *Remedies Clause and Speedy Trial*, OREGON CONSTITUTIONAL LAW MANUAL (2013), www.osbar.org/secured/barbooks/viewchapter.asp?bid=85&cid=2337.

12.2 Interpretation

Article I, section 10, applies to natural persons only, not to corporations. *Liberty Northwest Ins. Corp. v Oregon Ins. Guarantee Assoc*., 206 Or App 102 (2006).

The Oregon Supreme Court wrote in 2016: "Textually, Article I, section 10, differs from other sections included in Oregon's bill of rights. It is not a protection against the exercise of governmental power. *State ex rel Oregonian Pub. Co. v Deiz*, 289 Or 277, 288, 613 P2d 23 (1980) (Linde, J., concurring). Rather, '[i]t is one of those provisions of the constitution that prescribe how the functions of government shall be conducted.' *Id*. Specifically, '[s]ection 10 as a whole is plainly concerned with the administration of justice.' Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 Or L Rev 125, 136 (1970). Each of the three independent clauses that comprise Article I, section 10, addresses that topic. The first independent clause prohibits secret courts while the second provides that justice shall be administered 'openly and without purchase, completely and without delay.' The third independent clause provides that 'every man shall have remedy by due course of law for injury done him in his person, property, or reputation.'" *Id*. at 179 (footnotes omitted). ***Horton v OHSU***, 359 Or 168, 179 (2016) (footnotes omitted).

The *Horton* Court believes that "the text and history of the remedy clause do not yield a clear answer regarding the clause's meaning." 359 Or at 217.

In ***Horton v OHSU***, 359 Or 168 (2016), two doctors negligently cut blood vessels to an infant's liver, resulting in the infant's severe lifelong injuries. A jury returned a verdict for plaintiff for $6,071,190 as economic damages plus $6,000,000 in noneconomic damages. The trial court ruled that the Tort Claims Limit capping damages at three million dollars, as applied to one doctor (not the hospital), violated the Remedy Clause in Article I, section 10, and Article I, section 17 and Article VII (Amended), section 3, which protect civil jury verdicts. The trial court entered a limited judgment for the jury's verdict against one doctor. The doctor filed a direct appeal to the Oregon Supreme Court under ORS 30.274(3).

The *Horton* Court held:

> "the right to a remedy protected by Article I, section 10, and the right to a jury trial protected by Article I, section 17, address related but separate issues. Article I, section 10, limits the legislature's substantive authority to alter or adjust a person's remedy for injuries to person, property, and reputation. Article I, section 17, guarantees a jury trial in those classes of cases in which the right to a jury trial was customary at the time the Oregon Constitution was adopted and in cases of like nature. However, Article I, section 17, places no additional substantive limit on the legislature's authority to alter or adjust remedies beyond that found in Article I, section 10." *Id*. at 173.

The Court overturned *Smothers v Gresham Transfer, Inc*., 332 Or 83 (2001) but "reaffirm[ed]" its remedy clause decisions that preceded *Smothers*, including the cases that *Smothers* disavowed." *Id*. at 188 & n 9, 218. *Horton* also said that cases "after *Smothers* * * * must be taken with a grain of salt." *Id*. at 220. (The Court of Appeals has summarized *Horton*'s effects on the Article I, section 10, Remedies Clause: *Horton* "overruled *Smothers v. Gresham Transfer, Inc*., 332 Or 83, 23 P3d 333 (2001); reinvigorated pre-*Smothers* cases applying Article I, section 10; and called into question the viability of post-Smothers Article I, section 10, cases that rely on the Smothers construct. *See Horton*, 359 Or at 218, 220-21." *Vasquez v Double Press Mfg., Inc*., 288 Or App 503, 516 (2017)).

Smothers had concluded that Article I, section 10, requires courts to ask "whether the plaintiff has alleged an injury to one of the absolute rights that Article I, section 10 protects." *Id*. at 175. If yes, "then the remedy clause mandates that a constitutionally adequate remedy for that injury be available." *Id*. at 176. "If the legislature has abolished a common-law cause of action for protected injuries, has the legislature 'provided a constitutionally adequate substitute remedy for the common-law cause of action for that injury?'" *Id*. The Court wrote that *Smothers* was incorrect in viewing early remedy clause cases as preventing the legislature from modifying Oregon common law as it existed in 1857. *Id*. at 197.

The *Horton* Court concluded:

> "we cannot say that the $3,000,000 tort claims limit on damages against state employees is insubstantial in light of the overall statutory scheme, which extends an assurance of benefits to some while limiting benefits to others." *Id*. at 224. "We recognize that the damages available under the Tort Claims Act are not sufficient in this case to compensate plaintiff for the full extent of the injuries that her son suffered.

> However, our remedy clause cases do not deny the legislature authority to adjust, within constitutional limits, the duties and remedies that one person owes another." *Id*.

Bell v City of Hood River* and *NBW Hood River, Inc., 283 Or App 13 (12/21/16) (Hood River) (Armstrong, Hadlock, Egan) Defendant developer proposed a waterfront development. Plaintiffs opposed the development. They testified before the city planning commission. The city planning commission approved the development. The city requires people to pay a fee to appeal from the planning commission to the city council. There is no provisions to waive that fee. That appeal fee is $3,258 in this case. The city declined to waive that fee for plaintiff. Land use decisions must be exhausted at the city level before an appeal to LUBA can be filed, and then an appeal to the Court of Appeals may be filed. ORS 197.825(2)-(3).

Plaintiff then filed this declaratory judgment action against the city and the developer. Plaintiff's theory is that the city's fee violates the "justice without purchase" provision of Article I, section 10, of the Oregon Constitution. On cross-motions for summary judgment, the trial court concluded that Article I, section 10 is inapplicable because a city council is not a "court." The "justice without purchase" part of Article I, section 10 applies to courts.

The Court of Appeals agreed with the trial court's legal conclusions but vacated and remanded so the court could enter a judgment declaring the parties' rights. The trial court had erred procedurally by dismissing the plaintiff's action, see *Doe v Medford School District 549C*, 232 Or App 38, 46 (2009). The Court of Appeals explained the legal reasoning as follows.

Article I, section 10 provides: "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."

"[A]lthough the first two clauses are grammatically independent, their meaning is not. The first clause, 'No court shall be secret,' and the second clause, 'justice shall be administered,' are linked by the conjunction 'but.' That linkage suggests that the administration of justice prescribed (including 'without purchase') is the means by which courts are to fulfill their obligation to operate openly. In that way, the prescriptions on how justice is to be administered apply only to the work done in a 'court.' The Supreme Court previously has examined the word 'court' and concluded that, 'within the meaning of Article I, section 10, a "court" is a governmental institution, composed of judges and their supporting staff, whom the law charges with the responsibility to administer justice.' [*Doe v. Corp. of Presiding Bishop*, 352 Or 77, 88, 90 (2012)]. Administering justice, in turn, is directed at adjudications, because "'[t]he fundamental function of courts is to determine legal rights based upon a presentation of evidence and argument.'" *Id*. (quoting *Oregonian Publishing Co. v O'Leary*, 303 Or 297, 303, 736 P2d 173 (1987) (brackets in *Doe*)); *see also State v MacBale*, 353 Or 789, 806, 305 P3d 107 (2013) ('Justice is administered when a court determines legal rights based on the presentation of evidence and argument.'); *Oregonian Publishing Co*., 303 Or at 303 ("The primary limitation on the scope of section 10 is that it is directed only at adjudications. To the extent that adjudications are not involved, the administration of

justice is not governed by it."). Thus, the administration of justice prescribed by Article I, section 10, is directed to courts that are conducting adjudications." *Id*. at 18.

The court emphasized that plaintiff did not challenge the administration of justice in the courts. They only challenged the city's fee to appeal to the city council. *Id*. at 19. The court wrote: "It may be that the exhaustion requirement, as applied in plaintiff's case, imposes an onerous financial burden to the access to courts that is amenable to constitutional challenge. However, that is not the challenge that plaintiffs have brought. Simply put, plaintiffs' declaration judgment action is not addressed to what Article I, section 10, prescribes." *Ibid*.

12.3 Caps

See ***Horton v OHSU***, 359 Or 168 (2016) discussed, *ante*.

In 1987, the Oregon legislature adopted a statute capping noneconomic damages at $500,000, regardless of the severity or permanence of an injury, regardless of the person's age, and regardless of the jury verdict. Or Laws 1987, ch 774, section 6 (now numbered ORS 31.710); *Vasquez v Double Press Mfg., Inc*., 288 Or App 503, 519 (2017) (so noting).

> "In enacting the cap, the Oregon Legislature sought to control the escalating costs of the tort compensation system. The legislature determined that the cap would put a lid on litigation costs, which in turn would help control rising insurance premium costs for Oregonians. The legislature listened to hours of testimony on the insurance and tort crisis, and how reform was needed n order to salvage the system." *Greist v Phillips*, 332 Or 281, 299 n 10 (1995); *Vasquez v Double Press Mfg., Inc*., 288 Or App 503, 519 (2017) (so quoting *Griest*, which quoted from a law review article).

To comply with the Remedy Clause, after *Horton v OHSU*, 359 Or 168 (2016), it appears that the remedy remaining after a cap is applied must be "substantial," or that "substantiality of the legislative remedy can matter in determining whether the remedy is consistent with the remedy clause." ***Horton v OHSU***, 359 Or 168, 220 (2016).

Horton v OHSU, 359 Or 168 (2016) did not identify a clear principle to resolve challenges to legislation under the remedy clause. *Cf. Vasquez v Double Press Mfg., Inc*., 288 Or App 503, 516-17 (2017). Instead, it "considered three general categories of legislation." *Id*. at 516 (quoting *Horton*, 359 Or at 219-20).

•*Horton*'s first category: When the legislature completely denies a remedy, or provides an "insubstantial remedy" to an injured person, that violates the remedy clause. *Horton*, 359 Or at 219; *Vasquez*, 288 Or App at 516.

•*Horton*'s second category: When the legislature "adjusts" or "reduces" an individual plaintiff's rights and remedies as part of a law that increases benefits to some, but reduces benefits to others, courts consider "that quid pro quo in determining whether the reduced benefit" to an individual plaintiff is "substantial" in "the overall statutory scheme." *Horton*, 359 Or at 219-20; *Vasquez*, 288 Or App at 516.

•*Horton*'s third category: When the legislature "modifies" or "eliminates" common-law causes of action, the court considers the reason for the change. Stated otherwise, the court considers "whether the common-law cause of action that was modified continues to protect core interests against injury to persons, property, or reputation or whether, in light of the changed conditions, the legislature permissibly could conclude that those interests no longer require the protection formerly afforded to them." *Horton*, 359 Or at 220; *Vasquez*, 288 Or App at 516-17.

Vasquez summarized *Horton*'s effects on the Article I, section 10, Remedies Clause: *Horton* "overruled *Smothers v Gresham Transfer, Inc*., 332 Or 83, 23 P3d 333 (2001); reinvigorated pre-*Smothers* cases applying Article I, section 10; and called into question the viability of post-*Smothers* Article I, section 10, cases that rely on the *Smothers* construct. *See Horton*, 359 Or at 218, 220-21." *Vasquez v Double Press Mfg., Inc*., 288 Or App 503, 516 (2017).

In *Howell v Boyle*, 353 Or 359 (2013) (predating *Horton*), "[b]ut for" the damage cap in ORS 31.270, a plaintiff would have recovered $507K. The damages cap allowed for only $200K. The Court considered that remaining sum to be substantial. *Greist v Phillips*, 322 Or 281 (1995) (wrongful death action predating *Horton*) interpreted the Remedy Clause as guaranteeing that plaintiffs "not be left 'wholly without remedy'" rather than with "a whole remedy." "The damage limitation thus does not leave plaintiff 'wholly without a remedy,'" the Court decided. "The fact is that not every constitutional provision can be reduced to a neat formula that avoids the necessity of applying careful judgment to the facts and circumstances of each case." *Howell v Boyle*, 353 Or 359 (2013).

Clarke v OHSU, 343 Or 581 (2007) is a remedy clause case that concluded the then-$200,000 cap on a $12 million damages award was not "substantial." Instead it was "paltry," per the *Clarke* court; *see also Vasquez v Double Press Mfg., Inc*., 288 Or App 503, 523 (2017) (so noting).

Horton v OHSU, 359 Or 168 (2016) stated that "remedy clause cases that have come after *Smothers* * * * must be taken with a grain of salt." *Id*. at 220. "That said, we agree with *Clarke* and *Howell* that the substantiality of the legislative remedy can matter in determining whether the remedy is consistent with the remedy clause." *Ibid*. The Court of Appeals summarized *Horton*'s effects on the Article I, section 10, Remedies Clause: *Horton* "overruled *Smothers v. Gresham Transfer, Inc*., 332 Or 83, 23 P3d 333 (2001); reinvigorated pre-*Smothers* cases applying Article I, section 10; and called into question the viability of post-Smothers Article I, section 10, cases that rely on the *Smothers* construct. *See Horton*, 359 Or at 218, 220-21." *Vasquez v Double Press Mfg., Inc*., 288 Or App 503, 516 (2017).

> ***Vasquez v Double Press Mfg., Inc*.**, 288 Or App 503 (11/01/17) (Armstrong, Hadlock) (Egan concurring) This is the second time this case has reached the Court of Appeals. Plaintiff worked for defendant, a machine manufacturer, in Junction City. He made $9.15 per hour. In 2010, when he was 21, he was cleaning hay out of a bale-cutting machine. At some point, he was crushed in a hydraulic ram and was compressed into a one-inch gap. His neurosurgeon testified that he was "essentially cut in half, right through the base of the spine," and was held together only by soft tissue. He was rendered permanently paraplegic despite five surgeries. He filed this action against defendant. Numerous times, defendant moved to apply the statutory noneconomic damages cap ($500,000). After a two-week trial, the jury returned its verdict after three hours of

deliberation. The jury awarded him $2,231,817 in economic damages plus $8,100,000 in noneconomic damages. The jury found plaintiff to be 40% at fault. Under *Lakin*, the trial court did not apply the statutory damages cap (because *Lakin* held the cap to violate the civil right to a jury verdict), and entered judgment for plaintiff for a total of $6,199.090, with $4,860,000 of that total as noneconomic damages.

The Court of Appeals affirmed under *Lakin*. Then the day after the Court of Appeals decided this case under *Lakin*, the Oregon Supreme Court issued *Horton*. Now, this (second) time in the Court of Appeals, the Court of Appeals decided the case on a motion for reconsideration. In this case, the Court of Appeals did not follow *Lakin*, because *Horton* overruled *Lakin*. But the Court of Appeals here again <u>affirmed</u> the trial court's decision <u>not</u> to apply the $500,000 noneconomic damages cap. As explained, under *Horton*, application of that cap would violate the Remedy Guarantee in Article I, section 10.

On reconsideration, the Court of Appeals addressed plaintiff's two newly raised arguments to affirm. One is that plaintiff's claims are excepted from the statutory cap because they are subject to ORS chapter 646 on workers' compensation. The other is that plaintiff's claims are excepted because the statutory cap violates the Remedy Guarantee both facially and as applied. The Court of Appeals did so under the "right for the wrong reason" principle. (<u>Note</u>: this principle should be called "right for another reason"). The Court of Appeals did so because "affirming the trial court on a proper alternative basis * * * promotes efficient use of judicial resources." *Id*. at 510. The "proper alternative basis" is when a party raises a "right for the wrong reason" argument for the first time in opposition to a petition for reconsideration as a basis on which to adhere to a prior affirmation of a trial court decision despite an intervening change in the law. *Id*. at 509-10.

The court reiterated the history of the damages cap. In 1987, the Oregon legislature adopted a statute capping noneconomic damages at $500,000, regardless of the severity or permanence of an injury, regardless of the person's age, and regardless of the jury verdict. Or Laws 1987, ch 774, section 6 (now numbered ORS 31.710). *Id*. at 519.

"In enacting the cap, the Oregon Legislature sought to control the escalating costs of the tort compensation system. The legislature determined that the cap would put a lid on litigation costs, which in turn would help control rising insurance premium costs for Oregonians. The legislature listened to hours of testimony on the insurance and tort crisis, and how reform was needed in order to salvage the system." *Greist v Phillips*, 332 Or 281, 299 n 10 (1995); *Id*. at 519 (quoting *Griest*, which quoted from a law review article).

The *Vasquez* court reviewed the text of ORS 31.710(1) which states some exceptions to the cap, specifically ORS chapter 656. The court concluded that plaintiff's claim against defendant does not fall within the statutory exception. *Id*. at 514-15.

Then the court turned to the facial and as-applied challenges to the statutory cap. The court summarized *Horton*'s effect on Remedy Guarantee analysis:

> *Horton* "overruled *Smothers v Gresham Transfer, Inc*., 332 Or 83, 23 P3d 333 (2001); reinvigorated pre-*Smothers* cases applying Article I, section 10; and called into question the viability of post-*Smothers* Article I, section 10, cases that rely on the Smothers construct. *See Horton*, 359 Or at 218, 220-21." *Id*. at 516.

Horton did not identify a clear principle to resolve challenges to legislation under the remedy clause. *Id.* at 516-17. Instead, it "considered three general categories of legislation." *Id*. at 516 (quoting *Horton*, 359 Or at 219-20). Vasquez quoted Horton to identify those three "general categories":

> •*Horton*'s first category: When the legislature completely denies a remedy, or provides an "insubstantial remedy" to an injured person, that violates the remedy clause. *Horton*, 359 Or at 219; *Vasquez*, 288 Or App at 516.
>
> •*Horton*'s second category: When the legislature "adjusts" or "reduces" an individual plaintiff's rights and remedies as part of a law that increases benefits to some, but reduces benefits to others, courts consider "that quid pro quo in determining whether the reduced benefit" to an individual plaintiff is "substantial" in "the overall statutory scheme." *Horton*, 359 Or at 219-20; *Vasquez*, 288 Or App at 516.
>
> •*Horton*'s third category: When the legislature "modifies" or "eliminates" common-law causes of action, the court considers the reason for the change. Stated otherwise, the court considers "whether the common-law cause of action that was modified continues to protect core interests against injury to persons, property, or reputation or whether, in light of the changed conditions, the legislature permissibly could conclude that those interests no longer require the protection formerly afforded to them." *Horton*, 359 Or at 220; *Vasquez*, 288 Or App at 516-17.

The court categorized *Horton* as a category-two case, because it involved the Oregon Tort Claims Act and state sovereign immunity. *Id*. at 518. *Horton* recited that the reason for the OTCA's $3 million limit on public bodies' liability was to "accommodate the state's constitutionally recognized interest" in immunity, and therefore the $3 million cap for state employees is not "insubstantial." *Id*. at 518 (quoting *Horton* at 224).

The *Vasquez* court concluded that *Vasquez* is a category-one case because "ORS 31.710 is not part of a *quid pro quo* statutory scheme as understood in the Article I, section 10, cases." *Id*. at 520. When the legislature enacted the noneconomic damages cap in 1987, it benefitted "the insurance industry and tortfeasor defendants" while constricting plaintiffs' benefits. *Id*. at 521. That is no a quid pro quo. "A quid pro quo occurs when both sides obtain a real beefit conferred in the statutory scheme itself. Here, the statutory scheme does not extend any benefit to plaintiffs on the whole." *Ibid*.

Turning then to plaintiff's first argument – that the cap is facially unconstitutional – the *Vasquez* court did not agree. That is "because a capped remedy could provide

complete relief for many claimants" such as those with verdicts under $500,000. *Id*. at 522. The *Vasquez* court wrote that under *Horton*'s category-one cases "the statutes that could be facially invalid are only those that completely deny a remedy for the breach of a recognized duty." *Id*. (citing *Horton*, 359 Or at 219). Statutes that do not completely deny a remedy are evaluated "only on a case-by-case basis" for a "substantial" remedy. *Ibid*.

The *Vasquez* court agreed with plaintiff that as applied, the cap violates Article I, section 10, because $500,000 is not "substantial" compared with the $4,860,000 awarded. *Id*. at 522-26. The legislature's "hard money cap," enacted in 1987 (which has not been revised to adjust for "the changing value of money or for adjustment based on the relative severity of the injuries sustained by a plaintiff") was enacted to "put a lid on litigation costs" to help insurance companies and "help control insurance premium costs." *Id*. at 525. Nothing about that cap was "concerned with injured with injured claimants." *Id*. "Here, we are left with a bare reduction in plaintiff's noneconomic damages without any identifiable statutory quid pro quo or constitutional principle that the cap takes into consideration. Under those circumstances, the application of ORS 31.710(1) to plaintiff's jury award violates the remedy clause in Article I, section 10." *Id*. at 525-26.

12.4 Contributory Negligence

In *Schutz v La Costita III, Inc*., 256 Or App 573 (2013), the court considered a claim against a bar for a plaintiff's injuries sustained after drunk driving. "Even if there had been a cause of action against alcohol purveyors for injuries sustained as a result of negligently served alcohol in first-party cases such as this one, the action would have been foreclosed by the well-settled doctrine of contributory negligence, if not also by assumption of the risk." The "extensive and detailed dicta" in *Howell v Boyle*, 353 Or 359 (2013) concluded that contributory negligence was a "complete bar" to mid-19th century negligence claims. Although that aspect of *Howell* was "pure dicta," the *Schutz* court felt it would be "imprudent to ignore it."

12.5 Workers' Compensation

The remedy clause of Article I, section 10, entitles a plaintiff to bring a civil negligence claim in circuit court, despite ORS 656.018 (the workers' comp exclusive-remedy statute). *Smothers v Gresham Transfer, Inc*., 332 Or 83 (2001). But ***Horton v OHSU***, 359 Or 168 (2016) overturned *Smothers* and kept cases predating *Smothers*, 359 Or at 188 & n 9 & 218, and said that cases after Smothers "must be taken with a grain of salt." *Id*. at 220. Workers' claims for negligence against employers and negligence *per se* were recognized in *Smothers*. *Alcutt v Adams Family Food Services, Inc*., 258 Or App 767 (2013).

12.6 Wrongful Death

In *Greist v Phillips*, 322 Or 281 (1995), the jury returned a verdict for plaintiff, awarding economic damages of $100,000 and noneconomic damages of $1.5 million. The trial court applied Oregon's $500,000 statutory cap on noneconomic damages and entered a judgment for plaintiff that included economic damages of $100,000 and noneconomic damages of $500,000.

The Oregon Supreme Court held that the Oregon "legislature is entitled to amend the amount of damages available in a statutory wrongful death action without running afoul of Article I, section 10, as long as the plaintiff is not left without a substantial remedy." "The remedy for wrongful death is substantial, not only because 100 percent of economic damages plus up to $500,000 in noneconomic damages is a substantial amount, but also because the statutory wrongful death action in Oregon has had a low limit on recovery for 113 years of its 133-year history. * * * [T]he wrongful death claim came into existence with a limitation, and the highest previous limitation (1961-1967) was $25,000. In relation to that history, the present remedy is substantial." *Greist v Phillips*, 322 Or 281 (1995).

In 2017, the Oregon Court of Appeals footnoted that it expresses no opinion on whether *Griest* is still controlling precedent for wrongful-death claims after ***Horton v OHSU***, 359 Or 168 (2016) "indicat[ed] that "historical limitations on tort claims are no longer the rubric by which we are to measure the legislature's departure from the common law." *Vasquez v Double Press Mfg., Inc*., 288 Or App 503, 524 n 6 (2017).

Chapter 13: Error

"If the supreme court shall be of opinion, after consideration of all the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed, notwithstanding any error committed during the trial * * * ." – Article VII (Amended), section 3, Or Const

13.1 Oregon Constitution

"Article VII (Amended), section 3, of the Oregon Constitution states the standard that governs whether [appellate courts] must affirm a conviction despite the fact that legal error occurred during the trial. That provision provides, in part:

> '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[.]'

"Pursuant to that provision, [appellate courts] must affirm a judgment, despite any error that occurred at trial, if, after reviewing the record, [appellate courts] conclude that there was little likelihood that the error affected the jury's verdict. *State v Davis*, 336 Or 19, 32, 77 P3d 1111 (2003). That conclusion is not a reflection of how [appellate courts] view the weight of the evidence of defendant's guilt, but rather a legal conclusion about the likely effect of the error on the verdict. *Id*." *State v Schiller-Munneman*, 359 Or 808, 819 (2016).

"Under Article VII (Amended), section 3, of the Oregon Constitution, an appellate court must 'affirm a conviction, notwithstanding any evidentiary error, if there is little likelihood that the error affected the verdict.'" *State v Gibson*, 338 Or 560, 576, *cert denied* 546 US 1044 (2005). In determining the possible influence on the jury, courts consider whether the evidence went to "the heart of * * * the case." *State v Sanchez-Alfonso*, 239 Or App 160 (2010) (quoting *State v Davis*, 336 Or 19, 34 (2003)).

The "test for affirmance despite error" is: "Is there little likelihood that the particular error affected the verdict?" *State v Davis*, 336 Or 19 (2003) (held: the trial court should not have admitted the physician's diagnosis of child sex abuse under the circumstances of this case; error was not harmless); *State v Gibson*, 338 Or 560, 576, *cert denied*, 546 US 1044 (2005). Whether the erroneous exclusion of evidence is "harmless" depends on the content and character of evidence, as well as the context in which it was offered. Erroneous exclusion of evidence that is "merely cumulative" of admitted evidence and not "qualitatively different" than admitted evidence generally is harmless. *State v Davis*, 336 Or 19, 32-34 (2003).

In assessing whether the admission of *hearsay* testimony was error and whether an erroneous admission was harmless, courts "describe and review all pertinent portions of the record, not just those portions most favorable to [the state]." *State v Eckert*, 220 Or App 274, 276 *rev den*, 345 Or

175 (2008); *State v Villenueva-Villenueva*, 262 Or App 530 (2014) (no mention of statute or constitution).

Harmless error analysis applies whether the evidence in question is scientific or ordinary. *State v Willis*, 348 Or 566, 572 n 2 (2010) (citing *Melendez-Diaz v Massachusetts*, 129 S Ct 2527 (2009) for Sixth Amendment issue).

The Oregon Court of Appeals has set a different scope of review in harmless-error analysis: "Generally, when considering an appeal from a judgment of conviction, 'we view the evidence presented in the light most favorable to the state. However, in our assessment of whether the erroneous admission [or exclusion] of disputed evidence was harmless, we describe and review all pertinent portions of the record[.]' *State v. Eckert*, 220 Or App 274, 276, 185 P3d 564, *rev den*, 345 Or 175 (2008) (internal citations omitted); *see also State v. Beisser*, 258 Or App 326, 328-29, 308 P3d 1121 (2013) (describing the evidence defendant sought to present and 'the evidence relevant to the issues on appeal that the parties presented at trial')." *State v Basua*, 280 Or App 339, 340 (2016).

If the trial court erred, then appellate courts "next address the state's assertion that defendant's conviction should nevertheless be affirmed because the error was harmless. Under Article VII (Amended), section 3, of the Oregon Constitution, we 'must affirm a judgment, despite any error committed at trial, if, after considering all the matters submitted, [we are] of the opinion that the judgment "was such as should have been rendered in the case."' *State v. Davis*, 336 Or 19, 28, 77 P3d 1111 (2003). Thus, * * * we must determine 'whether, after we review the record, we can say that there was little likelihood that the erroneous exclusion of the witness statements affected the jury's verdict.' *Id*. at 32. To be clear, that determination 'is a legal conclusion about the likely effect of the error on the verdict,' and 'not a finding about how the court views the weight of the evidence of the defendant's guilt.' *Id*. (emphasis added)." *State v Basua*, 280 Or App 339, 345 (2016).

13.2 Federal Constitution

Oregon courts assess violations of federal constitutional rights under the federal harmless error test in *Chapman v California*, 386 US 18, 23 (1967). That is, the "deprivation of such a right is harmless error when the reviewing court, in examining the record as a whole, can say, beyond a reasonable doubt, that the error did not contribute to the determination of guilt." *State v Sierra-Depina*, 230 Or App 86, 93 (2009).

"A federal constitutional error does not require reversal 'if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.' *State v. Cook*, 340 Or 530, 544, 135 P3d 260 (2006)." *State v Cuevas*, 263 Or App 94 (2014).

13.3 Statutory harmless error

13.3.1 Criminal

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

13.3.2 Civil

ORS 19.415(2) provides: "No judgment shall be reversed or modified except for error substantially affecting the rights of a party." Under that legislative directive, appellate courts "will reverse a trial court's decision only if the purported error substantially affected the aggrieved party's rights. '[E]videntiary errors substantially affect a party's rights and 13 require reversal when the error has some likelihood of affecting the jury's verdict.'" *Dew v Bay Area Health District*, 248 Or App 244, 258 (2012); *Bazzaz v Howe*, 262 Or App 519 (2014).

"In determining whether error is harmless," the court "examines whether it is likely that a trial court's error affected the outcome of the case below." *Baker v English*, 324 Or 585, 590 (1997); *Ramirez v Northwest Renal Clinic*, 262 Or App 317 (2014). Courts evaluate the error based on the lower-court proceedings, rather than make "a prediction about potential proceedings in the future." *Ramirez*.

13.4 Preservation and Error

Generally, appellate courts will not address the merits of an assignment of trial-court error unless the point was raised (preserved) in the trial court or the error is "plain." However, Article VII (Amended), section 3, of the Oregon Constitution requires courts to affirm despite error if the court concludes that "there was little likelihood that the error affected the verdict." *State v Davis*, 336 Or 19, 33 (2003).

13.4.1 Preservation

ORAP 5.45(1) provides: "[n]o matter claimed as error will be considered on appeal unless the claimed error was preserved in the lower court * * *." *See Ailes v Portland Meadows, Inc.*, 312 Or 376, 380, 823 P2d 956 (1991) (noting that, generally, an issue must have been preserved in the trial court for the appellate court to address it on appeal). The Court of Appeals states that it has a "duty to determine, *sua sponte*, whether the arguments that an appellant raises on appeal are adequately preserved for our review." *State v Cossette*, 256 Or App 675, 680 (2013); *Field v Coursey*, 264 Or App 724 (2014) (so stating).

That preservation requirement "gives a trial court the chance to consider and rule on a contention, thereby possibly avoiding an error altogether or correcting one already made, which in turn may obviate the need for an appeal." *Peeples v Lampert*, 345 Or 209, 219 (2008). The rule "also ensures fairness to opposing parties, by requiring that the positions of the parties are presented clearly to the initial tribunal." *State v Walker*, 350 Or 540, 548 (2011); *State v Rose*, 264 Or App 95, 100-01 (2014). "The purpose of preservation is 'to advance goals such as ensuring that the positions of the parties are presented clearly to the initial tribunal and that parties are not taken by surprise, misled, or denied opportunities to meet an argument.'" *State v Whitmore*, 257 Or App 664, 666 (2013); *State v Blasingame*, 267 Or App 686 (2014) (so noting); *see also State v. Clemente-Perez*, 357 Or 745, 752 (2015) ("primary purposes of the preservation rule are to allow the trial court to consider a contention and correct any error, to allow the opposing party an opportunity to respond to a contention, and to foster a full development of the record") (citing *Peeples v Lampert*, 345 Or 209, 219-20 (2008)).

Preservation also "fosters full development of the record, which aids the trial court in making a decision and the appellate court in reviewing it." *Peeples v Lampert*, 345 Or 209, 219-20 (2008). "Ultimately, the preservation rule is a practical one, and close calls * * * inevitably will turn on whether, given the particular record of a case, the court concludes that the policies underlying the rule have been sufficiently served." *State v Parkins*, 346 Or 333, 341, 211 P3d 262 (2009).

"'Although there is some degree of liberality to the preservation requirement, the requirement is not meant to be a cursory search for some common thread, however remote, between an issue on appeal and a position that was advanced at trial.'" *State v Blasingame*, 267 Or App 686, 691, 341 P3d 182 (2014), *rev den*, 357 Or 299 (2015) (internal quotation marks omitted). 'Instead, when determining if an issue has been adequately preserved for review, the appropriate focus is whether a party has given opponents and the trial court enough information to be able to understand the contention and to fairly respond to it.' *Id*. (internal quotation marks omitted)." *State v Walsh*, 288 Or App 278, 282 (2017).

13.4.2 Plain Error

An exception to that preservation rule is "plain error" or "an error of law apparent on the record" under ORAP 5.45(1). "Plain error" must be apparent on the face of the record. *State v Brown*, 310 Or 347, 355 (1990). If the appellate courts exercise discretionary authority to correct plain error, it "must articulate [its] reasons for exercising [its] discretion to consider the error." *State v Montwheeler*, 277 Or App 426, 438 (2016).

"An error is 'plain' only 'if (1) the error is one of law, (2) the error is obvious, not reasonably in dispute, and (3) the error appears on the face of the record, so that we need not go outside the record to identify the error or choose between competing inferences, and the facts constituting the error are irrefutable.' *State v Corkill*, 262 Or App 543, 551, 325 P3d 796, *rev den*, 355 Or 751 (2014) (internal quotation marks omitted)." *State v Pearson*, 286 Or App 110, 111 (2017).

"An error is plain if it is a legal error that is obvious or not reasonably in dispute and the court need not go outside the record or select among competing inferences to discern it. *State v Brown*, 310 Or 347, 355, 800 P2d 259 (1990). If we conclude that an asserted error is plain, we must determine whether to exercise our discretion to address the error. *Ailes v Portland Meadows, Inc.*, 312 Or 376, 382, 823 P2d 956 (1991)." *State v Birchard*, 251 Or App 223 (2012). Factors to determine if discretion should be exercised include "the competing interests of the parties; the nature of the case; the gravity of the error; the ends of justice * * *; how the error came to the court's attention; and whether the policies behind the general rule requiring preservation of error have been served in the case another way, i.e., whether the trial court was * * * presented with both sides of the issue and given an opportunity to correct any error. *Ailes*, 312 Or at 382 n 6.

"Other [discretionary] considerations include whether the defendant in some way encouraged the trial court to make the error; whether the defendant made a strategic choice not to object; and whether the error could have been remedied if raised below." *State v Chesnut*, 283 Or App 347, 350 (2017) (quoting *State v Rudnick*, 268 Or App 125, 133 (2014) (citing *State v Fults*, 343 Or 515, 523, 173 P3d 822 (2007))).

Appellate courts assess plain error "by reference to the law as of the time the appeal is decided" rather than the law at the time of the disputed trial court ruling. *State v Jury*, 185 Or App 132, 136 (2002), *rev den* 335 Or 504 (2003); *State v Tilden*, 252 Or App 581 (2012).

An error, preserved or not, is "grave" if the evidence is insufficient to convict. The "entry of a criminal conviction without sufficient proof * * * is of constitutional magnitude." *State v Reynolds*, 250 Or App 516, 522 (2012); *State v Tilden*, 252 Or App 581 (2012) (same). A defendant "obviously has a significant interest in not being convicted of a crime that the state did not prove, while the state has no conceivable interest in upholding [an] erroneous conviction." *Tilden,* 252 Or App 581 (2012).

A trial court may impose fees and costs on a defendant if it finds that the defendant "is or may be able to pay" the fees and costs. ORS 161.665(4); ORS 151.505(3). It is plain error for a trial court to order a criminal defendant to pay court-appointed attorney fees without finding that the defendant has the ability to pay those fees. *State v Coverstone*, 260 Or App 714, 716 (2014); *State v*

Delgado-Juarez, 263 Or App 706, 707 (2014); *State v Ramirez-Hernandez*, 264 Or App 346 (2014); *State v Below*, 264 Or App 384 (2014).

A trial court's failure to inform even a represented party at a civil commitment hearing of her right to subpoena witnesses, as required under ORS 426.100(1)(d), by using the word "subpoena," is plain error that is not harmless. *State v V.B.*, 264 Or App 621 (2014); *State v Z.A.B.*, 264 Or App 779 (2014).

It "is 'plain error' for a trial court to require a defendant to pay court-appointed attorney fees in the absence of legally sufficient evidence that the defendant has the ability to pay the amount imposed. *State v Coverstone*, 260 Or App 714, 716 (2014); *see* ORS 151.505(3) (a trial court may not impose costs unless the person 'is or may be able to pay the costs'). 'A court cannot impose fees based on pure speculation that a defendant has funds to pay the fees or may acquire them in the future.' *State v Pendergrapht*, 251 Or App 630, 634 (2012). The state bears the burden of proving that a defendant 'is or may be able to pay' attorney fees. *State v Kanuch*, 231 Or App 20, 24 (2009)." *State v Mejia-Espinoza*, 267 Or App 682 (2014) (finding plain error and exercising discretion to correct the plain error).

"[I]t is plain error for a trial court to not strike explicit vouching testimony *sua sponte*. *See State v Milbradt*, 305 Or 621, 630, 756 P2d 620 5 (1988) ('We suggest in the future that if counsel attempts to elicit [testimony commenting on the credibility of a witness,] the trial judge, *sua sponte*, should summarily cut off the inquiry before a jury is contaminated by it.'); *State v Higgins*, 258 Or App 8 177, 178 (2013), *rev den*, 354 Or 700 (2014) (plain error to not strike mother's testimony that she 'knew for sure' that her daughter was not lying when the daughter said that the defendant had raped her); *B. A. v Webb*, 253 Or App 1, 12 (2012), *rev den*, 353 Or 428 (2013) (plain error for trial court to fail to strike testimony that the witness had 'no doubt' what the complainant told her was the "absolute truth" because that testimony constituted 'explicit vouching for [the complainant's] credibility' and a 'blatant and pervasive violation of the *Middleton/Milbradt* proscription'); *Hollywood*, 250 Or App at 678-79; *Lowell*, 249 Or App at 366-70; *see also Kellar*, 315 Or at 278-79 (court plainly erred in failing to strike testimony by physician of child witness that '[t]here was no evidence of leading or coaching or fantasizing' and that the child 'was obviously telling you about what happened to her body'"); *State v McQuisten*, 97 Or App 517, 519-20, 776 P2d 1304 20 (1989) (concluding that trial court 'had a duty, *sua sponte*, not to allow testimony' from police officer that 'it is pretty hard for [a sexual assault victim] to fabricate those feelings' and that the complainant was showing 'very true emotions and signs' of sexual abuse, because 'the jury could reasonably have drawn the inference that the officer believed the story of the complaining witness, bolstering her credibility in its estimation')." *State v Wilson*, 266 Or App 481 (2014) (not plain error for the trial court to fail to strike, *sua sponte*, testimony that a rape victim's demeanor was "not fake"); *see also State v Hunt*, 270 Or App 206, 213 (2015) (it is not "plain" that a trial court errs when it does not *sua sponte* strike evidence that is not "true vouching" evidence.).

In ***State v Chandler***, 360 Or 323 (2016) the court disavowed a prior case on vouching and wrote the following excerpt, verbatim at pages 330-34:

> "This court has long held that one witness may not comment on the credibility of another witness. *State v Lupoli*, 348 Or 346, 357, 234 P3d 117 (2010); *see also State v. Middleton*, 294 Or 427, 438, 657 P2d 1215 (1983) ("We expressly hold that in Oregon a witness, expert or otherwise, may not give an opinion on whether he believes a witness is telling the truth.").

That rule developed largely in response to the use of expert psychiatric testimony to attack a witness's character. As this court observed in *State v Walgraeve*, 243 Or 328, 333, 413 P2d 609 (1966) (denying rehearing), the use of expert testimony in that manner 'would create a class of cases in which opinion evidence would, in fact, determine the credibility of witnesses. Unless the function of a jury is to find the truth, its role is devoid of substance.' The rule prohibiting vouching testimony thus serves the policy goals of ensuring that the jury remains the sole arbiter of witness credibility and that the jury's role in assessing witness credibility is not usurped by another witness's opinion testimony. *See State v Snider*, 296 Or 168, 172, 674 P2d 585 (1983) (noting that 'vice' of vouching testimony is that jury might give 'special credence' to such testimony, 'implying a guarantee of the witness's veracity').

"Although the vouching rule is an evidentiary rule, it is not codified in the Oregon Evidence Code. Rather, is a judicially created rule. See *Middleton*, 294 Or at 438 (expressly adopting rule); *State v Brown*, 297 Or 404, 443, 687 P2d 751 (1984) (noting that rule prohibiting witness from passing upon credibility of another witness is "the long-standing position of this court"). Perhaps as a result, the exact contours of the rule may be difficult to trace. Since its inception, however, this court has had a number of opportunities to clarify the rule. For example, this court has held that the rule applies to direct comments on the credibility of another witness, as well as to statements that are "tantamount" to stating that another witness is credible. *See State v Beauvais*, 357 Or 524, 543, 354 P3d 680 (2015) ("A direct comment on the credibility of a witness or a statement that is 'tantamount' to stating that another witness is truthful is not admissible[.]"). This court also has made clear that the rule applies to credibility opinions about statements that a witness made either at trial or on some other occasion. *See State v Keller*, 315 Or 273, 284-85, 844 P2d 195 (1993) ("[T]his rule applies whether the witness is testifying about the credibility of the other witness in relation to the latter's testimony at trial or is testifying about the credibility of the other witness in relation to statements made by the latter on some other occasion or for some reason unrelated to the current litigation."). Additionally, the rule applies to comments about the credibility of either a witness or a nonwitness complainant. See *Lupoli*, 348 Or at 364-65 (holding that expert testimony improperly vouched for credibility of nonwitness complainant).

* * * * *

"In [*State v Odoms*, 313 Or 76, 829 P2d 690 (1992)], a detective testified at the defendant's trial and recounted statements that the detective had made while interrogating the defendant indicating his belief that the victim was truthful. 313 Or at 79-80. On review, the defendant argued that the detective's testimony was an impermissible comment on the victim's credibility and should have been excluded. *Id*. at 81. This court recited the general rule from [*State v Middleton*, 294 Or 427, 438, 657 P2d 1215 (1983)]—i.e., that one witness may not give an opinion as to whether he or she believes that another witness is telling the truth—and observed that "the point of *Middleton* was only to preclude testimony by one trial witness about whether another trial witness is telling the truth[.]" *Id*. at 82 (emphases in original). This court then noted that "a relevant out-of-court statement, recounted at trial, generally may not be excluded merely because it is phrased in the form of an opinion." *Odoms*, 313 Or at 83. From those observations, this court concluded that the trial court had not erred in overruling the defendant's "improper opinion evidence" objection to the detective's statements. *Id*. at 84. Justice Unis specially concurred, offering a different explanation for this court's holding. In his view, an out of-court opinion rendered as to another witness's

credibility is susceptible to an improper opinion objection "only if it is offered as opinion testimony, i.e., for the truth of the judgment or belief it expresses." *Id.* at 85 (Unis, J., specially concurring).

* * * * *

"We therefore disavow the reasoning of the majority in *Odoms* and expressly recognize that the bounds of the vouching rule are not defined by the setting in which the credibility comment was uttered. Instead, we adopt the following rule, originally articulated by Justice Unis in his concurrence in *Odoms*: When a person makes an out-ofcourt statement about the credibility of a witness or nonwitness complainant, that statement is subject to the categorical prohibition against vouching evidence only if the statement is offered for the truth of the credibility opinion that it expresses. Put another way, a court does not err in admitting an out-of-court statement as to the credibility of a witness or nonwitness complainant if the statement is offered for a relevant, non-opinion purpose."

13.4.2 Subject Matter Jurisdiction

Claims that a lower court or an administrative agency lacked subject-matter jurisdiction do not need to be preserved to be raised on appeal:

> "This court has long held that the ordinary rule requiring preservation of claims of error does not apply when the claim is that a lower court lacked 'subject-matter jurisdiction.' *Waddill v. Anchor Hocking, Inc*., 330 Or 376, 384, 8 P3d 200 (2000) (party may raise lack of subject-matter jurisdiction 'at any time, including for the first time on appeal'). The same basic principle has been applied to administrative law cases." *Multnomah County Sheriff's Office v Edwards*, 361 Or 761, 777 (2017).

13.5 Invited Error

"Under the invited error doctrine, a party who 'was actively instrumental in bringing about' an alleged error 'cannot be heard to complain, and the case ought not to be reversed because of it.' *State v. Kammeyer*, 226 Or App 210, 214, 203 P3d 274, *rev den*, 346 Or 590 (2009) (quoting *Anderson v. Oregon Railroad Co.,* 45 Or 211, 216-17, 77 P 119 (1904)). For example, where a party 'affirmatively misstate[s] the law' and the trial court relies on that misstatement, that party may not then appeal the resulting decision. *State v. Calvert*, 214 Or App 227, 235, 164 P3d 1169 (2007)." *State v Brown*, 272 Or App 321, 324 (2015).

"The doctrine of invited error 'usually is invoked when a party has invited the trial court to rule in a particular way, under circumstances that suggest that the party will be bound by the ruling or at least will not later seek a reversal on the basis of it.'" *State v Kinney*, 264 Or App 612 (2014) (quoting *State v Ferguson*, 201 Or App 261, 269, *rev den* 340 Or 34 (2005) and *Anderson v Oregon Railroad Co*., 45 Or 211, 217 (1904)).

If the Court of Appeals determines that it is "not required to consider" errors, it may then "decline to review them" if the defendant invited the errors. *State v Kinney*, 264 Or App 612 (2014).

13.6 Effect of Pleas on Remand

A defendant who prevails on appeal may withdraw his or her guilty plea. ORS 153.335(3); *State v Kinney*, 264 Or App 612 (2014).

Chapter 14: Equal Privileges and Immunities

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

"We declare that all men, when they form a social compact are equal in right * * *."
-- Article I, section 1, Or Const

"**(1) Equality of rights under the law shall not be denied or abridged by the State of Oregon or by any political subdivision in this state on account of sex.**
(2) The Legislative Assembly shall have the power to enforce, by appropriate legislation, the provisions of this section.
(3) Nothing in this section shall diminish a right otherwise available to persons under section 20 of this Article or any other provision of this Constitution." – Article I, section 46, Or Const [Created through initiative petition filed Oct. 24, 2013, and adopted by the people Nov. 4, 2014]

See Erin C. Lagesen, *Equal Privileges and Immunities*, OREGON CONSTITUTIONAL LAW MANUAL (2013), www.osbar.org/secured/barbooks/viewchapter.asp?bid=85&cid=2336.

14.1 Introduction

Article I, section 20, prohibits two types of unequal treatment: "first, to any citizen, and second, to any class of citizens." *State v Clark*, 291 Or 231, 237, *cert denied* 454 US 1084 (1981). Article I, section 20, "applies to government actions generally, including prosecutors making charging decisions." *State v Savastano*, 354 Or 64 (2013).

Requiring privileges or immunities to be granted equally permits the legislature to grant privileges or immunities to one citizen or class of citizens as long as similarly situated people are treated the same. *State v Savastano*, 354 Or 64, 73 (2013). If a statute does not treat similarly situated people the same, the statute violates Article I, section 20," and courts "must determine whether to invalidate the statute or to extend it so that it applies to all who are similarly situated." *Madrone and Madrone*, 271 Or App 116, 126 (2015).

14.2 Classes of Citizens

Article I, section 20, "may be invoked by an individual who demands equality of treatment with other individuals as well as by one who demands equal privileges or immunities for a class to which he or she belongs." *State v Clark*, 291 Or 231, 237, *cert denied* 454 US 1084 (1981). Class-based claims under Article I, section 20, are similar to Equal Protection claims: a person claims

that he or she is unlawfully denied a privilege or immunity based on the person's membership in some societally-recognized class such as race, religion, or gender. *Id*.

> In *Madrone and Madrone*, 271 Or App 116, 126 (2015), two women registered as domestic partners after one partner conceived by artificial insemination and gave birth to a child. Two sperm donors were used – one was the non-conceiving partner's brother and the other was a friend. The parties also had a civil commitment ceremony. The baby was born. The parties separated. One partner (who did not give birth) brought this action for dissolution of their partnership, also seeking a declaration that she is the child's legal parent under ORS 109.234. That statute creates legal parentage in the *husband* of a woman who conceives by artificial insemination. The Court of Appeals concluded: "ORS 109.243 applies to unmarried same-sex couples who have a child through artificial insemination if the partner of the biological parent consented to the insemination *and* the couple would have chosen to marry had that choice been available to them." There is an issue of fact in this case on that point so the case was remanded.
>
> The Court of Appeals addressed the standard to determine whether the same-sex partner of a woman who conceived by artificial insemination falls within ORS 109.234, which creates legal parentage in the husband of a woman who conceives by artificial insemination. Under *Shineovich and Kemp*, 229 Or App 670, *rev den* 347 Or 365 (2009), that statute applies to the same-sex partner of the woman who conceived by artificial insemination when the same-sex partner consented to the artificial insemination. In this case, same-sex couples could not be married under former Oregon law. The question of whether a same-sex could would have married before the child's birth is the test to determine whether the statute creates parentage. This case is reversed and remanded to determine that fact issue.

14.3 Individuals or a "Class of One"

To make an individual–based claim (sometimes called a "class-of-one" claim) under Article I, section 20, "a defendant must initially show that the government 'in fact denied defendant individually * * * [an] equal privilege * * * with other citizens of the state similarly situated.'" *State v Savastano*, 354 Or 64 (2013) (quoting *State v Clark*, 291 Or 231, 237, *cert denied* 454 US 1084 (1981)). "An agency or official's decision will comply with Article I, section 20, 'as long as no discriminatory practice or illegitimate motive is shown and the use of discretion has a defensible explanation' in the individual case." *Savastano* (quoting *Clark*). "An executive official's decision will be 'defensible' when there is a rational explanation for the differential treatment that is reasonably related to the official's task or to the person's individual situation." *Savastano.*

"Article I, section 20, does not require consistent adherence to a set of standards or a coherent, systematic policy" but does "require government to treat similarly situated people the same. A government decision-maker will be in compliance with Article I, section 20, as long as there is a rational explanation for the differential treatment that is reasonably related to his or her official task or to the person's individual situation." *Savastano* overruled *State v Freeland*, 295 Or 367 (1983) and reaffirmed *State v Clark,* 291 Or 231, *cert denied* 454 US 1084 (1981).

"Article I, section 20, has never been applied to require police officers to articulate and adhere to criteria for every discretionary patrol activity that might occur in the ordinary course of a day."

State v Davis, 237 Or App 351, 361 (2010), *aff'd by an equally divided court*, 353 Or 166 (2013). In *Davis*, "defendant's license plates were run as part of the deputy's normal activity of investigating for stolen vehicles. In the course of that activity, *any* driver who happened to be coming out of the parking lot at that moment would have been subject to the same scrutiny. There was nothing arbitrary or whimsical about the deputy's decision to run defendant's license plates; rather, that decision was 'random'- in the deputy's words- only in the sense that, because of the juxtaposition of time and place, the plates that were run were defendant's, and not some other citizen's. So understood, we cannot conclude that defendant was denied any privilege or immunity on the same terms as other citizens-the benchmark of Article I, section 20. *See Clark,* 291 Or. at 246 ('We do not believe equal protection goes so far as to require previously stated standards as long as no discriminatory practice or illegitimate motive is shown and the use of discretion has a defensible explanation.'). *Davis,* 237 Or App at 261.

14.4 Fourteenth Amendment

> "There are fifty-two words which we come close to using for everything. I am referring to the three celebrated prohibitory clauses in the Fourteenth Amendment." Charles L. Black, Jr., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW, p. 33.
>
> The five sections of the Fourteenth Amendment contain about as many words as the first ten amendments put together. Akhil Reed Amar, THE BILL OF RIGHTS, p. 202-03.
>
> The phrases 'due process of law' and 'the equal protection of the laws' are the most significant expressions in American constitutional law." Charles Grove Haines, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY, p. 410.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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; nor deny to any person within its jurisdiction the equal protection of the laws." -- Section 1, Fourteenth Amendment, US Const

"The amendment's big idea was that the basic rights of American citizenship, rights both substantive and procedural, should apply fully and equally against all American governments – federal, state, and local." Akhil Reed Amar, AMERICAN'S UNWRITTEN CONSTITUTION, p. 120.

"This amendment was drafted by Congress for Congress. Its rights provisions were phrased in broad, open-ended language precisely to enable future Congresses to protect basic civil rights, both old and new. And Congress was not the only branch with authority to recognize new rights. Judges, too, were expected to play their part in the process to pay heed to emerging privileges and immunities embodied, among other places, in evolving American laws and practices." Akhil Reed Amar, AMERICAN'S UNWRITTEN CONSTITUTION, p. 109.

"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).

14.4.1 Birthright Citizenship

"That opening sentence [of the Fourteenth Amendment] made clear that all American-born persons were 'citizens of the United States.'" Akhil Reed Amar, AMERICAN'S UNWRITTEN CONSTITUTION, p. 110. Section 1 of the Fourteenth Amendment was intended to encompass "only civil rights, not political rights" such as voting rights. *Id*. at 187.

14.4.2 Privileges or Immunities

In *Paciulan v George*, 229 F3d 1226, 1229 (9th Cir 2000), a Ninth Circuit panel has described the Privileges or Immunities Clause as follows:

The Privileges or Immunities Clause "has traditionally protected only those rights accruing by virtue of being a citizen of the United States. *See, e.g.*, the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873); John E. Nowak and Ronald D. Rotunda, Constitutional Law 10. (5th ed. 1995). The Supreme Court declined to delineate these privileges and immunities with specificity in the *Slaughter-House Cases*, but included within their ranks 'some which owe their existence to the Federal government, its National character, its Constitution, or its laws.' 83 U.S. (16 Wall.) at 79. The courts and legal commentators have interpreted the decision as rendering the Clause essentially nugatory. See Robert H. Bork, THE TEMPTING OF AMERICA 180 (1990) ('[T]he privileges and immunities clause . . . has remained the cadaver that it was left by the *Slaughter-House Cases*.'); Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 556 (2d ed. 1988) ('The *Slaughter-House* definition of national rights renders the fourteenth amendment's privileges or immunities clause technically superfluous . . . ."); Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 Yale L.J. 643, 646 (2000) ('In contemporary constitutional discourse, *Slaughter-House* stands for one simple truth: that the Privileges or Immunities Clause is utterly incapable of performing any real work in the protection of individual rights against state interference, and that any argument premised on the Clause is therefore a constitutional non-starter.')."

In *Merrifield v Lockyer*, 547 F3d 978, 983 n 7 (9th Cir 2008), a Ninth Circuit panel stated that the "sole purpose" of the Privileges or Immunities Clause is to "declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction." (quoting *Slaughter–House Cases*, 83 US (16 Wall.) 36, 77 (1872).

14.4.3 Due Process

"Though the phrase 'due process of law' was inserted in the Fifth Amendment as a limitation on the federal government no act of either the executive or the legislature was condemned prior to 1860." Charles Grove Haines, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY, p. 411.

The "Fourteenth Amendment's opening sentence, and its companion language guaranteeing privileges and immunities, protected only citizens. The amendment's due-process clause aimed to make clear that even noncitizens – all 'persons," including aliens – were entitled to fair procedures." Akhil Reed Amar, AMERICA'S UNWRITTEN CONSTITUTION, p. 120.

14.4.4 Equal Protection

"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).

A person may make a "class-of-one" claim under the Fourteenth Amendment in certain circumstances. "In a 'class of one' claim, a plaintiff does not allege that she belongs to a protected class or that the defendant has trammeled her fundamental rights; she asserts merely that she was treated differently from others without any rational reason." *La Manna v City of Cornelius*, 276 Or App 149, 173 n 7 (2015) (citing *Engquist v Oregon Dep't of Agriculture*, 553 US 591, 601-02 (2008)).

"'One-person, one-vote' is an equal protection guarantee although that specific language does not appear in the Fourteenth Amendment. It is a 'catch-phrase' recognizing 'that the collective dilution of many individuals' votes can result in a form of unconstitutional disenfranchisement, even when no one individual is turned away at the ballot box.' *Kirk v. Carpeneti*, 623 F.3d 889, 897 (9th Cir. 2010) (discussing *Reynolds v. Sims*, 377 U.S. 533 (1964)); *see also Dudum v. Arntz*, 640 F.3d 1098, 1112 n.23 (9th Cir. 2011) ("'one person, one vote' cases involve instances in which citizens from heavily-populated districts select the same number of legislative representatives as voters from sparsely populated districts, with the result that their votes have less potential impact on the legislative process')." *Conant v Brown*, No. 3:16-cv-02290-HZ n 4 (D Or 2017).

Chapter 15: Takings

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

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

15.1 Introduction

See Denise G. Fjordbeck, Stephanie Striffler, Patrick M. Ebbett, and Jona J. Maukonen, *Takings*, OREGON CONSTITUTIONAL LAW MANUAL (2013), www.osbar.org/secured/barbooks/viewchapter.asp?bid=85&cid=2347.

"A 'taking' of property is a shorthand description for an exercise of the government's power of eminent domain, which is the power of the sovereign to take property for 'public use' without the property owner's consent. *Coast Range Conifers v Board of Forestry*, 339 Or 136, 142-43, 117 P3d 990 (2005)." *Dunn v City of Milwaukie*, 355 Or 339, 346 (2014); *Hall v Dep't of Transportation*, 355 Or 503, 510 (2014).

Under the federal Constitution: "The [federal] Takings Clause is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' *Armstrong* v *United States*, 364 US 40, 49 (1960)." *Arkansas Game and Fish Comm'n v United States*, 133 S Ct 511 (2012).

"A public body that takes private property for public use must pay the property owner 'just compensation.' Or Const, Art I, § 18." *City of Harrisburg v Leigh*, 254 Or App 558 (2013).

Private property is "taken" for public use through "the power inherent in a sovereign state of taking or authorizing the taking of any property* * * for public use or benefit," under *Dep't of Trans v Lundberg*, 312 Or 568, *cert den* 506 US 975 (1992). "Article I, section 18, is not the source of the state's eminent domain power." *Dunn v City of Milwaukie*, 355 Or 339 (2014).

The Takings Clause applies to the States through the Fourteenth Amendment. *Chicago, B. & Q. R. Co. v Chicago*, 166 US 226 (1897); *Murr v Wisconsin*, 137 S Ct 1933 (2017).

15.2 Condemnation

15.2.1   Eminent Domain

"Typically, government exercises its eminent domain power by initiating a condemnation proceeding and, through that proceeding, compensating a property owner before appropriating property for a public purpose." *Hall v Dep't of Transportation*, 355 Or 503, 510 (2014); *Dunn v City*

of Milwaukie, 355 Or 339, 346 (2014); *Cereghino v State Highway Comm'n*, 230 Or 439, 443-44 (1962). Governmental units exercise that authority through condemnation proceedings in ORS chapter 35. *City of Bend v Juniper Utility Company*, 242 Or App 9 (2011). The state's condemnation authority arises under Article I, section 18, of the Oregon Constitution. *Cf. State v Alderwoods (Oregon), Inc*., 265 Or App 572, 584 n 1 (2014) (Sercombe, J., concurring) (per curiam).

"ORS chapter 35 sets out a process for public bodies to follow in condemning private property. At least 40 days before filing an action to condemn private property, a public body must make a written offer to the property owner, which the owner must accept or reject within a specified period of time. ORS 35.346(1), (4). If the owner rejects the pretrial offer, proceeds to trial, and recovers more than the public body offered, then the owner shall receive, in addition to compensation for the property, the owner's "costs and disbursements including reasonable attorney fees and reasonable expenses." ORS 35.346(7). Conversely, if the owner rejects the public body's pretrial offer and recovers less than that offer, the owner may not recover its costs and fees. *Id*." *TriMet v Aizawa*, 362 Or 1, 4-5 (2017).

"Statutorily, the power to condemn private property is not limited to public bodies. See ORS 35.215(4) (recognizing that a private corporation may have the power to exercise the right of eminent domain)." *TriMet v Aizawa*, 362 Or 1, 4 n1 (2017).

***ODOT v Alderwoods (Oregon), Inc*.**, 358 Or 501 (2015) is an eminent domain case involving a temporary easement over an owner's property to install curbed sidewalks. the Oregon Supreme Court held that the state did not "take" the owner's real property within the meaning of Article I, section 18. The state eliminated two of the owner's four driveways onto his property. The Court concluded that the owner "holds a right of access to Highway 99W that may not be taken without just compensation," but "the state's actions [did not constitute] a compensable taking." *Id*. at 526. "Because ODOT eliminated the two driveways at issue for the purpose of maintaining the safe use of Highway 99W and because defendant retained reasonable access to Highway 99W * * *, the elimination of the driveways did not constitute a taking of defendant's right of access under Article I, section 18." *Id*. at 521.

In other words, "a governing body may—without effecting a taking—restrict an abutting landowner's right of access for the purpose of protecting the safety of public roads, so long as reasonable access to the abutting property remains." The owner "is not entitled to compensation under Article I, section 18—or, by extension, under ORS 374.035—for the loss of a more direct entryway onto Highway 99W." *Id*. at 526.

A defendant's right of access to his property "is subject to the state's interest in protecting the safe use of its highways." *Id*. at 518. The Court identified underlying principles: A "property owner is not entitled to compensation any time that governmental action renders the owner's means of ingress and egress less convenient." *Id*. at 516. The Court distilled "three governing principles regarding the common-law right of access of a property owner to an abutting public road. First, it is well established that a common-law right of access by property owners attaches to property as an interest in land. Specifically, an abutting property owner holds an easement of access, appurtenant to the abutting land, for the limited purpose of providing a means of ingress and egress to and from the owner's property by means of the abutting public road. Second, the right of access to an abutting

road is limited in scope. An abutting property owner does not have an absolute right to access an abutting road at the most direct or convenient location. Rather, the owner has a qualified right that is subject to the government's interest in regulating the safe use of public thoroughfares. Third, the owner's right of access ensures only reasonable access to and from the owner's property by means of the abutting road. Those three principles, in combination, reduce to this central proposition: When governmental action interferes with an abutting landowner's right of access for the purpose of ensuring the safe use of a public road, and the abutting landowner retains reasonable access to its property, no compensable taking of the property owner's right of access occurs." *Id*. at 517.

15.2.2 Just What is "Just Compensation"?

"[V]aluation of private property taken for public use 'is measured as of the date the condemnation action is commenced or the date the condemnor enters on and appropriates the property, whichever first occurs.' *State by Dept. of Trans. v. Lundberg*, 312 Or 568, 574 n 6, 825 P2d 641, cert den, 506 US 975 (1992); *see also ODOT v. Alderwoods*, 358 Or 501, 509 n 2, 366 P3d 316 (2015); *State Highway Com. v. Stumbo* et al, 222 Or 62, 74-77, 352 P2d 477 (1960); *ODOT v. Singh*, 257 Or App 322, 329, 306 P3d 745 (2013); *City of Harrisburg v. Leigh*, 254 Or App 558, 566, 295 P3d 138 (2013)." *Beaverton School Dist. 48J v Ward*, 281 Or App 76, 83 (2016) (rejecting argument that the trial date is the date of valuation).

"Standards of just compensation vary by locality, but generally demand market value as seen by an unpressured seller. For example, the federal standard for just compensation is 'what a willing buyer would pay in cash to a willing seller at the time of the taking.'" Alec Harris, Redemption and Return on Investment: Using Eminent Domain in the Underwater Mortgage Fight, 8 HARVARD LAW & POLICY REVIEW 437, 453 (2014) (quoting *United States v 564.54 Acres of Land*, 441 US 506, 511 (1979) citing *United States v Miller*, 317 US 369, 374 (1943)).

Governmental units exercise eminent domain authority through condemnation proceedings in ORS chapter 35 and must provide "just compensation" to the property owner based on the fair market value of the property being "taken." *City of Bend v Juniper Utility Company*, 242 Or App 9 (2011). The "[a]ppropriateness of a particular valuation method or combination of methods is not determined by fixed principles of law, but is a factual determination that depends on the record developed in each case." *Id*. at 20–21.

In a "total taking" for public use, the owner receives "the fair cash market value of the land" which includes "any improvements thereon." *City of Harrisburg v Leigh*, 254 Or App 558 (2013). The property is valued on the date the condemnation action is filed or the date the condemnor entered and appropriates the property, whichever is first. *Id*.

Valuation of "property is measured as of the date the condemnation action is commenced or the date the condemnor enters on and appropriates the property, whichever first occurs." *State v Lundberg*, 312 Or 568, 574 n 6, *cert denied*, 506 US 975 (1992); *City of Harrisburg v Leigh*, 254 Or App 558 (2013). Note: *Lundberg* was decided under the federal constitution, and the Court assumed the analysis would be the same under the Oregon Constitution. The *Leigh* court, conversely, applied the state constitution without noting that *Lundberg* was decided under the federal constitution.

Where "there is a total taking of the land for public use, the owner is to be compensated by receiving the fair cash market value of the land, which includes the land itself and any improvements thereon which are a part of the realty." *Highway Comm'n v Holt*, 209 Or 697, 699 (1957).

"Just compensation is full remuneration for loss or damage sustained by an owner of condemned property. It is the fair market value of the condemned property or the fair market value of that of which the condemnee has been deprived by reason of the acquisition of the condemnee's property. *State Highway Comm v Hooper*, 259 Or 555, 560 (1971). In the case of a partial taking of property, the measure of damages is the fair market value of the property acquired plus any depreciation in the fair market value of the remaining property caused by the taking. *Id*. Fair market value is defined as the amount of money the property would bring if it were offered for sale by one who desired, but was not obliged, to sell and was purchased by one who was willing, but not obliged, to buy. *Highway Comm. v Superbilt Mfg. Co.*, 204 Or 393, 412 (1955) (citing *Pape v Linn County*, 135 Or 430, 437 (1931)). Just compensation requires that valuation of property be based on its highest and best use. Highest and best use is that which, at the time of appraisal, is the most profitable likely use of a property. It may also be defined as that available use and program of future utilization which produces the highest present land value." *Lundberg*, 312 Or at 574.

Note: In *Lundberg*, at footnote 4, the Oregon Supreme Court wrote: "Defendants also relied on Article I, section 18, of the Oregon Constitution, which provides that '[p]rivate property shall not be taken for public use * * * without just compensation.' Defendants, however, do not suggest any different analysis under the Oregon Constitution than under the United States Constitution. Therefore, we assume for purposes of this case, without deciding, that the analysis would be the same under the Oregon Constitution."

"Oregon law is identical to Fifth Amendment 'physical' takings law." *Hoeck v City of Portland*, 57 F3d 781, 787 (9th Cir 1995) (citing *Ferguson v City of Mill City*, 120 Or App 210, 207 (1993)).

Dedications. The "rough proportionality" test from *Dolan v City of Tigard*, 512 US 374 (1994) governs a Fifth Amendment takings claim. Under that test, "the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *David Hill Development, LLC v City of Forest Grove*, 688 F Supp 2d 1193 (D Or 2010).

15.3 Inverse Condemnation

A "condemnation" action is commenced by the state or its instrumentality to acquire private interests in land for public use. *See, e.g., State v Alderwoods (Oregon), Inc*., 265 Or App 572 (2014) (Armstrong, J., concurring) (per curiam).

The words "inverse condemnation" are neither a constitutional or statutory phrase but instead is "the popular description of a cause of action against a government 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." *Suess Builders v City of Beaverton*, 294 Or 254, 258 n 3 (1982); *Courter v City of Portland*, 286 Or App 39, 46 (2017).

In *Emmert v Clackamas County*, No. 3:13-cv-01317-HU (2014), the District Court summarized inverse condemnation in Oregon and federal courts:

> "'Inverse condemnation is simply a popular term for a takings claim in which the government has taken property without formal condemnation proceedings.' *W. Linn Corporate Park, LLC v. City of W. Linn,* 428 Fed App'x 700, 701 n2 (9th Cir 2011). The criteria for an unconstitutional taking are not necessarily identical under the provisions of the state and federal constitutions, however. *Ferguson v. City of Mill City,* 120 Or App 210, 213 (1993). Indeed, [t]he Oregon Supreme Court has observed that the 'basic thrust' of the two constitutional provisions 'is generally the same' but has cautioned that the 'criteria' used to determine if a 'taking for public use' has occurred within the meaning of the Oregon Constitution 'are not necessarily identical to those pronounced from time to time by the United States Supreme Court under the fifth amendment.' *Schoonover v. Klamath County,* 105 Or App 611, 614 (1991) (citing *Suess Builders v. City of Beaverton,* 294 Or. 254, 259 n.5 (1982)).
>
> "An example that illustrates the importance of the distinction is *David Hill Development, LLC v City of Forest Grove,* 688 F Supp 2d 1193 (D Or 2010), where Judge Acosta undertook separate state and federal takings analyses and ultimately granted summary judgment on the plaintiff's state law inverse condemnation claim and denied summary judgment on the plaintiff's federal inverse condemnation claim. *Id.* at 1197 & 1209-11. Later in his opinion, Judge Acosta also noted that state law takings claims are subject to a six-year statute of limitations under ORS 12.080(4), while federal takings claims brought under § 1983 are governed by Oregon's two-year statute of limitations for personal injury claims. *Id.* at 1223.
>
> "In the Ninth Circuit, '[t]aking claims must be brought under § 1983.' *Hacienda Valley Mobile Estates v. City of Morgan Hill,* 353 F3d 651, 655 (9th Cir 2003); *Golden Gate Hotel Ass'n v. City & County of San Francisco,* 18 F3d 1482, 1486 (9th Cir 1994) * * *. 'To state a claim under § 1983, a plaintiff must allege two essential elements—that a right secured by the Constitution or laws of the United States was violated; and that the alleged violation was committed by a person acting under the color of state law.' *Taylor v. Fields,* No. C 14-0411 PJH, 2014 WL 644557, at *4 (N.D. Cal. Feb. 19, 2014) (citing *West v. Atkins,* 487 U.S. 42, 48 (1988))." *Emmert v Clackamas County*, slip op at 11-13 (2014).

"Typically, government exercises its eminent domain power by initiating a condemnation proceeding and, through that proceeding, compensating a property owner before appropriating property for a public purpose." *Hall v Dep't of Transportation*, 355 Or 503, 510 (2014).*Dunn v City of Milwaukie*, 355 Or 339 (2014); *Cereghino v State Highway Comm'n*, 230 Or 439, 443-44 (1962). When "the government takes property interests through its actions without first initiating condemnation proceedings," "the property owner can bring an inverse condemnation action to obtain the just compensation that Article I, section 18, guarantees." *Hall*, 355 Or at 510; *Dunn*, 355 Or at 346-47 (citing *Cereghino v State Highway Comm'n*, 230 Or 439, 444 (1962)).

In Oregon state courts, inverse condemnation claims have a six-year statute of limitations. *The Foster Group, Inc. v City of Elgin, Oregon*, 264 Or App 424, 441 (2014). But federal takings claims brought under § 1983 are governed by Oregon's two-year statute of limitations for personal injury claims. *David Hill Development, LLC v. City of Forest Grove,* 688 F. Supp. 2d 1193, 1223 (D Or 2010)..

15.3.1 Oregon Constitution

Courter v City of Portland, 286 Or App 39, 46 (6/07/17) (Multnomah) (Maizels, judge pro tem) In 2003, the city exercised its power of eminent domain to acquire plaintiffs' property to build a water tank and related items. A jury awarded plaintiffs just under $600,000 in just compensation for that taking. The trial court awarded the city some acreage and "an easement" on an accessway on plaintiffs' property. The city built the tank and buried pipes from 4 to 15 feet on that way. Plaintiffs contend that the city represented that it would bury the pipe at least 18 feet. Plaintiffs filed a complaint raising an inverse condemnation claim, seeking money damages and other relief. The city argued that the inverse condemnation claim was "not ripe" because there was no imminent injury and plaintiffs' claims were based on hypothetical future events. Plaintiffs responded that burying the pipes only four feet was an entirely new taking that decreased the property value for its future development. The city also argued that the trial court lacked jurisdiction to interpret another court's judgment. The trial court granted summary judgment for the city.

The Court of Appeals reversed and remanded. "Under Article I, section 18, whenever the government permanently physically occupies the property of a citizen, that physical occupation is a taking." *Id*. at 47. And "Oregon law is identical to the Fifth Amendment regarding permanent physical occupation of property." *Id*. (quoting *Hoeck v City of Portland*, 57 F3d 781, 787 (9th Cir 1995)). The court explained that a "takings claim based on a permanent physical occupation of property is justiciable as soon as the government intrudes on that property." *Id*. at 45. The claim became ripe when the city buried its pipes outside the scope of its easement, according to the plaintiffs, which is "a taking of soil underneath the access road." The court agreed that at this early stage of litigation, the case is ripe: "Because it is based on an allegation of a permanent physical occupation of plaintiffs' property by the city, plaintiffs' inverse condemnation claim is ripe." *Id*. at 47. That is because "if there has in fact been a taking of the easement, plaintiffs are entitled to just compensation for damages resulting directly from the physical occupation of their property. Moreover, the extent of the loss of value to the remainder of the property caused by the taking of the easement can presently be assessed and is a matter for a jury to determine at trial." *Id*. at 48.

The court also rejected the city's argument that trial courts do not have jurisdiction under the Declaratory Judgments Act to issue declarations construing the meaning of a prior judgment entered by a circuit court. The city based that argument on *Oregonian Publishing Co., LLC v Waller*, 253 Or App 123 (2012), *rev den*, 353 Or 714 (2013). In that case, the court had noted that under Article VII (Original), section 9, of the Oregon Constitution, a circuit court lacks authority to review the decisions of another circuit court unless the authority is otherwise provided by the constitution or a law. In this case, the court explained that "an action to construe an ambiguous term [in a prior judgment] does not raise the constitutional problem identified in *Oregonian Publishing Co., LLC*, because it is not a request for 'review' by one circuit court of a prior judgment entered by another ciruit court. Rather it is a request for a declaration determining or clarifying the parties' legal interests under the prior judgment." *Id*. at 53. An "action to construe an ambiguous term in a prior judgment fits squarely within the court's authority under the Declaratory Judgments Act" and "where courts have the opportunity to resolve uncertainty or insecurity" regarding parties' rights, courts are obligated to liberally construe the Act. *Id*.

15.3.1.A "Different Standards to Different Categories"

An action to recover the value of private property that the government has taken without first filing condemnation proceedings is an action for "inverse condemnation." *Mossberg v University of Oregon*, 240 Or App 490 (2011). "Inverse condemnation is the popular description of a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." *Thornburg v Port of Portland*, 233 Or 178, 180 n 1 (1962); *West Linn Corporate Park v City of West Linn*, 349 Or 58, 64, 240 P3d 29 (2010). *Hall v State of Oregon*, 355 Or 503, 506 n 1 (2014).

The Oregon Supreme Court "has distinguished among de facto takings [inverse condemnation] depending on the nature of the governmental action that gave rise to the claim, and it has applied different standards to different categories of governmental actions." *Hall*, 355 Or at 511.

In other words, the Court's standards have been all over the map. Any case predating *Hall* should be interpreted through *Hall*. In *Hall*, the Court tried to organize its cases into three categories:

> (1) physical occupation that causes a substantial interference with use and enjoyment, such as nuisance and trespass;
>
> (2) regulations that restrict possession, enjoyment, or use that result in no economically viable use or substantial beneficial use; and
>
> (3) zoning or planning for eventual public use that reduces the property's value only if the owner "is precluded from all economically feasible private uses pending eventual taking for public use or the governmental intrusion inflicts virtually irreversible damage . *Hall*, 355 Or at 511-12 & 522.

(1) "Deprivation of All Economically Viable Use." "[T]here are at least two different ways in which governmental action may result in a 'taking' by inverse condemnation under Article I,

section 18, of the Oregon Constitution. The first arises when a present governmental action creates an expectation that the private land in question eventually will be taken for a public use. *See Fifth Avenue Corp. v Washington Co.*, 282 Or 591, 613 (1978) (illustrating concept). In such circumstances, a property owner must prove that the owner is precluded from "all economically feasible private uses [of the property] pending eventual taking for public use" or that "the designation [of the property for eventual public use] results in such governmental intrusion as to inflict virtually irreversible damage." *Fifth Avenue Corp*, 282 Or at 613-14.

"The second category of 'takings' by inverse condemnation occurs when the government acts to 'intervene[ ] to straighten out situations in which the citizenry is in conflict over land use or where one person's use of his land is injurious to others.' *Fifth Avenue Corp*., 282 Or at 613. To establish a 'taking' in the latter context, the test is essentially the same as under the former: The property owner must show that the application of the government's particular choice deprives the owner of all economically viable use of the property. *Fifth Avenue Corp*., 282 Or at 609, 613. If the owner has 'some substantial beneficial use' of the property remaining, then the owner fails to meet the test. *Dodd v Hood River County*, 317 Or 172, 184-86 (1993)." *Boise Cascade Corp v Board of Forestry*, 325 Or 185, 197-98 (1997) (emphasis added).

(2) "Substantial Interference." "To establish a taking by inverse condemnation, the plaintiff is not required to show that the governmental defendant deprived the plaintiff of all use and enjoyment of the property at issue." *Vokoun v City of Lake Oswego*, 335 Or 19, 26 (2002). The plaintiff is required to show "that the governmental acts alleged to constitute a taking of private property were done with the intent to take the property for a public use." *Id.* at 27. In *Hall*, the Oregon Supreme Court categorized *Vokoun* as a physical occupation case that substantially interfered with the owner's use and enjoyment. *Hall*, 355 Or at 511. Hall also put these cases into the physical occupation category that requires only proof of substantial interference: *Thornburg v Port of Portland*, 233 Or 178 (1963) (nuisance), *Morrison v Clackamas County*, 141 Or 564 (1933) (trespass), *Kurtz v Southern Pacific Co*, 80 Or 213 (1916) (encroachments), and *Mosier v Oregon Navigation Co*, 39 Or 256 (1901) (encroachments).

(3) "No Economically Viable Use or Substantial Beneficial Use." *Hall* organized its prior cases into a category of "government zoning or planning actions involving the designation of private property for eventual public use" that "result[s] in a reduction in the property's value." *Hall*, 355 Or at 511. In those cases, "the owner is entitled to compensation if, and only if: '(1) he [or she] is precluded from all economically feasible private uses pending eventual taking for public use; or (2) the designation results in such governmental intrusion as to inflict virtually irreversible damage." *Id*. at 511-12, 522. *Hall* listed *Fifth Avenue Corp v Washington County*, 282 Or 591 (1978) and *Suess Builders Co v City of Beaverton*, 294 Or 254 (1982) as "applying that standard." *Hall* quoted *Fifth Avenue* to state the "generally accepted rule" that "mere plotting or planning in anticipation of a public improvement does not constitute a taking or damaging of property affected." *Hall*, 355 Or at 518. There are two exceptions to that general rule, per *Hall*: **(a)** actions that "preclude an owner form all economically feasible private uses pending an eventual taking by eminent domain," such as "condemnation blight," as in *Coast Range Conifers*, 339 Or at 147 n 12 and *Suess Builders*, 294 Or at 257-58; and (b) "precondemnation government action results in a physical occupation of private property or invasion of private property rights that substantially interferes with an owner's rights of exclusive possession and use," as discussed in *Fifth Avenue*, 282 Or at 613-14 & n 17 and *Lincoln Loan*. *Hall*, 355 Or at 519-22.

15.3.1.B Takings Elements

There "is no unitary test for takings claims, and the test varies with the nature of the claim." *Dunn v City of Milwaukie*, 355 Or 339 (2014). Tests the Oregon Supreme Court has identified in *Dunn* and *Hall v State of Oregon*, 355 Or 503 (2014) include these cases:

•Physical invasion of property: *Dunn v City of Milwaukie*, 355 Or 339 (2014)
•Other physical occupations:
 -*Cereghino v State Highway Comm'n*, 230 Or 439, 446 (1962)
 -*Kurtz v Southern Pacific Co.*, 80 Or 213 (1916)
 -*Mosier v. Oregon Navigation Co.*, 39 Or 256 (1901)
•Regulation or planning: *Dodd v Hood River County*, 317 Or 172, 182 (1993).
•Nuisance: *Thornburg v Port of Portland*, 233 Or 178, 180 (1963).

Intent – Not Negligence – Required. "[N]egligence alone will not support a claim for inverse condemnation and that intent to take is an element of such a claim." The "government's conduct must be 'tantamount to a public appropriation' of property" in nature and degree (citing *Coast Range Conifers*). "The power of eminent domain is affirmative in nature. It is a power exercised for a particular purpose - the public's benefit – and intentionally. The idea that the sovereign's power of eminent domain could be exercised through error, accident, or inadvertence, is at odds with the nature of the power itself. Inadvertent and unintended acts give rise to liability, if at all, as ordinary torts, not takings." *Dunn v City of Milwaukie*, 355 Or 339 (2014) (no citation).

Damages. Damages for takings and under ORS 197.796 are determined as of the date of the injury. *Brown v City of Medford*, 251 Or App 42 (2012).

Doctrine of Unconstitutional Conditions. The doctrine of unconstitutional conditions "provides that 'the government may not require a person to give up a constitutional right – [such as] the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property.'" (Citing *Lingle v Chevron USA*, 544 US 528, 547 (2005)). It "is the imposition of that unconstitutional condition – and not the later physical invasion of the property – that violates a property owner's rights." *Brown v City of Medford*, 251 Or App 42 (2012).

15.3.1.C Exactions

Two cases establish a two-part test for assessing the constitutionality of a government exaction of a dedication of private property: First, the exaction must substantially advance the same government interest that would furnish a valid ground for denial of the development permit – also known as the 'essential nexus' prong of the test, *Nollan v California Coastal Comm'n*, 483 US 825, 836-37 (1987). Second, the nature and extent of the exaction must be 'roughly proportional' to the effect of the proposed development, *Dolan v City of Tigard*, 512 US 374, 385 (1994). *Brown v City of Medford*, 251 Or App 42 (2012).

15.3.1.D Temporary Takings

To assert an inverse condemnation claim for a "temporary taking" under the Oregon Constitution, "the complaining party must allege that it has been denied all economic use of its property under a law, ordinance, regulation, or other government action that either is permanent on its face or so long lived as to make any present economic plans for the property impractical." *Boise Cascade Corp v Board of Forestry*, 325 Or 185, 199 (1997).

To "distinguish between a 'taking, on the one hand, and simple administrative inconvenience or delay, on the other, it is necessary to require that a complaining party allege some degree of permanence in its loss. We hold that, in order to assert a claim for a 'temporary taking' under the Oregon Constitution, the complaining party must allege that it has been denied all economic use of its property under a law, ordinance, regulation, or other government action that either is permanent on its face or so long lived as to make any present economic plans for the property impractical." *Id*. at 200.

In a physical occupations claim, "negligence alone will not support a claim for inverse condemnation." Instead, "intent to take is an element of such a claim." Unlike other courts, Oregon "takings" do not reach governmental negligence: a plaintiff must show that the government intentionally acted and the inevitable result of those actions, in the ordinary course of events, was the invasion of the plaintiff's property that is the basis for the plaintiff's inverse condemnation claim. Held: sewage backups into people's houses due to city sewer-line cleaning is "rare and uncommon" so this home invasion by sewage was not "the necessary, certain, predictable, or inevitable result of the city's intentional manner of hydrocleaning the adjacent sewer, the evidence was insufficient to support plaintiff's inverse condemnation claim." *Dunn v City of Milwaukie*, 355 Or 339 (2014).

15.3.2 Regulatory Takings

Under the Fifth Amendment, a claim that land use laws violate the Fifth Amendment's "just compensation" clause, "must be assessed in order to determine if a regulatory taking has occurred," and that is done by assessing the "parcel as a whole." *Tahoe-Sierra Preservation Council, Inc. v Tahoe Reg. Planning Agency*, 535 US 302, 331-32 (2002); *Coast Range Conifers v Board of Forestry*, 339 Or 136, 151-54 (2005); *Bruner v Josephine County*, 240 Or App 276 (2011) (the "entire property interest" must be assessed to determine if a regulatory taking occurred).

For additional analysis on regulatory takings in a state case, see *Murr v Wisconsin*, __ S Ct __ (2017).

15.3.3 Fifth Amendment

The Just Compensation Clause of the Fifth Amendment applies to the States through the Due Process Clause of the Fourteenth Amendment. *Chicago, Burlington, Railroad v Chicago*, 166 US 226, 241 (1897).

To establish an inverse condemnation claim under the Fifth Amendment, the claimant must plead that it has been deprived of all economically viable uses of its property, to create a per se taking under the Fifth Amendment. *Lucas v South Carolina Coastal Council*, 505 US 1003, 1015 (1992); *Bruner v Josephine County*, 240 Or App 276 (2011).

"As a general rule, zoning laws do not constitute a taking, even though they affect real property interests: "'[T]his Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests. Zoning laws are, of course, the classic example, which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property.' *Penn Cent. Transp. Co. v. City of New York*, 438 US 104, 125 (1978) (citations omitted)* * * *see also Lingle v Chevron U.S.A. Inc.*, 544 US 528, 538 (2005) (holding that, in considering a regulatory taking case, 'we must remain cognizant that 'government regulation— by definition— involves the adjustment of rights for the public good." *Laurel Park Community, LLC v City of Tumwater*, 698 F3d 1180 (9th Cir 2012).

Even if no property was taken, the "unconstitutional conditions doctrine" in the Fifth Amendment context means: "Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation. As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury." *Koontz v St. Johns River Water Mgmt Dist*, 133 S Ct 2586 (2013).

Chapter 16: Right to Bear Arms

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

16.1 History

See Jeffery J. Matthews, Right to Bear Arms, www.osbar.org/secured/barbooks/viewchapter.asp?bid=85&cid=2339

Article I, section 27, "was patterned upon and is identical to Art. I, §§ 32 and 33, Constitution of Indiana." *State v Robinson*, 217 Or 612, 619 (1959); *State v Christian*, 354 Or 22 (2013).

Article I, section 27, is not absolute: Lawbreakers can be disarmed. In England and colonial America, firearms regulations were directed at public safety concerns. Today Oregon laws restricting arms must promote public safety. *State v Hirsch/Friend*, 338 Or 622 (2005). Also, a person with a "mental illness" can be disarmed: "Finding that an individual 'is a person with mental illness' is a condition precedent to the issuance of an order prohibiting the purchase or possession of a firearm, ORS 426.130(1)(a)(D). *State v Thierman*, 161 Or App 175, 176 (1999)." *State v W.B.*, 264 Or App 777 (2014). See also *State v Z.A.B.*, 266 Or App 708 (2014).

16.2 Tenets

"As a general proposition, individuals in Oregon have a right to possess firearms for defense of self and property, under Article I, section 27." *Willis v Winters*, 350 Or 299, 302 n 1 (2011) (citing *State v Hirsch/Friend*, 338 Or 622 (2005)).

Article I, section 27, prevents the legislature from infringing on the people's individual right to bear arms for purposes limited to self-defense. *State v Kessler*, 289 Or 359 (1980) (billy club is protected by Article I, section 27 as a weapon of self-defense); *but see People v Lee*, (unpublished) Cal App 4th (2016) ("Unlike in *Kessler*, where the court determined for purposes of the Oregon Constitution that billy clubs were commonly used for self-defense, there is no evidence in the record that assault weapons have been typically possessed by law-abiding citizens for the purpose of self-defense."); *State v Christian*, 354 Or 22 (2013).

The legislature may prohibit carrying concealed weapons and felons possessing arms when it determines such acts to be threats to public safety. *State v Christian*, 354 Or 22 (2013). The "legislature has wide latitude to enact specific regulations restricting the possession and use of weapons to promote public safety * * * as long as the enactment does not unduly frustrate the individual right to bear arms for the purpose of self-defense." *Id*.

A sheriff may deny and revoke a concealed-carry license under ORS 166.291 *et seq* and ORS 166.293(3). See *Stanley v Myers*, 276 Or App 321 (2016) on due process.

"[O]verbreadth challenges are not cognizable in Article I, section 27, challenges." Unlike "protected speech and assembly, recognizing overbreadth challenges in Article I, section 27, cases is not necessary because the enforcement of an overbroad restriction on the right to bear arms does not tend to similarly deter or 'chill' conduct that that provision protects." *State v Christian*, 354 Or 22, 39 (2013). Instead of facial overbreadth, Article I, section 27, challenges are "conventional facial" challenges. *Id*. at 40. Such facial challenges are "limited to whether the ordinance is capable of constitutional application in any circumstance." *Id*.

16.3 Second Amendment

> **"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."** -- Second Amendment, US Const

For a sketch of the history of regulation of the right to bear arms in England since Edward I in 1299, see the 190-page *Peruta v County of San Diego*, 742 F3d 1144 (9th Cir 2016) (held: The Second Amendment does not preserve or protect a right of a member of the general public to carry concealed firearms in public). Oral argument is here.

Before it was ratified, what became the Second Amendment went through numerous versions. James Madison wrote a draft of what became, after editing by the Senate, the Second Amendment. On June 8, 1789, he proposed: "The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms, shall be compelled to render military sense in person." Joseph J. Ellis, THE QUARTET: ORCHESTRATING THE SECOND AMERICAN REVOLUTION, 1783-1789 p. 211 (2015); Helen E. Viet, CREATING THE BILL OF RIGHTS p 12 (1991).

A July 28, 1789 House Committee Report sought to add these words: "A well regulated militia, composed of the body of the people, being the best security of a free State, the right of the people to keep and bear arms shall not be infringed, but no person religiously scrupulous shall be compelled to bear arms." Viet, p. 30 & nn 12-13.

On August 17, 1789, a motion to insert the words "trained to arms" after "A well regulated militia" failed to pass. *Id*. at n 12.

An August 24 House Resolution proposed: "A well regulated militia, composed of the body of the People, being the best security of a free State, the right of the People to keep and bear arms, shall not be infringed, but no one religiously scrupulous of bearing arms, shall be compelled to render military service in person." *Id*. at p. 38.

On September 4, the Senate rejected a motion that proposed to insert these words to the end of that sentence (after "in person"): "that standing armies, in time of peace, being dangerous to Liberty, should be avoided as far as the circumstances and protection of the community will admit; and that in all cases the military should be under strict subordination to, and governed by the civil Power. That no standing army or regular troops shall be raised in time of peace, without the consent of two thirds of the Members present in both Houses, and that

no soldier shall be inlisted [sic] for any longer term than the continuance of the war." *Id*. at 38-39 n 13.

On September 4, after that rejection, the Senate agreed to amend the proposal to read: "A well regulated militia, being the best security of a free state, the right of the people to keep and bear arms, shall not be infringed." *Id*. at n 13.

On September 9, the Senate replaced "the best" with "necessary to the" and then rejected a motion to insert "for the common defence" [sic] after "bear arms." *Ibid*.

In August of 1789, debate was held on the religious exemption for bearing arms, see *id*. at 182-84 and 198-99. The Congressional Register, August 17, 1789, reports that regarding what became the Second Amendment, Elbridge Gerry asked: "What, sir, is the use of a militia? It is to prevent the establishment of a standing army, the bane of liberty." *Id*. at 182.

One historian has opined: The "reason the [United States Supreme] Court has pronounced that limited right [to bear arms] is not because the Framers of the Second Amendment intended it to confer it. (They didn't.) * * * Rather, it is because the people today believe there is such a right. The country has evolved – the Constitution is living, as it were – and the widespread acceptance of some form of gun ownership is part of the way Americans think. Not then, now. *Heller* can be justified not as originalism, but as something more rooted in common sense: it reflected a popular consensus won by focused activists." Michael Waldman, THE SECOND AMENDMENT: A BIOGRAPHY (2014) p. 174.

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

The Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *District of Columbia v Heller*, 554 US 570, 592, 635 (2008). A law that "totally bans handgun possession in the home" violates the Second Amendment. *Id*. at 627, 635.

In *Silvester v Harris*, 848 F3d 816 (9th Cir 2016), in a case of first impression in federal appellate courts, the Ninth Circuit held that California's ten-day waiting period is a reasonable safety precaution for all purchasers of firearms and need not be suspended once a purchaser has been approved. Applying intermediate scrutiny analysis, the court held that the law does not violate plaintiff's Second Amendment rights because the ten-day wait is a reasonable precaution. Oral argument is here. The *Silvester* court summarized *Heller*:

> "In *Heller*, the plaintiff challenged District of Columbia statutes that banned the possession of all handguns, and required that any lawful firearm stored in the home, such as a hunting rifle, be 'disassembled or bound by a trigger lock at all times, rendering it inoperable.' *Id*. After conducting a lengthy historical inquiry into the original meaning of the Second Amendment, the Court announced for the first time that the Second Amendment secured an 'individual right to keep and bear arms.' *Id*. at 595. The Court determined that the right of self defense in the home is central to the purpose of the Second Amendment, while cautioning that the right preserved by the Second Amendment 'is not unlimited.' *Id*. at 626–28.

> "*Heller* gave us the framework for addressing Second Amendment challenges. First, *Heller* evaluated whether the firearms regulations fell within 'the historical understanding of the scope of the [Second Amendment] right.' *Id.* at 625. The Court indicated that determining the scope of the Second Amendment's protections requires a textual and historical analysis of the Amendment. *Id*. at 576–605.
>
> "The Court also recognized that the Second Amendment does not preclude certain 'longstanding' provisions, *id*. at 626–27, which it termed 'presumptively lawful regulatory measures,' *id*. at 627 n.26. The Court provided examples of such presumptively lawful regulations that it said included, but were not limited to, 'prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.' *Id*. at 626–27.
>
> "Guided by its historical inquiry, the Court struck down District of Columbia statutes that banned handgun possession and required all lawful firearms in homes to be unloaded and disassembled or locked. *Id*. at 629–30. The Court rejected the government's position that because the Amendment begins with a reference to the need for a militia, the Second Amendment protects only the right to bear arms for military purposes." *Silvester v Harris*, 848 F3d 816 (9th Cir 2016).

The Second Amendment "does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns." And the "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons'" limits the Second Amendment right." *Heller*, 554 US at 625-27; *see also United States v Henry*, 668 F3d 637 (9th Cir 2012) ("we hold that the Second Amendment does not apply to machine guns.").

The majority of federal circuits have discerned a two-step Second Amendment analysis from *Heller*. *United States v Chovan*, 735 F3d 1127, 1136-37 (9th Cir 2013); *Jackson v City & County of San Francisco*, 746 F3d 953 (9th Cir 2014), *cert denied*, 576 US ___ (2015) (Thomas and Scalia dissenting from denial of cert). First, courts ask whether the challenged law burdens conduct that the Second Amendment protects. Second, courts determine the "appropriate level of scrutiny." *Chovan*, 735 F3d at 1136. This inquiry "bears strong analogies" to the US Supreme Court's free-speech cases. *Jackson*, slip op at 10 (citing *Ezell v City of Chicago*, 651 F3d 684, 702-03 (7th Cir 2011). The Ninth Circuit has "imported the test for intermediate scrutiny from First Amendment cases." *Silvester v Harris*, 848 F3d 816 (9th Cir 2016).

Some circuits conclude that the government may regulate the carrying of concealed weapons outside of the home. Revocation "of a firearms license on the basis of providing false information * * * on the firearms license application form is not a violation of the Second Amendment in this case." *Hightower v City of Boston*, 693 F3d 61 (1st Cir 2012).

The Ninth Circuit has held that a law requiring handguns to be stored in a locked container when not carried on the person burdens Second Amendment rights, but does not violate the Second Amendment under intermediate-level scrutiny, because it burdens only the manner of exercising Second Amendment rights, similarly to a content-neutral speech restriction that regulates the time, place, or manner of speech. *Jackson v City & County of San Francisco*, 746 F3d 953 (9th Cir

2014), *cert denied*, 576 US ___ (2015) (Thomas and Scalia dissenting from denial of cert). A law prohibiting sales of hollow-point bullets does not violate the Second Amendment under intermediate-level scrutiny; even though the text of the Second Amendment does not mention ammunition, the right to possess firearms implies a corresponding right to obtain the bullets necessary to use them. *Id*. Hollow-point bullets are designed to tear larger wounds inside a body so as to hit a major organ or artery, and the city carried its burden of showing that the law is a reasonable fit to achieve its goal of reducing the lethality of ammunition.

Professor Akhil Amar posits that in Article I, section 8, of the US Constitution and the Second Amendment, "*army* means enlisted soldiers, and *militia* means citizen conscripts." Akhil Reed Amar, THE BILL OF RIGHTS 54 (1998) (emphasis in original). In 1789, army meant a "mercenary force" that was "feared" because it was a standing army "filled with hired guns" who had "sold themselves into virtual bondage to the government" and "were typically considered the dregs of society." *Id*. at 53. In contrast, the militia was "a randomly conscripted cross-section" of "all citizens capable of bearing arms" who land, families, homes, and served alongside their friends, classmates, parishioners (their community) and thus were less likely to become "servile brutes." *Ibid*. and 55.

Professor Leonard Levy writes that the Second Amendment protects individual rights, not only collective states' rights to maintain militias. A "substantial scholarly literature maintains that those militias exist, at least in part, as a shield against tyranny by the national government. That notion is bizarre, even loony, in character; the Constitution does not authorize the state militias to make was against the national government. However, a right to insurrection theoretically exists to correct intolerable and systematic abuses. Americans embrace the doctrine of that a right of revolution is a natural right; some state constitutions even endorse the right. The Constitution nevertheless brands as treason overt acts or the levying of war against the United States." Leonard W. Levy, ORIGINS OF THE BILL OF RIGHTS 134 (1999).

In *Peruta v County of San Diego*, 742 F3d 1144 (9th Cir 2014), a Ninth Circuit panel concluded that San Diego County's "good cause" requirement for issuing concealed handgun permits impermissibly infringes on the Second Amendment right to bear arms in lawful self-defense." In California, open or concealed carry of a firearm is generally prohibited, although persons can apply for a concealed-carry license. San Diego County has a "good cause" requirement in its application, which is a "set of circumstances that distinguish the applicant form the mainstream and causes him or her to be placed in harm's way." Concern for "one's personal safety alone is not considered good cause." The issue was deemed to be whether the policy "allows the typical, law-abiding citizen to bear arms in public for the lawful purpose of self-defense." This is a 127-page opinion with a dissent and is a part of a split among the circuits. See Reed Harasimowicz, Comment, *The Comfort of Home: Why Peruta v County of San Diego's Extension of Second Amendment Rights Goes Beyond the Scope Envisioned by the Supreme Court*, 56 B.C.L.REV.E. SUPP. 51 (2015), here.

"The National Firearms Act provides that prior to manufacturing a firearm, any prospective maker must apply for permission from the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). 26 U.S.C. §§ 5822, 5841. ATF will deny the application if making or possessing the firearm would place the person applying in violation of any law. See 26 U.S.C. § 5822; 27 C.F.R. § 479.65. Although a machine gun qualifies as a firearm under the National Firearms Act, 26 U.S.C. §

5845(a), a separate federal law, the Gun Control Act, prohibits the private manufacture of machine guns in most instances by making it unlawful for any person "to transfer or possess a machine gun," with narrow exceptions for certain government entities and machine guns lawfully possessed before 1986. 18 U.S.C. § 922(o). The Gun Control Act defines a "person" as an "individual, corporation, company, association, firm, partnership, society, or joint stock company." 18 U.S.C. § 921(a)(1)." *United States v. One (1) Palmetto State Armory PA-15 Machine Gun Receiver/Frame, Unknown Caliber Serial Number: LW001804*, __ F3d __ (3d Cir 2016) (held: the Second Amendment does not protect machine guns under *Heller*; they are "weapons of war").

Chapter 17: Sovereign Immunity

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

17.1 Oregon Constitution

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

"The Oregon Constitution, Art. IV, sec. 24, protects the state from 'suit' unless the legislature provides a cause of action. The Oregon Tort Claims Act was passed in 1967 to partially abolish tort immunity for all public bodies. However, any person who claims damages from a public body under the Oregon Tort Claims Act must comply with certain requirements, including giving written notice of the tort 'within 180 days after the alleged loss or injury.' As explained by the Oregon Supreme Court: 'When the Oregon Tort Claims Act was first adopted, it enacted a partial waiver of sovereign immunity. At the same time, the sovereign, acting through the legislature, exacted certain conditions as a part of that partial waiver of sovereign immunity. One condition was a dollar limitation on the amount that an injured party may recover from the sovereign. Another condition was timely notice. Under the Oregon Tort Claims Act, it was insufficient for the sovereign that a summons and complaint might show up on the sovereign's doorstep any time within the period of the statute of limitations. The sovereign required additional and earlier notice.' *Krieger v Just,* 319 Or 328, 333, 876 P2d 754, 756-57 (1994) (citations omitted)." *Wharton v Jewell*, Case No. 3:14-cv-00314-ST (D Or 2014).

Stated similarly: "Article IV, section 24, of the Oregon Constitution protects the state, including its political subdivisions, from 'suit' unless the legislature provides a cause of action. *Dowers Farms v Lake County*, 288 Or 669, 679 (1980)."

The Oregon Tort Claims Act, however, "'abrogated, in part, the state's sovereign immunity.' *Jensen v Whitlow*, 334 Or 412, 416 (2002)." Thus under the OTCA, every public body is subject to action or suit for its – and its officers', employees', and agents' – torts, committed in the scope of employment or duties, subject to the time limits in ORS 30.260 to 30.300. The discovery rule applies to the OTCA, so those time periods do not begin until plaintiffs knew or should have known of the facts, see *Gaston v Parsons*, 318 Or 247 (1994), *Stephens v Bohlman*, 314 Or 344 (1992), *Duyck v Tualatin Valley Irrig Dist*, 304 Or 151 (1987), *Cooksey v Portland Public School Dist*, 143 Or App 527, *rev den* 324 Or 394 (1996). *Doe v Lake Oswego School District*, 242 Or App 605 (2011).

17.2 Eleventh Amendment

"**The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.**" - Eleventh Amendment, US Const

In 1793, in *Chisolm v Georgia*, 2 Dall. 419, the US Supreme Court took jurisdiction in a case brought by a South Carolina citizen against the State of Georgia. The Court reasoned that Article III, section 1, clause 1 (extending federal judicial power to controversies "between a State and Citizens of another State") limited Georgia's sovereign immunity. *Chisolm* created a "shock of surprise" and prompted the immediate adoption of the Eleventh Amendment. Though the Eleventh Amendment's precise terms bar only federal jurisdiction over suits brought against one State by citizens of another State or foreign state, the Eleventh Amendment repudiated *Chisholm*'s premise that Article III superseded the sovereign immunity that the States had before entering the Union. While immunity from suit is not absolute, the US Supreme Court has "recognized only two circumstances in which an individual may sue a State. First, Congress may authorize such a suit in the exercise of its power to enforce the Fourteenth Amendment – an Amendment enacted after the Eleventh Amendment and specifically designed to alter the federal-state balance. *Fitzpatrick v Bitzer*, 427 US 445 (1976). Second, a State may waive its sovereign immunity by consenting to suit. *Clark v Barnard*, 108 US 436, 447-48 (1883)." *College Savings Bank v Florida Prepaid*, 527 US 666, 670 (1999).

"'Dual sovereignty is a defining feature of our Nation's constitutional blueprint.' *Federal Maritime Comm'n v South Carolina Ports Authority*, 535 US 743, 751 (2002). Upon ratification of the Constitution, the States entered the Union 'with their sovereignty intact.' *Ibid*." *Sossamon v Texas*, 131 S Ct 1651, 1657 (2011). A waiver of sovereign immunity must be expressly and unequivocally stated in the text of the relevant statute. *Id.* (held: "States, in accepting federal funding, do not consent to waive their sovereign immunity to private suits for money damages under RLUIPA because no statute expressly and unequivocally includes such a waiver.").

"Despite the narrowness of its terms, since *Hans v Louisiana*, 134 US 1 (1890), we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty * * * and that a State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the 'plan of the convention.'" *Blatchford v Native Village of Noatuk*, 501 US 775, 779 (1991) (citations omitted).

Chapter 18: Impairment of Contracts

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

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

18.1 U.S. Constitution

The Contracts Clause prevents a state from arbitrarily “reduc[ing] its financial obligations whenever it want[s] to spend the money” elsewhere, but nevertheless permits the state to modify its contractual obligations subject to certain limitations. *United States Trust Co. of New York v New Jersey*, 431 US 1, 26 (1977). A court's task is "to reconcile the strictures of the Contract Clause with the essential attributes of sovereign power necessarily reserved by the states to safeguard the welfare of their citizens." *Id. at* 20.

18.2 Oregon Constitution

See C. Robert Steringer, *Contract Clause*, OREGON CONSTITUTIONAL LAW MANUAL (2013), www.osbar.org/secured/barbooks/viewchapter.asp?bid=85&cid=2340.

18.2.1 Origins and Application

“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). Note: In 2015, the Oregon Supreme Court cited *Eckles* to describe the federal source of Article I, section 21, but it did not include the Northwest Ordinance of 1787 as a source. See *Moro v State of Oregon*, 357 Or 167, 192 (2015).

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. *Eckles v State of Oregon*, 306 Or 380, 390 (1988). “Given this interpretation, Article I, section 21, was very likely intended to apply to both state and private contacts.” *Ibid*.

The “state may enter into contracts and be bound by the promises contained in those contracts, so long as the state is not ‘contract[ing] away its “police powers”’ or limiting its power of eminent domain.” *Moro v State of Oregon*, 357 Or 167, 195 (2015) (quotation omitted). The Court applies “a canon of construction that disfavors interpreting statutes as contractual promises. *Ibid*. “[T]hose limitations may not be exhaustive, but any further rules of this nature must be found within the language or history of Article I, section21, itself.” *Id*. at n 16 (quotations omitted).

18.2.2 Methodology

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). In other words: "(1) is there a contract?; (2) if so, what are its terms?; (3) what obligations do those terms require?; and (4) has the state impaired an obligation of that contract?" *Moro v State of Oregon*, 357 Or 167, 194 (2015). "[A]dditional considerations informed by the state's role serving the public "supplement the general rules of contract law" when the state is alleged to be a party to the contract. *Id*.

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).

18.3.3 Statutes as Contracts

The "state may enter into contracts and be bound by the promises contained in those contracts, so long as the state is not 'contract[ing] away its "police powers"' or limiting its power of eminent domain." *Moro v State of Oregon*, 357 Or 167, 195 (2015) (quotation omitted). "When the legislature pursues a particular policy by passing legislation, it does not usually intend to prevent future legislatures from changing course. * * * for that reason, the intention to surrender or suspend legislative control over matters vitally affecting the public welfare cannot be established by mere implication." *Id*. (quotations omitted). The Oregon Supreme Court will "therefore treat a statute as a contractual promise only if the legislature has 'clearly and unmistakably' expressed its intent to create a contract." *Ibid*. (quotations omitted).

Moro v State of Oregon, 357 Or 167 (2015) addresses state contracts. The Oregon Legislature conferred original jurisdiction on the Court to decide the constitutionality of the laws at issue in this case. Petitioners are active and retired PERS members who challenge two legislative amendments. Those are SB 822 (2013) and SB 861 (2013). They primarily argued that the two amendments impair their contract rights under the state and federal constitutions.

SB 822 eliminated income tax offset benefits for non-state resident PERS beneficiaries. It also reduced COLA benefits to PERS beneficiaries by reducing the COLA cap to 1.5% from 2% for 2013 and further restrictions. *Id*. at 186. SB 861 further modified the PERS COLA, with a 1.25% COLA on some benefits and a .15% COLA on benefits over $60K. *Ibid*.

PERS has been "a contractual benefit of public employment[] since 1945." *Strunk v PERB*, 338 Or 145, 157 (2005).

The PERS fund lost 27% of its value in 2008. The State responded that the amendments were justified on public purpose grounds, and they were reasonable and necessary to make up for those losses.

The Court concluded that "nonresident petitioners have no contractual right to the income tax offset payments" so "the legislature did not violate the state or federal Contract Clauses by eliminating those payments to nonresident" beneficiaries in SB 822. The Court further "rejected" non-resident beneficiaries' other challenges.

As to the COLA amendments, the Court concluded that "petitioners have a contractual right to receive the pre-amendment COLA for benefits that they earned before the effective dates of the amendments – that is, benefits that are generally attributable to work performed *before* the amendments went into effect. Thus insofar as they apply retrospectively to benefits earned before the effective dates, the COLA amendments impair the PERS contract and violate the state Contract Clause. Petitioners, however, have no contractual right to receive the pre-amendment COLA for benefits that they earned *on or after* the effective dates of the amendments – that is, benefits that are generally attributable to work performed after the amendments went into effect. In the absence of specific contract rights outside the PERS statutes, the COLA amendments do not violate the state or federal Contract Clauses when applied to benefits earned on or after the effective dates." *Id*. at 193. In short, the Court held that the State "constitutionally may cease the income tax offset payments to nonresidents as set out in SB 822." It further held that the State "also constitutionally may apply the COLA amendments as set out in SB 822 and SB 861 prospectively to benefits earned on or after the effective dates of those laws, but not retrospectively to benefits earned before those effective dates." *Id*. at 174 & n 1.

The Court further "rejected" the State's "substantiality and public purpose arguments attempting to justify that impairment." *Id*. at 193.

The Court sketched the text and origin of the state Contract Clause, which dates to 1857 and was derived from the federal Contract Clause, which caused the Court to interpret the state provision "as being consistent with the United States Supreme Court's interpretation of the federal Contract Clause in 1857." In 1857, "it was well established that the federal Contract Clause protected only those obligations arising from contracts that were formed *before* the effective date of the law being challenged." "If the contract creates obligations that contravene a law in effect at the time that the contract is entered, then the parties have no legitimate expectation that those obligations will be enforced." *Id*. at 193. Therefore, the Court considers "the potential impairment of contractual obligations arising only from contracts entered into before the effective date of the law being challenged." In this case, SB 822 became effective on 5/6/13 and SB 861 on 10/8/13, so the scope of the analysis is on contracts entered into before those dates.

The State "may enter into contracts and be bound by the promises contained in those promises, so long as the state is not contracting away its police powers or limiting its powers of eminent domain." The Court reiterated its "canon of construction that disfavors interpreting statutes as contractual promises." The Court treats "a statute as a contractual promise only if the legislature has clearly and unmistakably expressed its intent to create a contract." *Id*. at 195. A "PERS contract is a unilateral contract." *Id*. at 198. "But merely because the PERS contract has been formed does not mean that the contractual relationship between the employer and the PERS member becomes static." *Id*. at 199. "The PERS contract binds a participating employer to compensate a member for only the work that the member has rendered and based on only the terms offered at the time that the work was rendered, even if the employer changed that offer over time." Id. at 201.

The 69-page majority opinion concludes: "We recognize the many public policy concerns that were the impetus for the 2013 PERS amendments. When public employers have to pay higher PRS contribution rates without additional funding, they have less money to pay for current services provided by police officers, teachers, and other employees delivering critical services to the public. * * * The legislature, however, must pursue those objectives consistently with constitutional requirements, including Oregon's constitutional prohibition against impairing the obligations of contracts. We have concluded that the pre-amendment COLA provisions were part of the PERS contract and therefore are protected by the state Contract Clause. * * * In summary, we hold that the 1991 and 1995 income tax offsets are not part of the PERS contract and that SB 822 does not impair or breach the * * * settlement agreement. Therefore [the 1991 and 1995 offsets] do not violate" any provision of the constitutions. The Court further held that both amendments impair contract rights of PERS members to as to benefits that members earned before the effective dates of those amendments.

Chapter 19: Voting and Elections

"The best argument against Democracy is a five-minute conversation with the average voter."
-- Attributed to Winston Churchill (without authentication)

The voter is the "rational god of vengeance and of reward."
-- V.O. KEY, JR., POLITICS, PARTIES, & PRESSURE GROUPS 568 (5th ed. 1964).

19.1 Oregon Constitution

19.1.1 Article II

Article II of the Oregon Constitution describes elections, electors, recalls, campaigning, and dueling, see http://bluebook.state.or.us/state/constitution/constitution02.htm. The full text is recited in **Section 19.1.1.B**, *post*.

Oregon voting originally was a public, not a secret, act. Article II, section 15, was part of the original Oregon Constitution of 1857. It provides: "In all elections by the Legislative Assembly, or by either branch thereof, votes shall be given openly or viva voce and not by ballot, forever; and in all elections by the people, votes shall be given openly, or viva voce, until the Legislative Assembly shall otherwise direct." "Oregon did not adopt the modern secret ballot system, including official ballots, private polling booths, and restrictions on who, other than electors, could enter polling places, until 1891." *Picray v Secretary of State*, 140 Or App 592, 601-02 & n 13 (1996) (citing 2 CODES AND STATUTES OF OREGON, Title XXVII (Bellinger and Cotton 1902)).

A. History and Interpretation

Article II, section 8, is interpreted based on its specific wording, the case law surrounding it, and the historical circumstances that led to its creation. *Picray v Secretary of State*, 140 Or App 592, 599 (1996) (quoting *Priest v Pearce*, 314 Or 411, 415-16 (1992) (*Picray* held that a statute prohibiting wearing political buttons in a polling place violates Article II, section 8 and Article I, section 8).

> ***State v Hirschman***, 279 Or App 338, 354 (2016) In this case involving a successful Article I, section 8, challenge to ORS 260.715(9) (prohibiting making an "offer to purchase" a ballot), the Court of Appeals interpreted the state's position as "any election law designed to promote public trust in the state's election system must be constitutional, even though it restricts speech." *Id*. at 354. The state cited Article II, section 8, of the Oregon Constitution but it did "not develop an argument about how that constitutional provision relates to Article I, section 8," so the court did "not consider it further." *Id*. at 354 n 10.

B. Text

Article II in its current form is lengthy:

"Section 1. Elections free. All elections shall be free and equal.—

Section 2. Qualifications of electors. (1) Every citizen of the United States is entitled to vote in all elections not otherwise provided for by this Constitution if such citizen: (a) Is 18 years of age or older; (b) Has resided in this state during the six months immediately preceding the election, except that provision may be made by law to permit a person who has resided in this state less than 30 days immediately preceding the election, but who is otherwise qualified under this subsection, to vote in the election for candidates for nomination or election for President or Vice President of the United States or elector of President and Vice President of the United States; and (c) Is registered not less than 20 calendar days immediately preceding any election in the manner provided by law.

(2) Provision may be made by law to require that persons who vote upon questions of levying special taxes or issuing public bonds shall be taxpayers.

Section 3. Rights of certain electors. A person suffering from a mental handicap is entitled to the full rights of an elector, if otherwise qualified, unless the person has been adjudicated incompetent to vote as provided by law. The privilege of an elector, upon conviction of any crime which is punishable by imprisonment in the penitentiary, shall be forfeited, unless otherwise provided by law.

Section 4. Residence. For the purpose of voting, no person shall be deemed to have gained, or lost a residence, by reason of his presence, or absence while employed in the service of the United States, or of this State; nor while engaged in the navigation of the waters of this State, or of the United States, or of the high seas; nor while a student of any Seminary of Learning; nor while kept at any alms house, or other assylum [sic], at public expence [sic]; nor while confined in any public prison.—

Section 5. Soldiers, seamen and marines; residence; right to vote. No soldier, seaman, or marine in the Army, or Navy of the United States, or of their allies, shall be deemed to have acquired a residence in the state, in consequence of having been stationed within the same; nor shall any such soldier, seaman, or marine have the right to vote.—

Section 6. Right of suffrage for certain persons. [*Repealed*. Note: This section was part of the original Constitution of 1857. It had provided: "No Negro, Chinaman or Mulatto shall have the right of suffrage." See http://bluebook.state.or.us/state/constitution/orig/article_II_03.htm. This section was repealed on June 28, 1927].

Section 7. Bribery at elections. Every person shall be disqualified from holding office, during the term for which he may have been elected, who shall have given, or offered a bribe, threat, or reward to procure his election.—

Section 8. Regulation of elections. The Legislative Assembly shall enact laws to support the privilege of free suffrage, prescribing the manner of regulating, and conducting elections, and prohibiting under adequate penalties, all undue influence therein, from power, bribery, tumult, and other improper conduct.—

Section 9. Penalty for dueling. Every person who shall give, or accept a challenge to fight a duel, or who shall knowingly carry to another person such challenge, or who shall agree to go out of the State to fight a duel, shall be ineligible to any office of trust, or profit.—

Section 10. Lucrative offices; holding other offices forbidden. No person holding a lucrative office, or appointment under the United States, or under this State, shall be eligible to a seat in the Legislative Assembly; nor shall any person hold more than one lucrative office at the same time, except as in this Constition [sic] expressly permitted; Provided, that Officers in the Militia, to which there is attached no annual salary, and the Office of Post Master, where the compensation does not exceed One Hundred Dollars per annum, shall not be deemed lucrative.—

Section 11. When collector or holder of public moneys ineligible to office. No person who may hereafter be a collector, or holder of public moneys, shall be eligible to any office of trust or profit, until he shall have accounted for, and paid over according to law, all sums for which he may be liable.—

Section 12. Temporary appointments to office. In all cases, in which it is provided that an office shall not be filled by the same person, more than a certain number of years continuously, an appointment pro tempore shall not be reckoned a part of that term.—

Section 13. Privileges of electors. In all cases, except treason, felony, and breach of the peace, electors shall be free from arrest in going to elections, during their attendance there, and in returning from the same; and no elector shall be obliged to do duty in the Militia on any day of election, except in time of war, or public danger.—

Section 14. Time of holding elections and assuming duties of office. The regular general biennial election in Oregon for the year A. D. 1910 and thereafter shall be held on the first Tuesday after the first Monday in November. All officers except the Governor, elected for a six year term in 1904 or for a four year term in 1906 or for a two year term in 1908 shall continue to hold their respective offices until the first Monday in January, 1911; and all officers, except the Governor elected at any regular general biennial election after the adoption of this amendment shall assume the duties of their respective offices on the first Monday in January following such election. All laws pertaining to the nomination of candidates, registration of voters and all other things incident to the holding of the regular biennial election shall be enforced and be effected the same number of days before the first Tuesday after the first Monday in November that they have heretofore been before the first Monday in June biennially, except as may hereafter be provided by law.

Section 14a. Time of holding elections in incorporated cities and towns. Incorporated cities and towns shall hold their nominating and regular elections for their several elective officers at the same time that the primary and general biennial elections for State and county officers are held, and the election precincts and officers shall be the same for all elections held at the same time. All provisions of the charters and ordinances of incorporated cities and towns pertaining to the holding of elections shall continue in full force and effect except so far as they relate to the time of holding such elections. Every officer who, at the time of the adoption of this amendment, is the duly qualified incumbent of an elective office of an incorporated city or town shall hold his office for the term for which he was elected and until his successor is elected and qualified. The Legislature, and cities and towns, shall enact such supplementary legislation as may be necessary to carry the provisions of this amendment into effect.

Section 15. Method of voting in legislature. In all elections by the Legislative Assembly, or by either branch thereof, votes shall be given openly or viva voce, and not by ballot, forever; and in all elections by the people, votes shall be given openly, or viva voce, until the Legislative Assembly shall otherwise direct.—

Section 16. Election by plurality; proportional representation. In all elections authorized by this constitution until otherwise provided by law, the person or persons receiving the highest number of votes shall be declared elected, but provision may be made by law for elections by equal proportional representation of all the voters for every office which is filled by the election of two or more persons whose official duties, rights and powers are equal and concurrent. Every qualified elector resident in his precinct and registered as may be required by law, may vote for one person under the title for each office. Provision may be made by law for the voter's direct or indirect expression of his first, second or additional choices among the candidates for any office. For

an office which is filled by the election of one person it may be required by law that the person elected shall be the final choice of a majority of the electors voting for candidates for that office. These principles may be applied by law to nominations by political parties and organizations.

Section 17. Place of voting. All qualified electors shall vote in the election precinct in the County where they may reside, for County Officers, and in any County in the State for State Officers, or in any County of a Congressional District in which such electors may reside, for Members of Congress.—

Section 18. Recall; meaning of words "the legislative assembly shall provide." (1) Every public officer in Oregon is subject, as herein provided, to recall by the electors of the state or of the electoral district from which the public officer is elected.

(2) Fifteen per cent, but not more, of the number of electors who voted for Governor in the officer's electoral district at the most recent election at which a candidate for Governor was elected to a full term, may be required to file their petition demanding the officer's recall by the people.

(3) They shall set forth in the petition the reasons for the demand.

(4) If the public officer offers to resign, the resignation shall be accepted and take effect on the day it is offered, and the vacancy shall be filled as may be provided by law. If the public officer does not resign within five days after the petition is filed, a special election shall be ordered to be held within 35 days in the electoral district to determine whether the people will recall the officer.

(5) On the ballot at the election shall be printed in not more than 200 words the reasons for demanding the recall of the officer as set forth in the recall petition, and, in not more than 200 words, the officer's justification of the officer's course in office. The officer shall continue to perform the duties of office until the result of the special election is officially declared. If an officer is recalled from any public office the vacancy shall be filled immediately in the manner provided by law for filling a vacancy in that office arising from any other cause.

(6) The recall petition shall be filed with the officer with whom a petition for nomination to such office should be filed, and the same officer shall order the special election when it is required. No such petition shall be circulated against any officer until the officer has actually held the office six months, save and except that it may be filed against a senator or representative in the legislative assembly at any time after five days from the beginning of the first session after the election of the senator or representative.

(7) After one such petition and special election, no further recall petition shall be filed against the same officer during the term for which the officer was elected unless such further petitioners first pay into the public treasury which has paid such special election expenses, the whole amount of its expenses for the preceding special election.

(8) Such additional legislation as may aid the operation of this section shall be provided by the legislative assembly, including provision for payment by the public treasury of the reasonable special election campaign expenses of such officer. But the words, "the legislative assembly shall provide," or any similar or equivalent words in this constitution or any amendment thereto, shall not be construed to grant to the legislative assembly any exclusive power of lawmaking nor in any way to limit the initiative and referendum powers reserved by the people.

Section 22. Political campaign contribution limitations. Section (1) For purposes of campaigning for an elected public office, a candidate may use or direct only contributions which originate from individuals who at the time of their donation were residents of the electoral district of the public office sought by the candidate, unless the contribution consists of volunteer time, information provided to the candidate, or funding provided by federal, state, or local government for purposes of campaigning for an elected public office.

Section (2) Where more than ten percent (10%) of a candidate's total campaign funding is in violation of Section (1), and the candidate is subsequently elected, the elected official shall forfeit the office and shall not hold a subsequent elected public office for a period equal to twice the tenure of the office sought. Where more than ten percent (10%) of a candidate's total campaign funding is in violation of Section (1) and the candidate is not elected, the unelected candidate shall not hold a subsequent elected public office for a period equal to twice the tenure of the office sought.

Section (3) A qualified donor (an individual who is a resident within the electoral district of the office sought by the candidate) shall not contribute to a candidate's campaign any restricted contributions of Section (1) received from an unqualified donor for the purpose of contributing to a candidate's campaign for elected public office. An unqualified donor (an entity which is not an individual and who is not a resident of the electoral district of the office sought by the candidate) shall not give any restricted contributions of Section (1) to a qualified donor for the purpose of contributing to a candidate's campaign for elected public office.

Section (4) A violation of Section (3) shall be an unclassified felony.

Section 23. Approval by more than majority required for certain measures submitted to people. (1) Any measure that includes any proposed requirement for more than a majority of votes cast by the electorate to approve any change in law or government action shall become effective only if approved by at least the same percentage of voters specified in the proposed voting requirement.
(2) For the purposes of this section, "measure" includes all initiatives and all measures referred to the voters by the Legislative Assembly.
(3) The requirements of this section apply to all measures presented to the voters at the November 3, 1998 election and thereafter.
(4) The purpose of this section is to prevent greater-than-majority voting requirements from being imposed by only a majority of the voters.

Section 24. Death of candidate prior to election. When any vacancy occurs in the nomination of a candidate for elective public office in this state, and the vacancy is due to the death of the candidate, the Legislative Assembly may provide by law that:
(1) The regularly scheduled election for that public office may be postponed;
(2) The public office may be filled at a subsequent election; and
(3) Votes cast candidates for the public office at the regularly scheduled election may not be considered."

19.1.2 Article I, section 8

Article I, section 8, of the Oregon Constitution protects 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."

A statute that provided "No person, within a polling place, shall wear a political badge, button or other insignia" focused on the "content of expression rather than on any properly regulable effect of such expression, and does not fall within any recognized exception to Article I, section 8," violates Article I, section 8. *Picray v Secretary of State*, 140 Or App 592 (1996), *aff'd by an equally divided court*, 325 Or 279 (1997).

In *Rideout v Gardner*, 838 F3d 65 (1st Cir 2016), the Court of Appeals struck a statute involving $1,000 statutory fines for posting "ballot selfies" as a content-based restriction that did not pass intermediate-level scrutiny under the First Amendment. The New Hampshire law stated that no voter shall allow his ballot to be seen by any person with the intention of letting it be known how he is about to vote. [E]ven accepting the possibility that ballot selfies will make vote buying and voter coercion easier by providing proof of how the voter actually voted, the statute still fails for lack of narrow tailoring. . . . "First, the prohibition on ballot selfies reaches and curtails the speech rights of all voters, not just those motivated to cast a particular vote for illegal reasons. New Hampshire does so in the name of trying to prevent a much smaller hypothetical pool of voters who, New Hampshire fears, may try to sell their votes. New Hampshire admits that no such vote-selling market has in fact emerged. And to the extent that the State hypothesizes this will make intimidation of some voters more likely, that is no reason to infringe on the rights of all voters. Second, the State has not demonstrated that other state and federal laws prohibiting vote corruption are not already adequate to the justifications it has identified." *Id*.

19.2 Oregon Statutes

Statutes and regulations abound as well, see http://sos.oregon.gov/elections/Pages/laws-rules.aspx.

19.3 Federal Laws

On federal voting rights laws, see the United States Department of Justice links at www.justice.gov/crt/about/vot/intro/intro.php

Chapter 20: Finance, Tax, Bonds, Improvements

Several Articles in the Oregon Constitution involve finance, bonds, and taxation.

See Harry M. Auerbach, *Limitation on Taxes*, OREGON CONSTITUTIONAL LAW MANUAL (2013), www.osbar.org/secured/barbooks/viewchapter.asp?bid=85&cid=2346.

See Harvey W. Rogers and Edward H. Trompke, *Public Finance*, OREGON CONSTITUTIONAL LAW MANUAL (2013), www.osbar.org/secured/barbooks/viewchapter.asp?bid=85&cid=2345.

20.1 Finance

20.1.1 Generally

Article IX contains numerous provisions identifying state financing, mostly through bonds and taxation. That lengthy Article is available here: http://bluebook.state.or.us/state/constitution/constitution09.htm

20.1.2 Poll Tax

Article IX, section 1a, provides: "No poll or head tax shall be levied or collected in Oregon." That provision was enacted in 1910 by voter initiative. *Wittemyer v City of Portland*, 278 Or App 746, 747 n 2, 750-51, *aff'd*, 361 Or 854 (2017). The phrase "poll or head tax" was not defined in the Oregon Constitution. *Id*. at 751. "[A]lthough earlier in American history the poll tax had a broader meaning, by 1900 it referred to taxation that did not take into account income, property, or resources in any manner." *Wittemyer v City of Portland*, 361 Or 854, 874 (2017). The Oregon "legislature repealed the state poll tax in 1907. Or Laws 1907, ch 228; Or Laws 1907, ch 267." *Id*. at 877. "[N]othing in the adoption of Article IX, section 1a, either in general or in the statement in support of its passage, suggests that the meaning of "poll or head tax" was different from what we have described as the general understanding of the terms at that time. In fact, to the extent that the framers of what became Article IX, section 1a, used the poll or head tax prohibition as a stalking horse for the single tax initiative, they did so precisely because of the antipathy to poll taxation that was common throughout the country at that time." Id. at 881.

In *Bogdanski v City of Portland*, 21 OTR 341 (2014), a taxpaying Lewis & Clark Law Professor challenged the Portland Arts Tax, OCC 5.73.020, which is a $35 per adult income-earning resident of Portland to support the arts in public schools. The City moved to dismiss for lack of jurisdiction. ORS 305.410 limits the court's jurisdiction to questions of law and fact arising under the tax laws of this state. The governmental entity that imposed the Arts Tax was the city, not the state. The court cited Oregon Supreme Court precedent: "If the state imposed a tax, jurisdiction would be in this court unless there was a specific statutory exception. If a city imposed a tax, jurisdiction would be in the circuit court unless a statute provided for jurisdiction in this court." The tax court dismissed the case because the tax court lacked subject matter jurisdiction.

Wittemyer v City of Portland, 361 Or 854 (9/21/17) (Landau) (Baldwin, Brewer, Duncan not participating) This case followed *Bogdanski* referenced above. In this case, rather than filing in the Tax Court, a taxpaying plaintiff filed in the circuit court. This plaintiff challenged the Portland Arts Tax of $35, which is imposed on income-earning residents 18

and over, with exceptions. For example, in these situations, a person is exempt from the Arts Tax: A person who earns under $1000/year; a person who earns a lot in PERS or old-age benefits but who makes under $1000/year from other sources; and a person who makes over $1000/year but who is a member of a household at or below federal poverty guidelines.

The plaintiff (with Bogdanski now filing an amicus brief) brought this action for a declaratory judgment that the Arts Tax is a "poll or head tax" that violates Article IX, section 1a, of the Oregon Constitution. The trial court granted summary judgment for the city (defendant) and denied plaintiff's motion for summary judgment.

The Court of Appeals affirmed. Tracing the statutory history of Article IX, section 1a, from its inception in 1910 as an initiative measure, plus dictionaries, the court concluded that the Portland Arts Tax is not a "poll or head tax" because a "poll or head tax" is "a fixed tax, levied per capita, subject to limited exceptions not based on income or resources." *Id*. at 754. "[I]t was the 'poll or head tax' – combining features of universal, or near-universal, application with a uniform tax imposed without any regard for ability to pay – the uniquely, egregiously, bore 'so unequally on men in proportion to their ability to pay'" and was thus barred by the Constitution. *Ibid*. The "Portland Arts Tax incorporates * * * financial exceptions, yielding diverse, income-predicated applications that contradict the fundamental per capital character of a 'poll or head tax.' Accordingly, the Arts Tax does not violate Article IX, section 1a." *Id*. at 755.

The court footnoted from the city's brief that a "poll" tax originally was not related to voting rights, as became known from the 24th Amendment to the US Constitution which the States ratified in 1964 in response to Jim Crow laws. *Id*. at 751 n 7.

The Oregon Supreme Court affirmed. A "tax that takes into account the income, property, or other resources of taxpayers is not a 'poll or head tax' within the meaning of Article IX, section 1a. In this case, the City of Portland arts tax exempts certain residents based on their income and household resources. Thus, the tax does take income into account and, as a result, does not amount to a 'poll or head tax' within the meaning of the state constitution." *Id*. at 856. In other words: A "'poll or head tax' within the meaning of Article IX, section 1a, is one that applies uniformly on a per capita basis, but does not take income, property, or resources into account in any way. In this case, the city's arts tax takes income and household resources into account in at least three ways." *Id*. at 883. "First, the arts tax does not apply to individuals earning income of less than $1,000 per year. Second, certain types of income do not count in determining an individual's income for the purpose of in defining who is and who is not subject to the tax. For example, Social Security benefits, federal pension benefits, and state Public Employee Retirement System benefits are not counted. Third, the tax does not apply if an individual resides in a household with resources lower than federal poverty guidelines. Those federal poverty guidelines, in turn, are graduated according to the size of the household. As a result, the household income threshold below which the arts tax will not be owed increases with the size of the household." *Ibid*.

In reaching its conclusion, the Court recited its interpretive method: "We construe the Oregon Constitution in accordance with settled principles of interpretation, which require

us to examine the text of the provision in dispute in its historical context, along with relevant cases interpreting it. *Priest v. Pearce*, 314 Or 411, 415-16, 840 P2d 65 (1992). In the case of constitutional amendments adopted by initiative, our analysis also includes 'sources of information that were available to the voters' at the time the amendment was adopted, including the ballot title, information in the voters' pamphlet and contemporaneous news reports and editorials. *State v. Sagdal*, 356 Or 639, 642-43, 343 P3d 226 (2015). The goal is to 'determine the meaning of the provision at issue most likely understood by those who adopted it.' *Couey v. Atkins*, 357 Or 460, 490-91, 355 P3d 866 (2015). That analysis then provides the basis for identifying, 'in light of the meaning understood by the framers, relevant underlying principles that may inform our application of the constitutional text to modern circumstances.' *State v Davis*, 350 Or 440, 446, 256 P3d 1075 (2011)." *Id*. at 860.

"When the constitution does not define its terms, we presume that those who adopted them intended or understood such terms to be given their ordinary meanings. *State v. Lane*, 357 Or 619, 624-25, 355 P3d 914 (2015). Contemporaneous dictionary definitions provide a helpful starting point in our determination of that ordinary meaning. *Doe v. Corp. of Presiding Bishop*, 352 Or 77, 90, 280 P3d 377 (2012)." *Id*. at 861.

The words "poll or head tax" appear to have been used interchangeably, the Court reasoned: "As this court explained in *State v. Cloutier*, 351 Or 68, 97-98, 261 P3d 1234 (2011), occasional redundancy "is a fact of life and of law." Legal terminology often employs synonyms, "sometimes for clarity, sometimes for emphasis." *Riley Hill General Contractor v. Tandy Corp*., 303 Or 390, 397, 737 P2d 595 (1987); see also David Mellinkoff, THE LANGUAGE OF THE LAW 363, 345- 364 (1963) ('Legal tradition still makes it fashionable to use many phrases made up of synonyms.'). This appears to be such a case, when dictionary definitions—and as our discussion of the historical context below makes clear, case law and other sources as well—consistently used the terms interchangeably." *Id*. at 864 (footnote omitted).

The Court then considered the cross-continental poll tax history. "In Biblical times, individuals were subject to four kinds of direct taxes: 'income taxes, property taxes, special assessment taxes, and poll or capitation taxes.' Manuel L. Jose & Charles K. Moore, *The Development of Taxation in the Bible: Improvements in Counting, Measurement, and Computation in the Ancient Middle East*, 25 ACCT HISTORIANS J 63, 64 (1998). The poll tax first appears in the book of Exodus, in which a tax is levied on each Israelite over the age of 20 at the time of their departure from Egypt. Exodus 30:12. Poll taxes appear again in Nehemiah and again in the book of Matthew in the New Testament. Nehemiah 10:32; Matthew 17:24-27." *Id*. at 866-67. "The first poll tax in England was levied in 1377, during the reign of Edward III, on every person over the age of 14. Stephen Dowell, 3 A HISTORY OF TAXATION AND TAXES IN ENGLAND: FROM THE EARLIEST TIMES TO THE PRESENT DAY 5 (1884)." *Id*. at 868. "In nineteenth-century Prussia, the general population was subjected to a poll tax. Joseph A. Hill, *The Prussian Income Tax*, 6 Q J ECON 207 (1892)." *Id*. at 869. "In 1619, Virginia became the first colony to impose a poll tax. The tax 'applied to free men regardless of occupation or the amount of property' they owned. Edward T. Howe & Donald J. Reeb, *The Historical Evolution of State and Local Tax Systems*, 78 SOC SCI Q 109, 110 (1997). Poll taxes were almost ubiquitous in the colonies before the Revolution and continued in many states afterward. Harvey Walker, *The Poll Tax in the United States*, 9 Bull Nat'l Tax Ass'n 46, 47 (1923). The taxes were generally levied 'upon all electors, regardless of sex' when imposed for the

support of schools, and on 'able-bodied males' of voting age when imposed for the upkeep of roads. *Id*. at 49." *Id*. at 869.

Relevant to the case, the Court wrote: "By 1900, the idea of what constituted a "poll tax" in America had shifted to a tax that uniformly applied to each individual taxpayer, with no consideration of income, property, or other resources whatever. Although poll taxes still existed throughout the United States at the time, they no longer included exclusions based on income, property, or other resources; such exclusions were regarded as having the effect of transforming the tax from a poll tax to something else. Writings of the time distinguished 'a uniform polltax' from 'a tax varying with the wealth or income of the taxpayer.' Max West, *The Income Tax and the National Revenues*, 8 J POL ECON 433, 434 (1900)." *Id*. at 872-73. "In short, although earlier in American history the poll tax had a broader meaning, by 1900 it referred to taxation that did not take into account income, property, or resources in any manner." *Id*. at 874.

20.2 Uniform Taxation

"**No tax or duty shall be imposed without the consent of the people or their representatives in the Legislative Assembly; and all taxation shall be uniform on the same class of subjects within the territorial limits of the authority levying the tax.**" - Article I, section 21, Or Const

Class of One: The "taxing authorities may not single out one taxpayer for discriminatory, or selective, enforcement of a tax law that should apply equally to all similarly situated taxpayers. *Penn Phillips Lands v Tax Comm'n*, 247 Or 380, 385-86 (1967); *City of Eugene v Comcast of Oregon II, Inc*., 263 Or App 116 (2014). "Oregon courts have employed the same analysis under Article I, section 32, and the Equal Protection Clause" of the United States Constitution. *City of Eugene v Comcast of Oregon II, Inc*., 263 Or App 116 (2014) (citing *Kane v Tri-Co. Metro Transp District*, 65 Or App 55, 59 (1983), *rev den* 296 Or 411 (1984)).

To prove a violation of Article I, section 32, the taxpayer must "demonstrate an intentional and systematic pattern of discrimination." *Pacificorp Power Marketing v Dep't of Revenue*, 340 Or 204, 219 (2006). "Intentional" means "an intention, or the equivalent of fraudulent purpose, to disregard the fundamental principal of uniformity." *Freightliner Corp v Dep't of Revenue*, 275 Or 13, 20 (1976) (citing a US Supreme Court case); *City of Eugene v Comcast of Oregon II, Inc*., 263 Or App 116 (2014).

20.3 Income Tax

> "**Notwithstanding any other provision of this Constitution, the Legislative Assembly, in any law imposing a tax or taxes on, in respect to or measured by income, may define the income on, in respect to or by which such tax or taxes are imposed or measured, by reference to any provision of the laws of the United States as the same may be or become effective at any time or from time to time, and may prescribe exceptions or modifications to any such provisions. At each regular session the Legislative Assembly shall, and at any special session may, provide for a review of the Oregon laws imposing a tax upon or measured by income, but no such laws shall be amended or repealed except by a legislative Act.**" -- Article IV, section 32, Or Const

State courts have jurisdiction, and the federal courts do not have original jurisdiction, over personal income tax cases. In *Glasgow v Dep't of Revenue*, 356 Or 511 (2014) an Oregonian who did not pay personal income tax for several years alleged that federal courts have original jurisdiction to determine that she must pay state tax on wages. She moved to change venue from the tax court to the United States Supreme Court. The Tax Court and the Oregon Supreme Court concluded that she must pay wages, the federal courts do not have original jurisdiction, and her claim is frivolous:

> "The first paragraph of Article III, section 2, specifically enumerates the cases over which federal courts have jurisdiction. Under that paragraph, federal courts have jurisdiction over controversies between states, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state and foreign states. The second paragraph of Article III, section 2, does not extend federal court jurisdiction beyond those enumerated cases. *United States v Texas*, 143 US 621, 643-44, 12 S Ct 488, 36 L Ed 285 (1892). This [personal income tax] case is not a case described in the first paragraph of Article III, section 2, and is therefore not subject to the original jurisdiction of the United States Supreme Court." *Id.* at 514-15.

ORS 316.037(1)(a) imposes a "tax . . . on the entire taxable income of every resident of this state." ORS 316.037(3) conversely imposes a "tax . . . on the taxable income of every full-year nonresident that is derived from sources within this state." See *Telfer v Dep't of Revenue*, Case No. 130478C (2014), on domicile for tax assessments.

"Oregon taxes not only the income of residents, see ORS 316.037(1), but also the income of nonresidents that 'is derived from sources within the state.' ORS 306.037(3). A nonresident's income is derived from sources within this state if it is attributable to the nonresident carrying on an occupation here. See ORS 316.127(2)(b)." *Etter v Dep't of Revenue*, 360 Or 46, 49 (2016) (held: Horizon Air dispatcher who lives in Washington and works in Portland does not meet a federal statutory exemption to avoid paying individual Oregon income tax) (footnotes omitted).

20.4 Property Tax

20.4.1 Generally

"Property taxation is certainly an area that has been traditionally occupied by the states. Indeed, the provisions of Article I, section 9, clause 4 of the federal constitution prohibit, as a practical matter, the imposition of a property tax by the federal government." *City of Seattle v Oregon Dep't of Revenue*, 20 OTR 408 (2011), *aff'd*, 357 Or 718 (2015).

"In Oregon, property taxes are assessed for, among other things, real property, including any improvements on that real property. The taxes—referred to as 'ad valorem' taxes—are based on the value of the property and improvements." *Village at Main Street Phase II v. Dep't of Revenue*, 356 Or 164, 166 (2014).

"The statutes that provide for the assessment and taxation of property in Oregon are consolidated in ORS chapter 308. As a general matter, Oregon property is assessed in one of two ways—it is either centrally assessed by the department or locally assessed by a county assessor. ORS 308.517(5) (all property not assessed by the department assessed by county assessor of county in which property situated)." *Comcast Corp v Dep't of Revenue*, 356 Or 282, 293 (2014).

Regarding property valuation, see *Hewlett-Packard Company v Benton County Assessor*, 357 Or 598 (2015). "The real market value of property is the starting point for determining the amount of property tax. See ORS 308.232 (unless property is exempt from ad valorem taxation, it should 'be valued at 100 percent of its real market value'). 'Real market value' is defined as essentially what a hypothetical buyer would pay a hypothetical seller in an arm's length transaction. See ORS 308.205(1) (defining real market value); *Hewlett-Packard Co., v Benton County Assessor*, 357 Or 598, 602, 356 P3d 70 (2015). The real market value is derived from the 'highest and best use' of the property, because the highest sale price would come from a buyer who intended to use the property in the most profitable way." *Dep't of Revenue v River's Edge Investments, LLC*, 359 Or 822, 825 (2016) (footnotes omitted).

20.4.2 Constitutional Limits

Measure 50 was a constitutional amendment enacted in 1997, codified as Article XI, section 11, of the Oregon Constitution. It caps property taxes. *Gall v Dept. of Rev.*, 343 Or 293, 295, (2007); *Ellison v Dept. of Rev.*, 362 Or 148, 154 (2017). The assessed value of the property will be the lesser of the real market value or what is called the "maximum assessed value." *Dep't of Revenue v River's Edge Investments, LLC,* 359 Or 822, 826 (2016). "The maximum assessed value generally is designed to keep the assessed property value from increasing more than three percent per year. See Or Const, Art XI, § 11(1)(b); ORS 308.146(1)." *Ibid*.

"That limit is known as the maximum assessed value. Or Const, Art XI, § 11(1)(a); *Gall*, 343 Or at 295. Ordinarily, a property's maximum assessed value can only increase by three percent per year. Or Const, Art XI, § 11(1)(b); ORS 308.146(1). In specified exceptional circumstances, however, the maximum assessed value is calculated differently, and it can increase by more than three percent in a particular year. *See* Or Const, Art XI, § 11(1)(c); ORS 308.146(3) (listing

circumstances). When such an exception applies, the result is sometimes colloquially called the exception value. *See Douglas County Assessor v. Crawford*, 21 OTR 6, 7 (2012) (discussing term). One situation in which there is an exception value is for new improvements to property. Or Const, Art XI, § 11(1)(c)(A); ORS 308.146(3)(a). The exception value becomes the new maximum assessed value in future years and will otherwise be subject to the three percent limit. See Or Const, Art XI, § 11(1)(d). For that reason, the exception value has long-term implications for the tax that may be assessed against the property." *Ellison v Dept. of Rev*., 362 Or 148, 155 (2017).

"Among many other things, Measure 50 and its implementing statutes reduced the assessed value of property to 10 percent below 1995 values. Or Const, Art XI, § 11(1)(a). For future years, the value of property for tax purposes cannot exceed three percent more than what it was in the preceding year. Or Const, Art XI, § 11(1)(b); ORS 308.146(2). The combined effect of [a case] and Measure 50 was to curb the assessor's ability to adjust any error in valuation of any assessment components that a taxpayer elected not to challenge." *Village at Main Street Phase II v. Dep't of Revenue*, 356 Or 164, 169 (2014) (citing *Flavorland Foods v Washington County Assessor*, 334 Or 562, 565 (2002) (summarizing effects of Measure 50)).

Part of **Article XI, section 11**, provides:

"(1)(a) For the tax year beginning July 1, 1997, each unit of property in this state shall have a maximum assessed value for ad valorem property tax purposes that does not exceed the property's real market value for the tax year beginning July 1, 1995, reduced by 10 percent.
"(b) For tax years beginning after July 1, 1997, the property's maximum assessed value shall not increase by more than three percent from the previous tax year."

"To determine the real market value of property, appraisers generally consider three different approaches to valuation: cost, income, and comparable sales. OAR 150-308.205-(A)(2)(a) (requiring the consideration of cost, income, or sales comparison approaches); Hewlett-Packard Co., 357 Or at 603. The cost approach estimates value from the cost that would be needed to construct a similar property; the income approach estimates value from the income that the property could be expected to generate; and the comparable sales approach estimates value from the prices paid for similar properties. *See id*. An appraiser must consider all three approaches, even if the appraiser ultimately cannot use one or more of them in developing the appraisal. OAR 150-308.205-(A)(2)(a). * * * When an appraiser uses more than one approach, the resulting values suggested by each approach may not be identical. The appraiser then must reconcile those value indications into a single, final value. *Id*.; see also APPRAISAL INSTITUTE, *The Appraisal of Real Estate* 65 (12th ed 2001). * * * In some cases, a property has no immediate market value. IN that circumstance, the real market value is determined based on just compensation. See ORS 308.205(2)(c)." *Dep't of Revenue v River's Edge Investments, LLC*, 359 Or 822, 827-28 (2016) (footnotes omitted).

20.5 Banks, Corporations, and Municipal Relations

Article XI of the Oregon Constitution, online here, organizes "corporations and internal improvements."

Article XI, section 9, of the Oregon Constitution provides in part:

> "No county, city, town or other municipal corporation, by vote of its citizens, or otherwise, shall become a stockholder in any joint company, corporation or association, whatever, or raise money for, or loan its credit to, or in aid of, any such company, corporation or association."

That provision's intent is "to prevent the investment of public funds in private enterprises." *Johnson v School District No. 1*, 128 Or 9, 12 (1928); *Carruthers v Port of Astoria*, 249 Or 329, 331 (1968). But that section protects only "tax revenues." *DeFazio v Washington Public Power Supply System*, 296 Or 550, 579 (1984); *Int'l Longshore and Warehouse Union v Port of Portland*, __ F Supp 2d __ (D Or 2014) No. 3:12-cv-01494-SI (2014) (*held*: Port of Portland's programs did not violate Art. XI, § 9, in any way alleged; among other things the "Port is simply obligated to demonstrate that revenues other than taxes were used to finance the private project").

> In 2017, the Oregon Supreme Court accepted a certified question from the Ninth Circuit: "Did programs financed by the Port of Portland for the benefit of private companies put tax revenues at risk in violation of Article XI, section 9, of the Oregon Constitution?" *Internat'l Longshore and Warehouse Union v Port of Portland*, 362 Or 36 (2017). The Court declined to answer the question because the parties settled the case.

20.6 Federalism

> "[N]othing in the text or structure of the [United States] Constitution categorically immunizes state taxation from federal preemption. On the contrary, Congress's dormant commerce authority precludes state taxation that improperly burdens interstate commerce, and the Constitution's Supremacy Clause precludes state taxation of federal instrumentalities. * * * the Supreme Court has long made clear that when Congress properly exercises its enumerated powers, it may lawfully abridge the states' ability to tax." *City of Spokane v Federal National Mortgage Ass'n*, 775 F3d 1113 (9th Cir 2014) (held: Congress's exemption of Fannie and Freddie from state and local taxation of real property transfers is within its constitutional authority, over a city's Tenth Amendment arguments).

Chapter 21: Education and Schools

The Oregon Constitutional provision on schools and education is in Article VIII. Part of it was enacted in 1857, and parts have been added to it. The text in full today is as follows:

Section 1. Superintendent of Public Instruction. The Governor shall be superintendent of public instruction, and his powers, and duties in that capacity shall be such as may be prescribed by law; but after the term of five years from the adoption of this Constitution, it shall be competent for the Legislative Assembly to provide by law for the election of a superintendent, to provide for his compensation, and prescribe his powers and duties.—

Section 2. Common School Fund. (1) The sources of the Common School Fund are:
(a) The proceeds of all lands granted to this state for educational purposes, except the lands granted to aid in the establishment of institutions of higher education under the Acts of February 14, 1859 (11 Stat. 383) and July 2, 1862 (12 Stat. 503).
(b) All the moneys and clear proceeds of all property which may accrue to the state by escheat.
(c) The proceeds of all gifts, devises and bequests, made by any person to the state for common school purposes.
(d) The proceeds of all property granted to the state, when the purposes of such grant shall not be stated.
(e) The proceeds of the five hundred thousand acres of land to which this state is entitled under the Act of September 4, 1841 (5 Stat. 455).
(f) The five percent of the net proceeds of the sales of public lands to which this state became entitled on her admission into the union.
(g) After providing for the cost of administration and any refunds or credits authorized by law, the proceeds from any tax or excise levied on, with respect to or measured by the extraction, production, storage, use, sale, distribution or receipt of oil or natural gas and the proceeds from any tax or excise levied on the ownership of oil or natural gas. However, the rate of such taxes shall not be greater than six percent of the market value of all oil and natural gas produced or salvaged from the earth or waters of this state as and when owned or produced. This paragraph does not include proceeds from any tax or excise as described in section 3, Article IX of this Constitution.
(2) All revenues derived from the sources mentioned in subsection (1) of this section shall become a part of the Common School Fund. The State Land Board may expend moneys in the Common School Fund to carry out its powers and duties under subsection (2) of section 5 of this Article. Unexpended moneys in the Common School Fund shall be invested as the Legislative Assembly shall provide by law and shall not be subject to the limitations of section 6, Article XI of this Constitution. The State Land Board may apply, as it considers appropriate, income derived from the investment of the Common School Fund to the operating expenses of the State Land Board in exercising its powers and duties under subsection (2) of section 5 of this Article. The remainder of the income derived from the investment of the Common School Fund shall be applied to the support of primary and secondary education as prescribed by law. [Constitution of 1859; Amendment proposed by H.J.R. 7, 1967, and adopted by the people May 28, 1968; Amendment proposed by H.J.R. 6, 1979, and adopted by the people Nov. 4, 1980; Amendment to subsection (2) proposed by S.J.R. 1, 1987, and adopted by the people Nov. 8, 1988; Amendment to paragraph (b) of subsection (1) proposed by H.J.R. 3, 1989, and adopted by the people June 27, 1989]

Section 3. System of common schools. The Legislative Assembly shall provide by law for the establishment of a uniform, and general system of Common schools.

Section 4. Distribution of school fund income. Provision shall be made by law for the distribution of the income of the common school fund among the several Counties of this state in proportion to the number of children resident therein between the ages, four and twenty years.—

Section 5. State Land Board; land management. (1) The Governor, Secretary of State and State Treasurer shall constitute a State Land Board for the disposition and management of lands described in section 2 of this Article, and other lands owned by this state that are placed under their jurisdiction by law. Their powers and duties shall be prescribed by law.
(2) The board shall manage lands under its jurisdiction with the object of obtaining the greatest benefit for the people of this state, consistent with the conservation of this resource under sound techniques of land management. [Constitution of 1859; Amendment proposed by H.J.R. 7, 1967, and adopted by the people May 28, 1968]

21.1 Basic Education

Article VIII, section 3 provides: "The Legislative Assembly shall provide by law for the establishment of a uniform, and general system of Common schools." In *Pendelton School Dist. v State of Oregon*, 345 Or 596 (2009), the Oregon Supreme Court wrote at length about basic education. Parts of that opinion are block-quoted as follows:

> "As originally introduced, Article VIII, section 3, appears to have been derived from the Wisconsin Constitution, Article X, § 3 (1848). See Claudia Burton, *A Legislative History of the Oregon Constitution of 1857-Part III (Mostly Miscellaneous: Articles VIII-XVIII)*, 40 WILLAMETTE L. REV. 225, 236 n 50 (2004) (so attributing section 3); but see THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857, 477 (Charles Henry Carey, ed.1926) (attributing section 3 to Iowa Constitution, Art IX, § 3 (1846)). The draft section provided:
>
> 'The Legislature may provide by law for the establishment of a uniform and general system of common schools which schools shall be free and without charge for tuition to all children between the ages of four & twenty years—and the instruction in such schools Shall be free from party or sectarian bias.' *Id*. at 250.
>
> The framers later changed 'may' to 'shall,' and struck all of the draft text after the words 'common schools.' *Id*. at 251-52." *Id*. at 616 n 8. ("Article VIII, section 3, requires the legislature to establish free public schools that will provide a basic education").
>
> Article VIII, section 3, was adopted as part of the original Oregon Constitution of 1857. Our methodology for interpreting original constitutional provisions is somewhat different from that used to analyze constitutional amendments adopted by initiative petition or legislative referral. *See Stranahan v Fred Meyer, Inc*., 331 Or 38, 56-57, 11 P.3d 228 (2000) (noting difference). For original provisions, we seek "`to ascertain and give effect to the intent of the framers [of the provision at issue] and of the people who adopted it.'" *Id*. at 54 (quoting *Jones v Hoss*, 132 Or 175, 178, 285 P. 205 (1930) (alteration in *Stranahan*)). In analyzing an original constitutional provision, we consider "[i]ts specific wording, the case law surrounding it, and the historical circumstances that led to its creation." *Priest v Pearce*, 314 Or. 411, 415-16, 840 P.2d 65 (1992). We begin with the wording of Article VIII, section 3. The text provides:
>
>> 'The Legislative Assembly shall provide by law for the establishment of a uniform, and general system of Common schools.'
>
> As can be seen, Article VIII, section 3, does not use the word "adequate." Article VIII, section 3, requires "[c]ommon schools" in a "system" that is "uniform" and "general."
>
> "Common schools" was a synonym for public or free schools, as attested by a variety of sources roughly contemporaneous with the framing of the Oregon Constitution in 1857. See, e.g., Alexander M. Burrill, 1 LAW DICTIONARY AND GLOSSARY 328 (2d ed. 1867) (noting that "common schools" are "[o]therwise termed public schools, and free schools"); James Kent, 2 COMMENTARIES ON AMERICAN LAW 196-202 (3d ed. 1836) (using the terms "common schools" and "public schools" interchangeably); *Jenkins v Andover*, 103 Mass. 94, 98 (1869) ("The words

`public schools' are synonymous with `common schools,' in the broadest sense * * *."); *Powell et al. v. Board of Education*, 97 Ill. 375, 379 (1881) (noting that "the legislature, from its earliest action on the subject of schools, seems to have used the words `free schools,' and `common schools,' interchangeably"); *School Dist. No. 20 v. Bryan*, 51 Wash. 498, 504, 99 P. 28, 30 (1909) ("[A] common school, within the meaning of our Constitution, is one that is common to all children of proper age and capacity, free, and subject to, and under the control of, the qualified voters of the school district.").

The term "common school" also had implications beyond the fact that the school did not charge tuition; it carried with it the connotation of a basic education. However, any meaning beyond that of a basic education was subject to dispute. Some authorities suggested that a "common school" meant only elementary school education. *E.g*., Charles Abner Howard, *A History of High School Legislation in Oregon to 1910*, 24 OR. HIST. Q. 201, 208 n. 15 (1923) ("`Common school' as used by the laity, means the grades below those ordinarily included in high school."); Burrill, 1 LAW DICTIONARY at 328 (defining "common schools" as "[s]chools for the elementary instruction of children of all classes; schools for general elementary education").

Most courts of the era, however, rejected the idea that the term "common school" was limited to an elementary school education, although they did not identify the exact nature of the education that might be provided above that basic level. In 1883, the Missouri Supreme Court stated:

"The term `common' when applied to schools, is used to denote that they are open and public to all, rather than to indicate the grade of the school or what may or may not be taught therein."

Roach v The Board of President and Directors of the St. Louis Public Schools, 77 Mo. 484, 485-88 (1883) (rejecting argument that common schools may lawfully teach only "the rudiments of an English education"). A few years earlier, the Illinois Supreme Court had noted that there was no agreement as to what the common school curriculum should include:

"The phrase, `a common school education' is one not easily defined. One might say that a student instructed in reading, writing, geography, English grammar and arithmetic had received a common school education, while another who had more enlarged notions on the subject might insist that history, natural philosophy and algebra should be included. It would thus be almost impossible to find two persons who would in all respects agree in regard to what constituted a common school education." *Richards v Raymond*, 92 Ill. 612, 617 (1879) (rejecting argument that high school was not common school). In 1881, the Illinois Supreme Court stated:

"Without being able to give any accurate definition of a `common school,' it is safe to say the common understanding is, it is a school that begins with the rudimental elements of an education, whatever else it may embrace, as contradistinguished from academies or universities devoted exclusively to teaching advanced pupils in the classics, and in all the higher branches of study usually included in the curriculum of the colleges." *Powell*, 97 Ill. at 378 (rejecting argument that teaching of German language constituted misappropriation of common school funds). See also *Jenkins*, 103 Mass. at 97 ("`Public schools,' as those words are used in the Constitution and laws of Massachusetts, are not limited to schools of the lowest grade.").

The wording of Article VIII, section 3, thus indicates that the term 'common school' means public or free school. The term also carries with it the idea of a basic or minimally adequate education. However, the wording of Article VIII, section 3, does not carry with it specific educational standards beyond a basic education." *Id*. at 613-15.

21.2 Funding

In the November 2000 general election, Oregon voters adopted Ballot Measure 1, a constitutional amendment that became Article VIII, section 8, of the Oregon Constitution, which provides in part:

> "(1) The Legislative Assembly shall appropriate in each biennium a sum of money sufficient to ensure that the state's system of public education meets quality goals established by law, and publish a report that either demonstrates the appropriation is sufficient, or identifies the reasons for the insufficiency, its extent, and its impact on the ability of the state's system of public education to meet those goals." *Pendelton School Dist. v State of Oregon*, 345 Or 596, 599 (2009).
>
> "Because the voters adopted that section through the initiative process, [courts] seek to determine the intent of the voters in adopting it. *Ecumenical Ministries v Oregon State Lottery Comm*., 318 Or 551, 559, 871 P.2d 106 (1994). 'The best evidence of the voters' intent is the text of the provision itself. The context of the language of the ballot measure may also be considered; however, if the intent is clear based on the text and context of the constitutional provision, the court does not look further.' *Id*. (quoting *Roseburg School Dist. v City of Roseburg*, 316 Or. 374, 378, 851 P.2d 595 (1993))." *Id*. at 606.
>
> *Pendleton* held that the legislature had failed to fund the public school system at the level specified in Article VIII, section 8." *Id*. at 611. It further held: "Article VIII, section 8, requires funding to meet the quality goals established by law, but it also includes a reporting requirement. * * * that reporting requirement expressly contemplates that funding may not be sufficient to meet the quality goals." *Id*. at 612.

Chapter 22: Other Provisions

The Oregon Constitution contains numerous holdover provisions from territorial days. For example, a person is ineligible for "any office of trust, or profit," if he gives, accepts, or carries another person to fight a duel, under Article II, section 9, http://bluebook.state.or.us/state/constitution/constitution02.htm .

The Oregon Constitution also contains newer statutesque provisions, particularly under the Finance Article. Examples include farm loans to veterans (Article XI-A), credits for higher education building projects (Article XI-F(1)), pollution control (Article XI-H), water and power projects (Article XI-D and XI-I(1)), multifamily housing for elderly and disabled (Article XI-I(2), OHSU (Article XI-L), seismic rehabilitation (Article XI-M and –N), pensions (Article XI-O), and lotteries (Article XV, section 4), among others. Those are litigated less frequently than Article I generally.

Chapter 23: Penumbral Rights

23.1 Textual Rights

"**This enumeration of rights, and privileges shall not be construed to impair or deny others retained by the people.**" -- Article I, section 33, Or Const

"**The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people**." -- Amendment IX, U.S. Constitution

Article I, section 33, of the Oregon Constitution, like the Ninth Amendment, is an underdeveloped area of Oregon constitutional law.

23.2 Origins

Article I, section 33, seems to have been copied from Iowa's Constitution and engrafted into Oregon's Constitution without debate or amendment. Claudia Burton and Andrew Grade, *A Legislative History of the Oregon Constitution of 1875 – Part I*, 37 WILLAMETTE L REV 469, 553-54 (2001). Iowa's constitutional history demonstrates that its framers relied on an Organic Act for Wisconsin Territory (Iowa had been carved out of Wisconsin Territory). *The Debates of the Constitutional Convention of the State of Iowa*, here.

The Oregon Supreme Court has only peripherally interpreted Article I, section 33. Justice Linde, in dissent, has commented on Article I, section 33:

> "[I]f a procedure is 'so rooted in the traditional conscience of our people as to be ranked as fundamental,' the people of Oregon do not need the fourteenth amendment to protect it. I take article I, section 33 of the Oregon Constitution to preserve such 'unenumerated' rights as were of constitutional magnitude in 1859, that is to say, rights specifically against government and 'so rooted as to be fundamental.'" *State v Burrow*, 293 Or 691, 713 (1982) (Linde, J., dissenting).

23.3 Ninth Amendment

The "original public meaning of the Ninth Amendment is somewhat murky". Akhil Reed Amar, AMERICA'S UNWRITTEN CONSTITUTION, p. 108.

Professor Leonard Levy posits: "The Ninth Amendment is the repository for natural rights, including the right to pursue happiness and the right to equality of treatment before the law." Leonard W. Levy, ORIGINS OF THE BILL OF RIGHTS 254 (1999). Some natural rights are within the Ninth Amendment, Professor Levy suggests, such as the right "to hunt and fish, the right to travel, and very likely the right to intimate association or privacy in matters concerning family and sex, at least within the bounds of marriage. Such rights were fundamental to the pursuit of

happiness. But no evidence exists to prove that the Framers intended the Ninth Amendment to protect any particular natural rights. The text expressly protects unenumerated rights, but we can only guess what the framers had in mind. On the basis of tantalizing hints and a general philosophy of natural rights, which then prevailed, conclusions emerge that bear slight relation to the racial, sexual, or political realities of that generation." *Ibid*.

On *positive* rights in the Ninth Amendment, Professor Levy observes: In addition to natural rights, some positive rights may be included – those resulting from the social compact that creates government. Those within the Ninth Amendment – that were not included in the first eight – may be the "right to vote and hold office, the right to free elections, the right not to be taxed except by consent through representatives of one's choice, the right to be free from monopolies, the right to be free from standing armies in times of peace, the right to refuse military service on grounds of religious conscience, the right to bail, the right of an accused person to be presumed innocent, and the person's right to have the prosecution shoulder the responsibility of proving guilt beyond a reasonable doubt – all these were among existing positive rights protected by various state law, state constitutions, and the common law." *Id*. at 254-55.

23.4 Rights Between the Lines

23.4.1 Standard of Proof in Criminal Cases

Justice Unis, citing Justice Linde's dissent in *Burrow* quoted above, has considered Article I, section 33, on the level of proof in criminal cases:

"the right not to be convicted of a crime except on proof beyond a reasonable doubt is a right protected by Article I, section 33, of the Oregon Constitution. In order to be an Article I, section 33, right, three elements must exist. First, the right must be one that no other Oregon constitutional provision affirmatively addresses. Second, the right must be shown to have been recognized at least in general terms to exist at the time Oregon became a state. Third, the right must be one that the people of Oregon's founding generation would have considered of constitutional magnitude between government and people, 'that is to say, rights specifically against government and so rooted as to be fundamental.' *State v Burrow*, 293 Or 691, 713 (1982) (Linde, J., dissenting). Those three elements exist with respect to the right not to be convicted of a crime except on proof beyond a reasonable doubt." *State v Williams*, 313 Or 19, 48 (1992).

23.4.2 Birth Mothers' Privacy

The Oregon Supreme Court has mentioned Article I, section 33, in several cases. In no case has it found privacy or other rights within the section:

"[N]either Article I, section 1, nor Article I, section 33, lend any support to the idea that the framers of the Oregon Constitution intended to confer on birth mothers a constitutional right to conceal their identities from their children. Those provisions, taken separately or together, have never been construed as providing a general privacy right under the Oregon Constitution." *Does v State of Oregon*, 164 Or App 543 (1999), *rev den*, 330 Or 138 (2000).

23.4.3 Convicted Sexual Predators' Privacy

There is "no federal privacy right" implicated in disseminating information to the public that a person is a convicted sexual predator. "Petitioner also argues, without explanation, that the [prison and parole] board's order violates his right to privacy under the state constitution. He does not provide any basis for saying that the right, if it exists, is any broader than the federal right that we recognized in *Does,* and we decline to address his state constitutional argument." *VLY v Board of Parole*, 188 Or App 617 n 20 (2003).

23.4.4 Right to Travel

Oregon courts have stated that the federal constitutional right of interstate travel is not named, and its source is not identified, but it "undoubtedly exists" in the Privileges and Immunities Clause of Article VI, section 2, or the Equal Protection Clause, or somewhere else. *State v Berringer*, 234 Or App 665, *rev denied*, 348 Or 669 (2010).

Federal courts have established that the right to travel is a fundamental right under the Due Process Clauses of the Fifth and Fourteenth Amendments; infringements are subject to strict scrutiny. *Shapiro v Thompson*, 394 US 618 (1969); *United States v Bredimus*, 352 F3d 200, 209-10 & n 12 (5th Cir 2003), *cert denied* 541 US 1044 (2003). The right to travel internationally is a recognized liberty interest in the Fifth Amendment, *Kent v Dulles*, 357 US 117, 127 (1958), although that right has less stature than the right to travel interstate (within the United States), *Haig v Agee*, 453 US 280, 306 (1981). *Bredimus*, 352 F3d at 209-10 & n 12.

"[W]e have found no case law supporting [the] proposition" that stalking protective orders violate "a constitutional right to travel. * * * Further, defendant has made no 'penumbral' argument under Article I, section 33, to the trial court or to the Court of Appeals. Consequently we reject defendant's arguments". *Delgado v Souders*, 334 Or 122 (2002).

Chapter 24: Amendments and Revisions

> "If state constitutions differ from the federal Constitution and from each other as well, the obvious question is why. Perhaps the most salient difference between state constitutionalism and national constitutionalism, as well as the one with the broadest implications, is the frequency of state constitutional change through constitutional amendment and constitutional revision." G. Alan Tarr, UNDERSTANDING STATE CONSTITUTIONS 29 (1998).

Article XVII of the Oregon Constitution consists of two sections setting out methods to amend and revise the Oregon Constitution. "Article XVII, section 2, was enacted, following a legislative referral to the voters, in 1960." *Martinez v Kulongoski*, 220 Or App 142, 150, *rev den*, 345 Or 415 (2008).

"[A]lthough an 'amendment' to the constitution may be initiated by the voters, a 'revision or all or part of the constitution can be considered by the voters only by referendum after approval of at least two-thirds of the members of each house of the legislature. Or Const, Art. VI §1(2)(b); Or Const, Art. XVII, §§ 1, 2(1)." *Martinez v Kulongoski*, 220 Or App 142, 146, *rev den*, 345 Or 415 (2008).

Under Article XVII, amendments "are drafted by the legislature, acting in its capacity as the collective representative of the people. Those proposed amendments are then subject to the hearings and deliberations that are part of that process and, if approved by the legislature, referred by the Secretary of State to the voters." *State v Lane*, 357 Or 619, 634 (2015).

On the "separate vote" requirement, see *Armatta v Kitzhaber*, 327 Or 250 (1998), *Lehman v Bradbury*, 333 Or 231 (2002, and *League of Oregon Cities v State of Oregon*, 334 Or 645 (2002).

24.1 Amendments

"Any amendment or amendments to this Constitution may be proposed in either branch of the legislative assembly, and if the same shall be agreed to by a majority of all the members elected to each of the two houses, such proposed amendment or amendments shall, with the yeas and nays thereon, be entered in their journals and referred by the secretary of state to the people for their approval or rejection, at the next regular general election, except when the legislative assembly shall order a special election for that purpose. If a majority of the electors voting on any such amendment shall vote in favor thereof, it shall thereby become a part of this Constitution. The votes for and against such amendment, or amendments, severally, whether proposed by the legislative assembly or by initiative petition, shall be canvassed by the secretary of state in the presence of the governor, and if it shall appear to the governor that the majority of the votes cast at said election on said amendment, or amendments, severally, are cast in favor thereof, it shall be his duty forthwith after such canvass, by his proclamation, to declare the said amendment, or amendments, severally, having received said majority of votes to have been adopted by the people of Oregon as part of the Constitution thereof, and the same shall be in effect as a part of the Constitution from the date of such proclamation. When two or more amendments shall be submitted in the manner aforesaid to the voters of this state at the same election, they shall be so submitted that each amendment shall be voted on separately. No convention shall be called to amend or propose amendments to this Constitution, or to propose a new Constitution, unless the law providing for such convention shall first be approved by the people on a referendum vote at a regular general election. This article shall not be construed to impair the right of the people to amend this Constitution by vote upon an initiative petition therefor." **– Article XVII, Section 1, Or Const**

24.2 Revisions

"(1) In addition to the power to amend this Constitution granted by section 1, Article IV, and section 1 of this Article, a revision of all or part of this Constitution may be proposed in either house of the Legislative Assembly and, if the proposed revision is agreed to by at least two-thirds of all the members of each house, the proposed revision shall, with the yeas and nays thereon, be entered in their journals and referred by the Secretary of State to the people for their approval or rejection, notwithstanding section 1, Article IV of this Constitution, at the next regular state-wide primary election, except when the Legislative Assembly orders a special election for that purpose. A proposed revision may deal with more than one subject and shall be voted upon as one question. The votes for and against the proposed revision shall be canvassed by the Secretary of State in the presence of the Governor and, if it appears to the Governor that the majority of the votes cast in the election on the proposed revision are in favor of the proposed revision, he shall, promptly following the canvass, declare, by his proclamation, that the proposed revision has received a majority of votes and has been adopted by the people as the Constitution of the State of Oregon or as a part of the Constitution of the State of Oregon, as the case may be. The revision shall be in effect as the Constitution or as a part of this Constitution from the date of such proclamation.

(2) Subject to subsection (3) of this section, an amendment proposed to the Constitution under section 1, Article IV, or under section 1 of this Article may be submitted to the people in the form of alternative provisions so that one provision will become a part of the Constitution if a proposed revision is adopted by the people and the other provision will become a part of the Constitution if a proposed revision is rejected by the people. A proposed amendment submitted in the form of alternative provisions as authorized by this subsection shall be voted upon as one question.

(3) Subsection (2) of this section applies only when:

(a) The Legislative Assembly proposes and refers to the people a revision under subsection (1) of this section; and

(b) An amendment is proposed under section 1, Article IV, or under section 1 of this Article; and

(c) The proposed amendment will be submitted to the people at an election held during the period between the adjournment of the legislative session at which the proposed revision is referred to the people and the next regular legislative session."

-- **Article XVII, section 2, Or Const**

See City Club of Portland (Portland, OR), "Report on Constitutional Revision Review" (1967), City Club of Portland Paper 232, here.

See "An Oregon Constitutional Convention?", presented by Jim Westwood and Charlie Hinkle, OREGON STATE BAR BULLETIN (April 2009), here.